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CASES

DECIDED IN

THE COURT OF SESSION,
COURT OF JUSTICIARY,

AND

HOUSE OF LORDS,

FROM JULY 27, 1896, TO JULY 27, 1897.

REPORTED BY

MIDDLETON RETTIE, H. J. E. FRASER, G. L. MACFARLANE,
JOHN BOYD, AND A. O. M. MACKENZIE,
ESQUIRES, ADVOCATES.

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JUDGES
OF THE
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DURING THE PERIOD OF THESE REPORTS.

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Lord M'LAREN.

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Lord Chancellor, LORD HALSBURY.

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MORRIS, SHAND, and DAVEY.

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ERRATA.

P. 105, line 4, *for* "attached" *read* "attaches."

P. 865, note 2, *for* "Hayley v. Baxendale, 1854, W. II. & G. Exch. Rep. 341," *read* "Hadley v. Baxendale, 1854, 9 W. H. & G. (Exch. Rep.) 341."

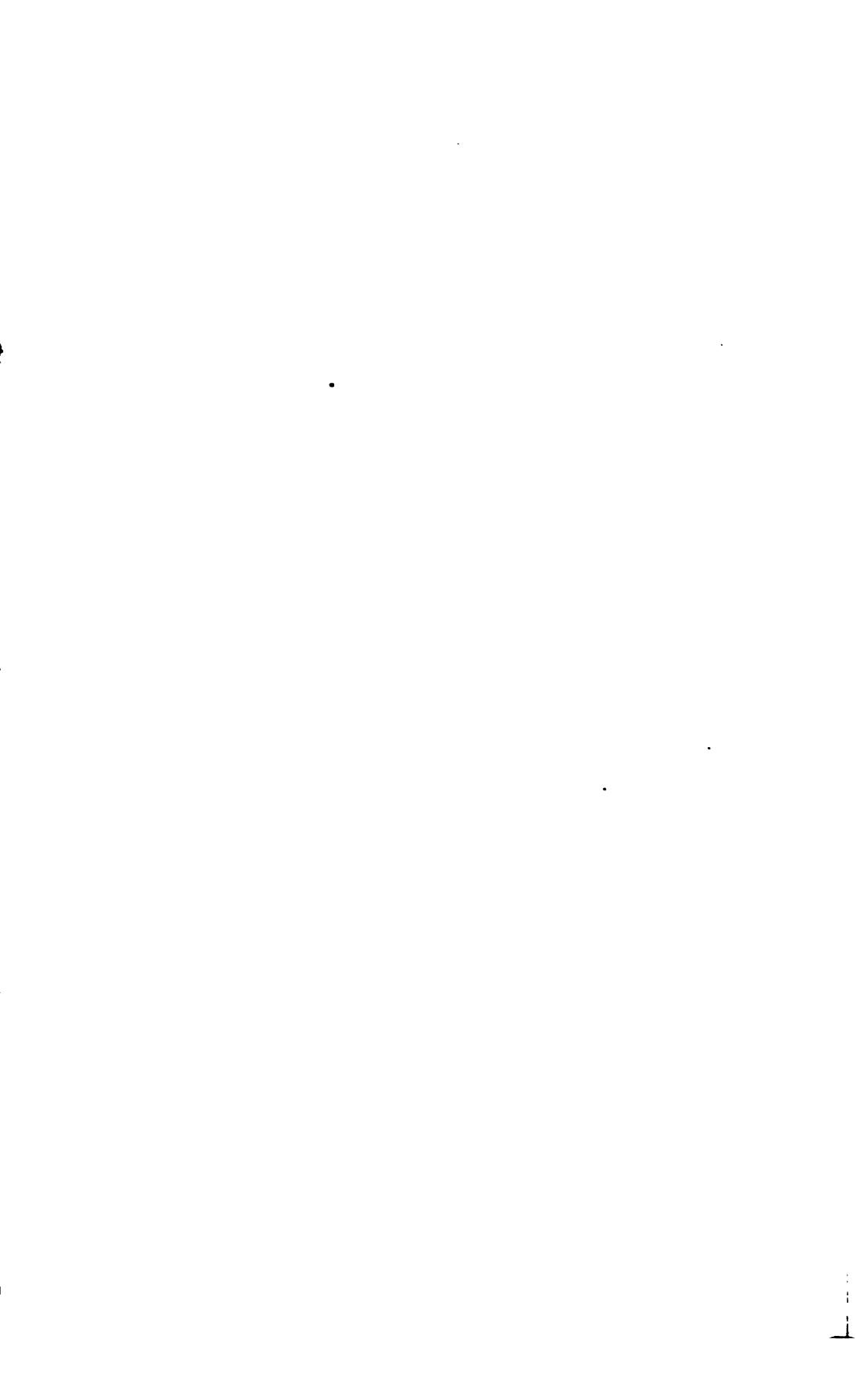
P. 866, note, lines 8 and 9, *for* "Hayley v. Baxendale, 6 Exch. 341," *read* "Hadley v. Baxendale, 9 Exch. 341."

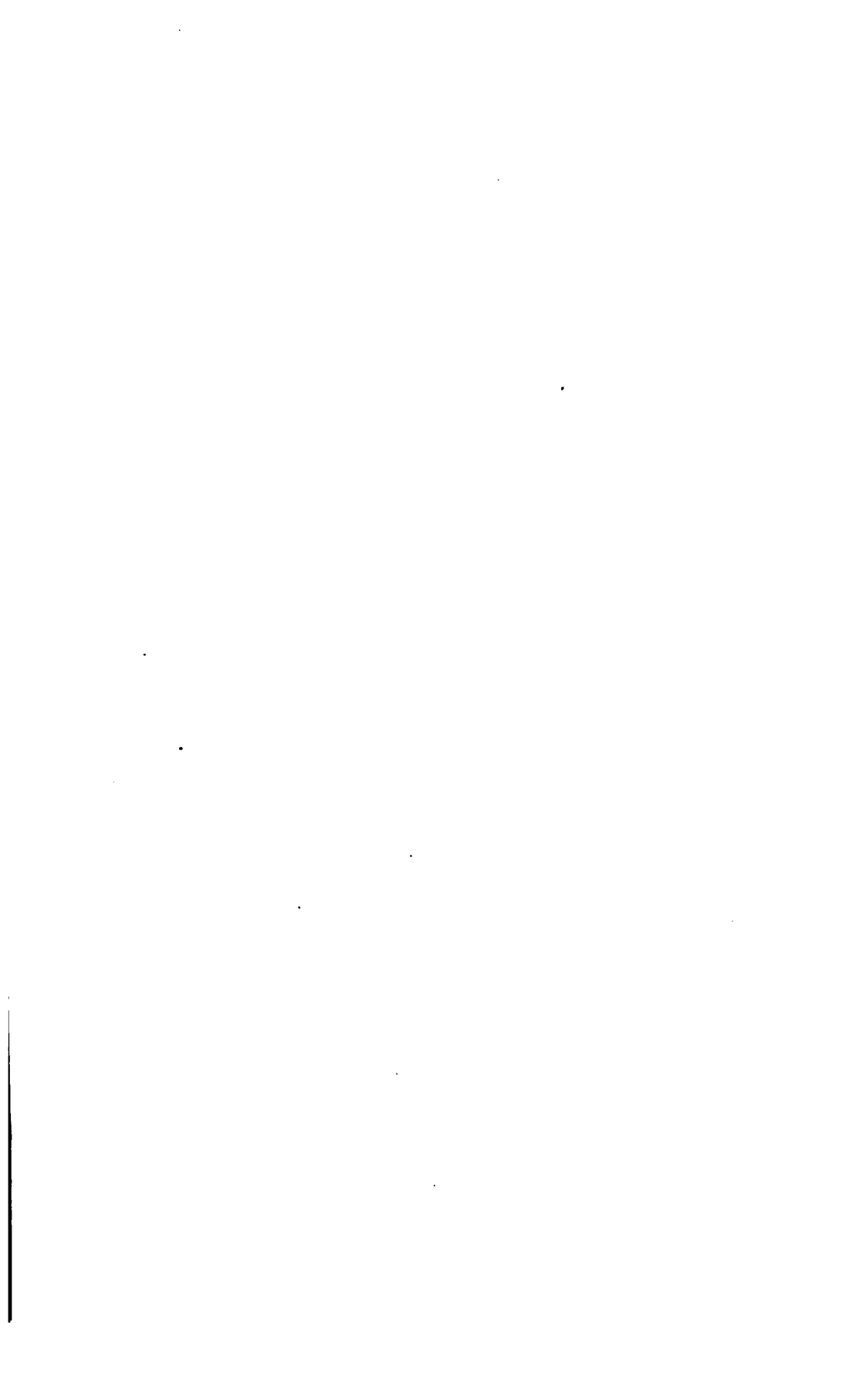
P. 875, line 10, *for* "pursuer's" *read* "defender's."

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P. 87, line 8 from foot, *for* "Procurator in Justice of Peace Court, Paisley," *read* "Procurator-Fiscal in Justice of Peace Court, Greenock."

P. 88, line 7 from top, *for* "Police Court," *read* "Justice of Peace Court."





CASES

DECIDED IN

THE HOUSE OF LORDS.

1896-97.

JOHN CURRIE (Owner of s.s. "Easdale") (Claimant), Appellant.— No. 1.
Walton, Q.C.—A. S. D. Thomson.

M'KNIGHT'S EXECUTORS (Mortgagees of s.s. "Dunlossit") (Claimants), Nov. 16, 1896.
Currie v. M'Knight.
 Respondents.—*Lord Adv. Murray—Sir Walter Phillimore, Q.C.*

Ship—Maritime lien for damage—Foreign.—The maritime law of Scotland is the same as that of England.

Although the maritime law of Great Britain creates a lien over a vessel for damage caused by the vessel, there is no lien for damage caused by the crew if the vessel itself is not the instrument doing the damage.

"*The Bold Buccleugh*" (1851), 7 Moore, P. C. 267, approved.

(In the Court of Session, May 24, 1895, 22 R. 607.)

On 17th November 1893, while the s.s. "Dunlossit" lay moored to the quay at Port Askaig, in the island of Islay, the s.s. "Easdale" was moored to the quay outside the "Dunlossit" by ropes crossing the stem and stern of the "Dunlossit." During the night a gale arose, and the master of the "Dunlossit," to enable him to put to sea for safety, cut the moorings of the "Easdale," which in consequence drifted, and was injured. Currie, the owner of the "Easdale," subsequently obtained a decree for damages against the owners of the "Dunlossit," on the ground that the cutting of the ropes was illegal.

Ld. Chancellor
 (Halsbury).
 Lord Watson.
 Ld. Herschell.
 Lord Morria.
 Lord Shand.

The "Dunlossit" having been judicially sold, in a competition between M'Knight, the holder of a mortgage over the "Dunlossit," and Currie, as owner of the "Easdale," the Sheriff found that the latter had a maritime lien over the "Dunlossit" for the damage sustained by his vessel, and ranked him preferably to the mortgagee.

In an appeal the Second Division held, assuming that by the law of Scotland there was a lien, that in the circumstances the lien did not apply, a majority of the Judges (Lord Rutherford Clark reserving his opinion) further holding that by the law of Scotland no lien attaches to a ship for damage wrongfully done by it to another vessel, and that the mortgagee had a preferable claim.

Currie, the owner of the "Easdale," appealed.

LORD CHANCELLOR.—This is a claim to establish a maritime lien against the ship "Dunlossit" by reason of damage sustained by another vessel under circumstances which it is necessary to state briefly to see whether the claim is sustainable.

The crew of the "Dunlossit," in order to enable that ship to get to sea, cut the cables of another vessel, the "Easdale." This proceeding on the

No. 1. part of the crew I will assume for this purpose to have been an unlawful act, and subjecting those responsible for the acts of the crew of the "Dunlossit" to a liability for the damage suffered by the "Easdale." But there seems to me to be no connection between the damage to the "Easdale" and any act or thing done by the "Dunlossit." That the act done was done in order to enable the "Dunlossit" to start does not make it an act of the "Dunlossit." That it was done by the crew of the "Dunlossit" does not make it an act of the "Dunlossit"; and the phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages is claimed is the instrument of mischief, and that in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage.

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I am, therefore, of opinion that it would be impossible, in an English Court of Admiralty, to maintain that the injury suffered by the "Easdale" gave rise to a maritime lien any more than if the master of the "Dunlossit" had unlawfully taken away some of the "Easdale's" property.

Having arrived at this conclusion, I am not certain that to discuss the other matters involved in this appeal is not outside any question properly arising here. If the judgment had been the other way, it would have been necessary to discuss whether the law which prevails in England prevails also in Scotland.

I cannot doubt that on such questions it is the law of Great Britain that prevails, and that Scottish Admiralty Courts and English Admiralty Courts administer the same law. The Admiralty law, as we know it, differs from the common law of England, and the common law of Scotland differs from the common law of England. But the reason is obvious—the laws of England and Scotland were derived from different sources in respect of these two branches of the law. The Admiralty laws were derived both by Scotland and England from the same source; and as it is said by no mean authority that the Admiralty law was derived from the laws of Oleron, supplemented by the civil law, it would be strange, as well as in the highest degree inconvenient, if a different maritime law prevailed in two different parts of the same island.

I only wish to add, that I think the case of "*The Bold Buccleugh*,"¹ in the Privy Council, was well decided. Its authority, I think, has never been shaken, and I should be sorry to see at this distance of time anything done which would weaken its authority.

I am, therefore, of opinion that this appeal should be dismissed, with costs.

LORD WATSON.—The steamship "Dunlossit" was sold under a warrant issuing from the Sheriff Court of Lanarkshire, at the instance of Samuel M'Knight, a mortgagee, now deceased, whose executors have been made respondents in this appeal. The price of the vessel having been paid into Court, a competition arose between the mortgagee and the present appellant, who holds a decree for damages against the registered owners of the

"Dunlossit" in respect of which he claims a preferable lien attaching to the proceeds of her judicial sale as a surrogatum for the ship. No. 1.

The findings of the decree upon which the appellant's claim is founded shew that during a night in November 1893 three vessels were moored alongside of an open quay at Port Askaig, in the Sound of Islay, where there is no harbour. The "Dunlossit" was in the centre of the tier, the steamship "Easdale," belonging to the appellant, being outside of her, and moored to the quay by cables passing over the deck of the "Dunlossit." Nov. 16, 1896.
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There was a gale of exceptional violence during the night, which made the position of the vessels very insecure. In the morning the crew of the "Dunlossit," which was in serious peril of damage from contact with the vessels between which she lay, and the possibility of another vessel moored in front of her coming into collision with her, got up steam, and, after notice of their intention, cut the mooring ropes of the "Easdale," and stood out to sea. The "Easdale" was short-handed owing to the defection of two of her crew, and, being unable to get up steam, was driven ashore and damaged. The master of the "Dunlossit" acted solely for the protection of his ship against present and possible damage. The First Division of the Court, reversing the decision of the Sheriff-substitute, held that the cutting of the "Easdale's" ropes by the crew of the "Dunlossit" was a wrongful act, for which her owners were responsible. That decree is final, and I have no right to express, and am not to be understood as expressing, any opinion with regard to its merits.

The Sheriff-substitute in the present suit sustained the appellant's claim, being of opinion that, in the sense of law, the proceedings of the "Dunlossit" crew constituted an act of the ship which was sufficient to create a maritime lien for the damage thereby occasioned to the "Easdale." His decision was reversed, on appeal, by the Second Division of the Court of Session, who dismissed the claim. Three of the learned Judges held that, according to the law of Scotland, no lien attaches to a ship for damage wrongfully done by her to another vessel, whether by collision or otherwise. Lord Rutherford Clark abstained from expressing any opinion upon that point, which did not appear to him to arise for decision. All of the learned Judges held that, assuming the same right of lien to exist in Scotland as in England, the injuries suffered by the "Easdale" were not due to the fault of the "Dunlossit" as a ship.

Both these grounds of judgment involve considerations, not of municipal but of maritime law. Had they been confined to the second point, I should have seen no reason to differ. But the first point is one of considerable importance to the shipping community, and I am unable to concur in the views which were expressed with regard to it by the majority of the Court.

From the earliest times the Courts of Scotland exercising jurisdiction in Admiralty causes have disregarded the municipal rules of Scottish law, and have invariably professed to administer the law and customs of the sea generally prevailing among maritime states. In later times, with the growth of British shipping, the Admiralty law of England has gradually acquired predominance, and resort has seldom been had to the laws of other states for the guidance of the Courts. Mr Bell, who wrote more than sixty years ago, states (2 Comm. 6th edit. p. 500) that the decisions which

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were at that time of the greatest authority in Scottish Maritime Courts were those of the High Court of Admiralty of England. His statement is fully borne out by the authorities, to three of which I think it sufficient to refer. In 1788 the Court of Session, in a case relating to lien for furnishings made to a ship (*Wood v. Hamilton*),¹ ordered the opinion of English counsel to be taken to ascertain the practice of England in such cases, and thereafter gave judgment in accordance with that opinion, although it was contrary to previous decisions of their own Court, and their judgment was affirmed by this House.² In the well-known case of *Hay v. Le Neve*³ the Court of Session followed what they understood to be the rule of the English Admiralty Court; and in moving the reversal of their judgment Lord Gifford, who delivered the opinion of the House, said,—“We are here on the law of the Admiralty of England.”⁴ In *Boettcher v. Carron Company*⁴ the identity of the maritime law of Scotland with that of England was distinctly proclaimed by the late Lord President Inglis, then Lord Justice-Clerk, who was certainly not disposed to accept English law in any case where it differed from the law of Scotland. After referring to various causes which had contributed to produce that identity, his Lordship observed,—“It would be very surprising if, at the present day, ships enjoying the privileges and subject to the conditions of British registry should sail from the ports of the United Kingdom under the same flag, and subject to the same statutory regulations in all respects, and yet that, in cases of collision, the legal rights of the parties might vary according as the case might be tried in one British Admiralty Court or another.”

It does not appear to me to be doubtful that if the “Dunlossit” had been so negligently navigated as to run into and sink the “Easdale” she would, in the absence of contributory fault by the “Easdale,” have been subject to a lien for the damage occasioned to the latter vessel in any English port; whereas, according to the law laid down in this case, no such lien would have attached to her in a Scottish harbour. That such a conflict should be possible is inconsistent with the views expressed by the late Lord President in *Boettcher v. Carron Company*,⁴ and also with the maritime code which ought to prevail in both countries, which, in my opinion, is neither English nor Scottish, but British law. That there may be conflicting decisions by the Courts of the two countries is possibly unavoidable, seeing that different conclusions may be arrived at even by Courts of the same country administering the same law; and I do not mean to suggest that a Scottish Admiralty Court is less free to examine the merits of an English authority than an English Court is to estimate the value of a Scottish decision, and to accept or reject it according to its own view of the law maritime. But it does not follow that the law either is or ought to be different in the two countries. This House has now become the ultimate *forum* in all maritime causes arising in the United Kingdom, and as your Lordships are, in my opinion, bound to apply one and the same law to the decision of all such cases, your judgments upon a proper maritime question, whether given in an English or in a Scottish appeal, must be of equal authority in all the Admiralty Courts of the Kingdom.

¹ Mor. Dict. 6269.

² 2 Sh. App. p. 403.

³ 3 Pat. App. p. 148.

⁴ 23 D. p. 331.

"*The Bold Buccleugh*,"¹ which was decided by the Judicial Committee of the Privy Council, affirming the judgment of Dr Lushington, is the earliest English authority which distinctly establishes the doctrine that in a case of actual collision between two ships, if one of them only is to blame, she must bear a maritime lien for the amount of the damage sustained by the other, which has priority, not only to the interest of her owner, but of her mortgagees. The principle of that decision has been adopted in the American Courts, and in the Admiralty Court of England it has for nearly forty years been followed in a variety of cases in which lien for damage done by the ship has been preferred to claims for salvage and seamen's wages, and upon bottomry bonds. In my opinion, the substantial question which your Lordships have to determine in this case is whether "*The Bold Buccleugh*"¹ was decided according to the maritime law of Britain. If it was, the rule which it lays down must apply to all maritime causes of a similar kind arising in the Courts of Scotland.

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It is unquestionably within the authority of this House to reconsider, and, if necessary, to overrule, the judgment of the Judicial Committee in "*The Bold Buccleugh*";¹ but it is no less clear that the opinions of the eminent Judges who took part in the decision of that case ought not to be disregarded without good cause shewn. To my mind their reasoning is satisfactory, and the result at which they arrived appears to me to be not only consistent with the principles of general maritime law, but to rest upon plain considerations of commercial expediency. The great increase which has taken place in the number of sea-going ships propelled by steam-power at high rates of speed has multiplied to such an extent the risk and occurrence of collisions, that it has become highly expedient, if not necessary, to interpret the rules of maritime liability in the manner best fitted to secure careful and prudent navigation. And, in my opinion, it is a reasonable and salutary rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the *corpus* of the offending ship, and should not be restricted to a personal claim against her owners, who may have no substantial interest in her and may be without the means of making due compensation.

The other point as to which the learned Judges of the Second Division were unanimous relates to the limits of the shipping rule which was followed in the case of "*The Bold Buccleugh*."¹ I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manœuvre of the ship to which it attaches. Such an act or manœuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated, but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands is the instrument which causes the damage. In the present case, according to the findings of fact contained in the decree of the First Division, the injuries sustained by the "*Easdale*" were not owing to any movement of the "*Dunlossit*," they were wholly occasioned by an act of the "*Dun-*

¹ 7 Moore, P. C. 267.

- No. 1. *Dunlossit's* crew, not done in the course of her navigation, but for the purpose of removing an obstacle which prevented her from starting on her voyage.
- Nov. 16, 1896. I am therefore of opinion that upon the second of these grounds the inter-
Currie v. locutor appealed from ought to be affirmed.
M'Knight.

LORD HERSCHELL.—The question raised by the appeal is whether the appellant is entitled to a maritime lien upon the vessel "*Dunlossit*" (or her proceeds), of which the original respondent, M'Knight, was the mortgagee.

In November 1893 the vessels "*Dunlossit*" and "*Easdale*" were lying alongside one another at Port Askaig Pier, Islay. A heavy gale was raging, which the "*Easdale*" was unable or unwilling to face; the master of the "*Dunlossit*," being anxious to put to sea and being unable to induce the master of the "*Easdale*" to let go his moorings, cut them and sent her adrift. The result was that the "*Easdale*" drifted ashore and was damaged. The owner of the "*Easdale*," having obtained judgment against the owners of the "*Dunlossit*" for the amount of the damage thus sustained, sought by the present proceedings to maintain a maritime lien on the "*Dunlossit*" in respect of the damage done to the "*Easdale*" owing to the act of the master of the "*Dunlossit*." I entirely agree with the Court below in thinking that no such lien can be sustained.

In the Admiralty Court in England a maritime lien has frequently been enforced, in cases of collision, against the vessel which was in fault, but no case could be cited which was at all similar to the present one. In all the cases referred to the damage had been caused either by a collision with the vessel which was to blame, or by that vessel having driven the other into collision with some third vessel or other object. The doctrine was originally asserted in cases of damage by collision with the vessel which was declared subject to the lien. It has since been applied in cases in which the damage did not result from a collision with the vessel in fault, but in which, owing to the negligent navigation of that vessel, the injured ship was driven into collision with some other vessel or object. Whether the circumstances have always warranted the conclusions arrived at, it is not necessary to inquire. I express no opinion upon the point, but the ground of the decision was in all cases this, that the vessel on which the lien was enforced had, in maritime language, done the damage. Here the "*Dunlossit*" did no damage. It was not by reason of the negligent navigation of that vessel that the disaster occurred. It arose simply from the wrongful act of the master in cutting the "*Easdale*" adrift. I am not prepared to extend the doctrine of maritime lien to such a case.

In the Court below three of the learned Judges held that the doctrine of maritime lien which exists in England in cases of collision is unknown in the law of Scotland. I entirely agree with the late Lord President Inglis, that much as the law of Scotland differs from that of England in many respects, the Admiralty law is the same in the two countries. The Courts of Scotland are, of course, not bound by the decision of an English Admiralty Court in any new case that arises. But, taking it to be established that the Admiralty law of the two countries is the same, they would no doubt hesitate to differ from a long course of decisions by English Admiralty Courts of high authority. I think it right to add, as the matter is

of much practical importance, that, in my opinion, the doctrine of maritime lien in cases of collision is, within the limits to which I have adverted, too well established to be now questioned.

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LORD MORRIS.—I am also of opinion that the interlocutor appealed from should be affirmed, for the reasons that have been assigned by my noble and learned friend Lord Watson in his judgment, which I have had the advantage of reading.

LORD SHAND.—After what has been said by your Lordships, it is unnecessary to recapitulate the facts which gave rise to the claim of damages on the part of the owner of the steamer "Easdale" against the owners of the "Dunlossit," which is the basis of the claim of lien maintained in this action. In a former action between these respective owners it seems to have been held by the Sheriff-substitute that in the position in which the "Dunlossit" was, lying moored to the quay of Port Askaig, on 17th November 1893, when a gale of exceptional violence occurred causing serious peril of considerable damage, those on board of her were entitled to require the persons in charge of the "Easdale" to remove the moorings of that vessel so as to allow the "Dunlossit" to go out to sea, and that, as the request to do this was refused, the crew of the "Dunlossit" were entitled to cut the moorings, and that the owners of the "Dunlossit" were not liable for the damage resulting to the "Easdale." This judgment was reversed by the First Division of the Court of Session, by whom it was held that the owners of the "Dunlossit" were responsible for the act of the captain in cutting the moorings of the "Easdale," and for the damage which resulted to that vessel, which was subsequently ascertained to amount to £407, 4s. 6d. No appeal was taken against this judgment, and this House is not therefore called on, or indeed in a position, to express any opinion on the question thus decided. The appellant holds a final decree against the owners of the "Dunlossit," and the question raised is whether in the circumstances he has in virtue of this decree a lien against the proceeds of sale of the ship which entitles him to be ranked preferably to the mortgagees.

I agree with your Lordships in thinking that the appellant has failed to establish any such right of lien. For the reasons fully stated by my noble and learned friend Lord Watson, and having regard to the authorities in the law of Scotland referred to by him—the maritime law to be applied in questions like the present—Admiralty questions—is, I think, the same in Scotland as in this country. I do not say that the Courts in Scotland are bound to accept a decision, not of this House, but given in other Courts in this country, as binding on them, or to give effect to these decisions unless they agree in thinking they are based upon sound and conclusive reasoning; but the greatest weight ought certainly to be given to a course of decisions in the Admiralty Courts in England, which has established a principle or rule of frequent application, for reasons which have commended themselves to many different Judges. Thus, if the lien here claimed had arisen because of a collision occasioned by the fault of those navigating the "Dunlossit" in the course of navigation, I should say that the English authorities and the rule which these have so long established should be conclusive in a case occurring in Scotland, and that the evil referred to by the Lord Justice-Clerk

No. 1. Inglis in *Boettcher's* case¹ of having conflicting rules applied in two different parts of the kingdom in maritime matters and in circumstances of frequent occurrence, should be avoided. If, then, this had been a case of collision caused by the fault exclusively of the "Dunlossit" as the offending ship, I should have had no difficulty in holding that the lien contended for existed. The learned Sheriff-substitute, Mr Balfour, in his judgment, has clearly and ably stated every consideration to support the view that the principle which has been applied in cases of collision ought to support the lien here claimed; but it seems to me, though I think the question is one not free from difficulty, that the act of the master in cutting the mooring ropes of the "Easdale" while attached to the pier, and so sending her adrift, does not make the "Dunlossit" an offending ship in the course of navigation, or the instrument which caused the damage, which seems to have been the test applied in all the cases which have hitherto occurred.

ORDERED that the appeal be dismissed, with costs.

THOMAS COOPER & CO.—MORTON, SMART, & MACDONALD, W.S.—GRAHAMES, CURREY, & SPENS—WEBSTER, WILL, & RITCHIE, S.S.C.

No. 2. JAMES OGSTON (Complainer), Appellant.—*D.-F. Asher, Q.C.—Haldane, Q.C.—Abel.*
 Dec. 14, 1896. THE ABERDEEN DISTRICT TRAMWAYS COMPANY, Respondents.—
Lord-Adv. Murray—Sir Robert Reid, Q.C.—Dove Wilson.
 Ogston v. Aberdeen Tramways Co.

Nuisance—Police—Street—Tramways—Snow and Salt—Interdict—Actio popularis.—A tramway company which had a statutory right to use certain streets in a town for their traffic were in the practice, when a snowstorm occurred, of removing the snow from their tramway lines to the sides of the street by the use of a snow-plough, and of afterwards scattering salt upon the lines.

In a suspension and interdict brought by a member of the public to have the tramway company interdicted from continuing this practice, the tramway company pleaded that the operations complained of were within their statutory rights.

It was proved that the operations of the tramway company created a nuisance to the complainer and to the public using the streets for horse traffic.

Held (in *rev.* judgment of the Second Division) that the statutory powers given to the tramway company to use the streets did not authorise them to create a nuisance, and that the complainer was entitled to an interdict against the company removing snow from the tramway lines in certain streets, and from scattering salt, in the manner hitherto practised by them to the nuisance of the complainer and of the public using the streets for the purpose of traffic with horses.

Ld. Chancellor
 (Halsbury).
 Lord Watson.
 Lord Shand.
 Lord Davey.

(IN the Court of Session, Dec. 20, 1895, 23 R. 340.)

James Ogston, of Norwood, manufacturer in Aberdeen, presented a note of suspension and interdict against the Aberdeen District Tramways Company, incorporated by Act of Parliament. The prayer of the note was in these terms:—"To interdict the respondents (1) from removing the snow, hail, slush, or other matter of a like kind, from the lines of tramway running through the public streets or thoroughfares of Aberdeen, on to or upon the sides of the said streets or thoroughfares between the said lines of tramway and the foot-pavements, and in particular from doing so in" certain streets, "or otherwise from so

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removing said snow, hail, slush, or other like matter, as in any way to interfere with, interrupt, or impede the traffic along the said streets and thoroughfares, and in particular along "the streets mentioned; and "(2) from putting or scattering upon the said streets and thoroughfares and lines of tramways, or any part thereof, and in particular upon any part of the "streets mentioned, "or the lines of tramways therein, salt, or any other similar substance, or otherwise from doing so in time of frost, or when there is snow or slush on the ground, or to do otherwise," &c.

The complainer averred;—(Stat. 3) "For some years the respondents have been in the habit during the winter months, when snow falls, of shifting the snow from off the tramway lines on to the part of the street unoccupied by them, between the tramway lines and the foot-pavement, piling it up in heaps on the streets along the sides of the lines, and thus causing accumulations of considerable depth. They are also invariably in the habit, whenever there is frost or snow or slush on the streets, of throwing down salt all along the tramway lines and on the whole streets between the said lines and for some distance outside the same, for the purpose of thawing the frost and melting the snow and slush. . . ." (Stat. 4) "These operations for clearing their line of rails and rendering them passable for the tramway cars are a source of great inconvenience and danger to the public and horses using the streets. . . . About Christmas 1894 a severe snowstorm commenced in Aberdeen, and thereafter there was snow in Aberdeen on the ground almost constantly for several weeks . . . and the respondents carried on their operations as described . . . In consequence, there was frequently a freezing mixture of salt and snow, made by the respondents as aforesaid, lying on the streets as deep as the horses' knees. As a result of this, serious injury was repeatedly caused to horses passing along the streets belonging to the complainer and others. . . ."

The complainer pleaded;—(1) The respondents having no right to carry on the operations complained of, and the same being illegal, the prayer of the note should be granted. (2) The complainer having suffered and being likely to suffer, serious loss, injury, and damage, by the actings of the respondents, he is entitled to interdict as craved, with expenses.

The respondents stated;—"It is the duty of the Town-council, and not of the respondents, to remove the snow from the streets. The respondents have a statutory right to run their cars, . . ."

The respondents pleaded;—(1) All parties not called. (2) The statements of the complainer are irrelevant and insufficient to support the prayer of the note. (3) The statements of the complainer being unfounded in fact, the note should be refused. (4) The operations of the respondents in clearing and keeping clear their lines being within their statutory rights, interdict ought to be refused.

A proof was allowed. The complainer's averments above quoted were proved. It was also proved that if the snow and slush had been removed within a reasonable time after the salt had been used the nuisance would have been obviated.

The following facts were also proved:—In February 1886 the Town-council, after receiving an opinion of counsel, informed the tramway company that they were advised that the practice of sprinkling salt upon the tramway track in times of frost and snow, and of clearing the rails by heaping snow on either side of the track, was unwarrantable and illegal, and they requested the company to discontinue

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the proceedings, and intimated that if the request was not complied with they would be compelled to have recourse to legal proceedings. In the beginning of 1895 the complainer brought the matter before the Town-council, and requested that they would take proceedings against the respondents. . . . In reply the town-clerk wrote to the complainer's agents on the 8th February 1895 as follows:—"The operation complained of is, as you are aware, not carried out by the Town-council but by the tramway company, and, under these circumstances, I am instructed to inform you that the Town-council repudiate all responsibility with the matter."

The complainer then brought the present note of suspension and interdict against the tramway company. The tramway company then brought the matter before the Town-council, and they made a remit to the streets and roads committee to consider the matter. The committee sent in a report, which was approved by the Council, in which they expressed the opinion that, if the complainer was successful, serious inconvenience would be caused to the public, and recommended that "such members of the Council as may be selected by the company should be authorised to give evidence on behalf of the Council in favour of the respondents."

Accordingly the provost and other members of the Council appeared as witnesses, and gave evidence to the effect that they were now satisfied that it was in the public interest that the respondents should be allowed to clear their lines as they have been in the habit of doing, and that the Council approved of the method adopted by the respondents.

On 28th November 1895 the Lord Ordinary (Low) refused the prayer of the note.

The Court adhered.

The complainer appealed.

LORD CHANCELLOR.—My Lords, in this case the appellant, who has a place of business in Loch Street, Aberdeen, complains that the Aberdeen District Tramways Company obstruct the highways in the city of Aberdeen and create a nuisance therein whenever a snowstorm occurs in that city. As to the facts which give rise to the complaint there is no serious dispute, and I do not understand that the Lord Ordinary or the Second Division of the Court of Session entertained any doubt that a serious inconvenience to horse traffic was caused by the acts complained of. It appears that the tramway company, when a snowstorm occurs in Aberdeen, are in the habit of clearing the snow off their track and piling it at the side of their rails. The heaps of snow thus piled are left sometimes for as long a period as a week together; and for the purpose of facilitating their own traffic the tramway company scatter salt, which causes the snow in the grooves of their rails to melt. The mixture thus created flows by gravitation into the heaps of snow already collected at the side, and forms a freezing mixture, which I think it cannot be doubted causes injury to the horses and inconvenience to the traffic wherever and whenever the carriage traffic, other than that of the tramway company themselves, is compelled to force its way through the freezing mixture of salt and snow. It cannot be doubted that unless this can be justified by some legal authority this does constitute a nuisance to the highway.

If the question had arisen in England, I think some doubt might be entertained whether the obstruction as proved was such that a private per-

son could sue without further proof of peculiar damage to himself; but that question does not arise according to the law of Scotland. Mr Ogston is entitled to sue in respect of an interference with the highway, which is applicable to him in common with the rest of Her Majesty's subjects.

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It is sought to justify the proceeding of the tramway company which I have described by the powers conferred by their Act of Parliament; and if the matters do constitute a nuisance, that is the only justification which is to be found on this record. I am of opinion that the Act of Parliament in question confers upon the respondents no such powers. It gives them the monopoly of using the tramway, where it is laid, with flange-wheels, or other wheels specially adapted to run on a grooved rail, and, except as otherwise specially provided by the Act, the track of the tramway is for all purposes to be and remain a part of the street or road. It is not suggested that, except in respect of the exclusive use to which I have referred, the tramway company have received any express authority to deal with the highways; but it is contended that in time of snow they can only continue the use of their tramway by scattering salt, and that if the municipal authority of Aberdeen were sufficiently prompt in sweeping up and carting away the freezing mixture thus created, the practice might be pursued without inconvenience to anyone. This may be perfectly true; but it is an absolutely untenable proposition that anyone may create a nuisance and shelter themselves from responsibility by suggesting that somebody else is under a legal responsibility to remove it. Each member of the public in turn might claim a right to create a nuisance by removing what was inconvenient to himself, and set up the same defence.

The question would be a very different one if the road authority were the persons sued, and were setting up that the acts complained of were necessarily done in the general interest of the community and in the course of clearing the streets from obstruction. I do not say that such a defence would be certainly complete: it would introduce questions of fact and degree with which I am at present not prepared to deal. That a snowstorm must cause some inconvenience to everyone may be true; but I cannot assent to the argument that a snowstorm in Aberdeen at some period of the winter is an extraordinary and unlooked for convulsion of nature, for which it is unreasonable to suppose that provision should be made; and the examples of Edinburgh and Glasgow would seem to indicate that it is not beyond the resources of civilisation to make such a provision; but, as I have said, I decline to enter into this field of inquiry.

If it were true, as the Lord Justice-Clerk assumes, that we were dealing here with what was done necessarily under the sanction of the public authority of the place, a great many of his Lordship's observations would be, I think, very pertinent; but that proposition is absolutely contrary to the fact I have already pointed out, that upon the record no such authority is pleaded. If it had been pleaded I think the proof would have failed—indeed, I think it is distinctly disproved. Not only did the Town-council of Aberdeen make a regulation against the practice, but by their letter of February 1, 1886, they had informed the tramway company that they had been advised that their operations in this respect were unwarrantable and illegal, and that if they did not desist the Council would be compelled to

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take legal proceedings against them. I do not think that the Town-council of Aberdeen have ever altered their position in this respect. It is true that long after this action was raised they deputed three gentlemen to give evidence upon the trial of the action on behalf of the Council in favour of the respondents. What legal operation such a transaction as this may be supposed to effect I am wholly unable to conceive. Adoption is, of course, out of the question. The acts complained of were not done and could not purport to be done under the authority of the Town-council: they were in fact done in absolute defiance of that authority. It is manifest, therefore, that if obstruction of the highway is proved, and a claim to persist in that obstruction insisted on, it is a proper case for interdict.

I am therefore of opinion that the interlocutors appealed from should be reversed; and I move your Lordships accordingly. [His Lordship read the order given at the end of the report.]

LORD WATSON.—My Lords, I also am of opinion that the method practised by the respondents of clearing and keeping open their tramway rails whenever there is a fall of snow is attended with injurious consequences, amounting to a legal nuisance, to those members of the public who have occasion to use the streets of Aberdeen for horse traffic. The evidence shews that on these occasions their first step is to clear their track, which is laid along the centre of the street, by means of a snow-plough—an operation which increases the deposit of snow upon the other parts of the street. Their next operation, which is repeated from time to time, is to scatter salt upon their rails and in their vicinity, the object of which is to prevent snow or snow-water from freezing in their grooves. The snow and salt in combination form a wet, briny amalgam, which does not freeze, although its temperature is considerably below the freezing point of water. The briny slush so produced is left on the street, and in course of time it gradually permeates a large portion and sometimes the whole of the street. It is, in my opinion, amply proved that the mixture thus diffused is injurious to horses standing or moving in it, and that its saline element has a direct and noxious effect of its own, if the skin of the animals coming in contact with it has been perforated or abraded.

The respondents have endeavoured to justify these proceedings by advancing a series of propositions, ingenious if not altogether consistent, which I shall notice in detail.

The first of these, which is the only defence stated by them in the record, upon the assumption that the allegations of the appellant have been established, is to the effect that their operations in clearing and keeping clear their lines are “within their statutory rights.” That plea, if well founded, would necessarily afford a good answer to the appellant’s prayer for interdict. But neither the provisions of their special Act nor those of the General Tramways Act of 1870 bear out that contention. Some statutory privileges they do possess which the law does not accord to the general public. They have the right to lay down and to maintain their grooved rails upon the public streets, and to use these rails for the passage of their tramway cars, to which, seeing that they cannot be deviated from the track, other vehicles meeting or passing must give precedence. But the respon-

dents' use of their track is in no other sense exclusive. Any other vehicle which does not run on flanged wheels may use the track and the rails as freely as any other part of the street, whenever and so long as these are not actually occupied by the respondents' cars. Beyond the possession of these privileges, which are all that the statutes confer upon them, the respondents are in no better position, and have no higher right, than the appellant and other persons who use the public highway.

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The respondents' next proposition was that, even if the operations complained of have not been expressly licensed by the statutes, they are sanctioned by implication, because they are necessary in order to the efficient carrying out of the purposes for which the respondents were incorporated by the Legislature. It was argued that tramway undertakings are authorised by the Legislature in the interest and for the accommodation of a large class of the community, who would be deprived of that accommodation, at times when they most require it, if the respondents were prevented from using the only means by which they can keep their tracks open, and maintain a regular tram-car service during times of snow. The answer to that argument appears to me to be obvious and conclusive. In the first place, the statutes give the respondents no right to create a nuisance, and they have no such right at common law. In the second place, it is not shewn that the nuisance complained of is in any sense necessary. Whilst I have little doubt that there may be other methods equally effective, I think the evidence very strongly suggests that the use of salt is involved in the only known methods which combine cheapness with efficiency. The experience of other cities appears to me to point to that result. But the same experience clearly demonstrates that salt may be effectively employed without occasioning a nuisance. Its injurious consequences may be obviated by the simple expedient of removing from the street, immediately or within a reasonably short time after the application of salt, both the snow and the brine which transforms it into slush. It would, in my opinion, be extravagant to suggest that what can be done and is done, either by the street authority or by the combined action of that authority and the tramway company, in Edinburgh, Glasgow, and Dundee, becomes an impossibility in the city of Aberdeen.

In the next branch of their argument the respondents accepted, but without admitting, the foregoing conclusion, their object being to shift the origin of the nuisance from themselves to the Town-council of Aberdeen. They maintained, upon that footing, that their use of salt does not necessarily lead to a nuisance, and that any nuisance which may thereby be created is entirely due to the fact that, after salt has been applied, the briny slush which it produces, and the snow which it may come in course of time to affect, are not removed with sufficient expedition. If they were, no injurious consequences would follow. Then it was maintained that the duty of removal rested with the Town-council as the street authority, and that they were chargeable with the creation of the nuisance, which resulted from their want of alacrity in the performance of their statutory duty. I see no reason to doubt that the Town-council, as constituting the road authority, are charged with the removal of snow from the streets under their jurisdiction whenever the fall is so heavy as to obstruct traffic; but I

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am unable to come to the conclusion that their dilatoriness in the performance of that duty will relieve the respondents of responsibility for the consequences of their own operations. The nuisance is ultimately and mainly due to the employment of salt, which is used by them and not by the Town-council. If they choose to employ means which, if certain precautions are not observed, will lead to nuisance, they must first ensure that these precautions will be taken. The Town-council are under no obligation, statutory or otherwise, to counteract the illegal proceedings of the respondents, and it is by no means clear that their delay in removing snow would create any nuisance; whilst it seems certain that, if it had that effect, the nuisance would be of a character different from and less aggravated than that which is complained of.

The last proposition submitted on behalf of the respondents is formulated by the second branch of the fourth reason in their appeal case, which is as follows:—"Because the operations of the respondents are in themselves legal, and are sanctioned by the street-cleansing authority." In the record there is not to be found either a statement of fact, or even a plea in law, calculated to raise the latter contention. The practice, which is becoming too common, of submitting for the consideration of this House points of controversy involving matters of fact which have neither been pleaded nor sent to proof in the Court below is not a commendable one. In the present instance the respondents have this excuse to offer—that the fact of the Town-council having either authorised or acquiesced in these operations, although it was neither pleaded nor remitted to probation, has been accepted and relied on both by the Lord Ordinary and by the Second Division of the Court, upon evidence which was not directed to the point.

The Lord Ordinary (Lord Low), after intimating an opinion that what the respondents have done "is to clear a part of the streets of snow with the acquiescence and approval of the Town-council," comes ultimately to the conclusion "that it is sufficient for the decision of this case that the Town-council have come to be of opinion—and I see no reason to doubt that the opinion has been formed honestly and after due consideration—that it is, upon the whole, in the public interest that the respondents should be allowed to do a part of the work of clearing the streets, by sending the snow-ploughs along the tramway lines, and melting the snow not removed by the ploughs by means of salt. And that that view is not an unreasonable one is, I think, shewn by the fact that the same practice is adopted in Edinburgh, Glasgow, and Dundee." His Lordship omits to notice that the practice of clearing snow from tramway rails which is followed in Aberdeen differs from that which obtains in Edinburgh, Glasgow, and Dundee in this essential respect—that in these cities it is carried on under conditions which practically obviate all risk of nuisance.

In like manner the Lord Justice-Clerk, who delivered the opinion of the Second Division, consisting of himself, with Lords Young and Trayner, observed,—“If we were here to express our own opinions as to the propriety of using salt upon the streets, I for one would have very little difficulty in expressing my opinion most emphatically against such a proposition. But we are dealing here also with what is done necessarily under the sanction of the public authority of the place; and if they are of opinion

that the only reasonable way of getting the street cleared so as to allow that traffic which Parliament has sanctioned to be kept in operation, I do not think we are the judges at all of whether they are right in that matter or not." Again, in the same connection, his Lordship said,—“They” (i.e. the Town-council) “have the responsibility and duty imposed upon them by the ratepayers of seeing that the roads are properly managed in all circumstances to the best of their ability. If the inhabitants of Aberdeen are of opinion that their affairs in that matter are being mismanaged by the corporation, they have the remedy in their own hands.” The last remark is hardly to the point. The streets of Aberdeen are open to all the inhabitants of the realm, who have the same rights of user as the ratepayers themselves; and it is not a matter of course that the persons aggrieved by a nuisance must be municipal electors.

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I am unable to concur either in the law which seems to be laid down in these opinions, or in the facts which they assume. So far as the law is concerned, I entertain no doubt that the road authority are invested with large discretionary powers in regard to such matters as the cleaning of the streets and the regulation of traffic upon them, and that a Court of law would decline to interfere with the due exercise of their discretion. But, in my opinion, in the case of a nuisance which the Legislature has not sanctioned, either expressly or by necessary implication, the road authority have no power or discretion either to commit it themselves or to authorise its commission by others. As regards the question of fact, an examination of those parts of the evidence which can be said to have any bearing upon it have satisfied me that the Town-council have not acquiesced in, and have not authorised, the operations complained of.

In dealing with these questions of acquiescence and authority, it is necessary to keep in view that the respondents have all along asserted, and in this suit are still maintaining, their statutory right to do the acts complained of, irrespective of any licence from the street authority. So far back as February 1886 the Town-council, acting upon the advice of counsel and the report of a subcommittee, intimated to the respondents that their operations, in so far as they consisted of sprinkling salt upon their track in times of snow and in clearing their rails by heaping the snow on either side of the track, “were unwarrantable and illegal,” and requested that they should discontinue those proceedings in the future. That intimation was never withdrawn, and the only answer which appears to have been sent to it was one or two letters of remonstrance, accompanied with a number of communications received by the respondents in reply to a circular addressed by them to the secretaries of various tramway companies throughout the country, all of which vindicate the practice of salting, and some of which go so far as to impeach the right of the road authority to interfere with it.

The respondents, in September 1895, sent to the Town-council a copy of the record in this action, which had been closed on May 18, 1895, together with a request that the council should nominate representatives “to give evidence supporting the conduct of the tramway company.” The Council remitted the matter to their streets and roads committee, upon receiving whose report they resolved (1) that such of their members as the respondents should select should give evidence, on behalf of the Council, in favour

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of the tramway company ; and (2) that a committee be appointed to meet the officials of the company, and to report whether an arrangement could be effected "with the view of having the streets expeditiously cleared during snow-storms." I think the position which was taken up by the Town-council is perfectly intelligible. They were willing to enter into any reasonable arrangement for clearing away the snow and slush which would remove all cause of complaint by the appellant and others ; but they at the same time thought it better that the respondents should maintain at their own hand, and at their own cost, the only plea which they had stated against the merits of the action. It is to my mind a very significant circumstance that, neither in their record nor in any of their communications with the Town-council, is there the slightest suggestion made of acquiescence or authority. The attitude of the Council may savour of north country caution ; but it must be remembered that, if the respondents had succeeded in establishing their plea, the Town-council and the public would have been alike at their mercy.

For these reasons I am of opinion that the interlocutors appealed from ought to be reversed, and that the cause should be remitted to the Second Division of the Court, with directions to grant the appellant an interdict in the terms proposed by the Lord Chancellor. I also think that the appellant ought, as proposed by his Lordship, to have the costs of his appeal in this House, and also the costs in both Courts below.

LORD SHAND.—My Lords, I am also of opinion that the appeal should be allowed in this case for the reasons which have been already so fully stated as to render it unnecessary for me to add more than a very few observations.

My Lords, I think it has been clearly proved as a matter of fact that a serious nuisance did exist and was caused by the respondent company during the winter of 1894-5 in Aberdeen, as complained of by Mr Ogston. The learned counsel who appeared for the tramway company endeavoured to draw a distinction between the two operations of clearing away the snow from the parts of the street on which their rails were situated, and putting down salt on the street in such large quantities ; but it is plain to me that those two operations must be taken together. The nuisance was created as the result of the combined operations, namely, the way in which the streets were cleared, and the quantity of salt placed on them. That nuisance might have been obviated if the snow and slush had been immediately removed, or removed within a reasonable time after the salt had been used. It is clear, I think, from the evidence in regard to other towns, that in Aberdeen the clearing of the streets has not been carried out with the promptitude and dispatch shewn elsewhere. If it had been there would have been an end to the complaint that is made here, and a complete answer to the action. I see no reason to doubt that the nuisance is not by any means one that must necessarily be caused and endured even in times of severe storm ; and I cannot doubt that in future arrangements will be made by which any such nuisance will be obviated.

As to the other defence,—that what was done had the sanction of the Town-council,—I have to observe, referring to what has been so fully stated by my noble and learned friend Lord Watson, that in my opinion that

defence is not made out in point of fact. I think the Town-council did not sanction the proceedings of the tramway company ; but apart from that, I agree with the opinion which my noble friend has expressed, that even the Town-council themselves would not be entitled to continue and perpetuate a nuisance, and to defend themselves by saying that they were to be the judges in a matter of this kind. I think, even if the Town-council as administrators of the streets were causing a serious nuisance of this kind, that the Court would have the power, and ought to exercise the power, of putting a stop to it.

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LORD DAVY.—My Lords, I am of the same opinion. I confess to some feeling of sympathy with the tramway company. In a time of snowstorm such as that which occurred in 1894-95, there must of necessity be some inconvenience and suffering to men and horses, and the directors of a tramway company might easily conceive that their first duty was to keep the tramway open for public traffic, and to avoid the general inconvenience that would be occasioned to the public, particularly at that time, by the tram-cars ceasing to run.

But, my Lords, what we have to consider is whether the complainer is entitled to the rights which he claims, and whether the respondents have infringed the rights of the complainer. He is entitled to have his rights protected even if it were shewn that a majority of the public who used the tramways were benefited by the acts of the respondents.

My Lords, I cannot doubt that to pile up large heaps of snow on the highway was in excess of the respondents' rights, and was in law a nuisance. The tramway company had no more right to do this than any other inhabitant of the street would have had to pile heaps of snow on the tramway itself. In the same way, with regard to the use of the salt: by the use of the salt in the manner in which it is proved in the evidence to have been used, the respondents produced a noxious mixture which they let loose upon the highway. That noxious mixture would not otherwise be there, and its presence, as I think is proved by the evidence, increased and aggravated to a material extent the inconvenience and danger to horses incident to the snowstorm itself.

My Lords, the only relevant defence that I can find pleaded is that the operations of the respondents in clearing and keeping clear their lines were within their statutory rights. I can only say that that argument depends on whether it was an incident necessary to the statutory rights conferred upon them. They have no statutory right to commit a nuisance, and the only attempt to make out or support that plea was by arguing that the statutory power of maintaining their tramways necessarily involved (and I say "necessarily" deliberately) the creation of this nuisance, and that in fact the statute has, if not expressly yet impliedly, authorised the nuisance. My Lords, I do not think that that is made out in this case, and I do not think there are any grounds whatever by which the respondents can maintain that the operations which I have held to be a nuisance were sanctioned or permitted by their Acts.

My Lords, the respondents point to the analogy of what is done in other towns, and evidence upon this point seems to have impressed the Lord

No. 2. Ordinary. But, my Lords, I think it is impossible to read the evidence of Mr Young as to what is done in Glasgow, and of Mr Pitcairn as to how the streets are cleared in Edinburgh, without coming to the conclusion that the analogy is entirely against the respondents, and not in their favour. I observe that in Mr Young's evidence he says, "we all knew what to do, and did it." It seems to me that that is exactly what did not take place at Aberdeen. And I observe that Mr Pitcairn says, "we exercise more care now than we used to do." Well, my Lords, perhaps the experience of the past and the knowledge of what has been done in Edinburgh may have a salutary effect in Aberdeen in the future.

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Now, my Lords, the Lord Ordinary and the Inner-House seem to have thought that the case might be regarded for this purpose as if the Town-council had been the defenders or respondents. Indeed, the Lord Advocate and his learned junior, Sir Robert Reid, argued before us that the defenders were, in the operations complained of, agents of the Town-council, and that they acted by their authority. Now, I agree generally with the Lord Justice-Clerk's observations as to the amount of latitude and consideration to be shewn to a public body entrusted with the duty of clearing the streets. They are entitled to exercise their discretion as to the time, the order, and the means to be employed, and if they are supine in the exercise of their power, that is primarily a question to be considered by those who elect them to act on behalf of the community. But, my Lords, the defenders are not the Town-council, and, in my opinion, they have wholly failed to shew any ground upon which they can shelter themselves under the powers and immunities of that body.

I need not refer again to the minutes of the Town-council or to the correspondence which passed between them and the tramway company which have been referred to by my noble and learned friend opposite (Lord Watson), but the effect left upon my mind is that, so far from acting under the authority of the Town-council, the Town-council, wisely perhaps, left them to fight their own action in the best way they could, and declined to interfere beyond permitting some of their body to give evidence. I do not see that they interfered at all, or intended to make themselves in any way responsible for the defence.

My Lords, in this state of things, if it were merely a temporary interference with the highway which came to an end with the state of circumstances which occasioned it, and if there were no claim of right to do the acts complained of, your Lordships would not probably think it was a case for granting an interdict; but by their fourth plea in law the respondents claim a statutory authority for their operations, and therefore I am of opinion that the appellant is entitled to the interdict he asks for; but, as it is quite possible that salt may be used for the purpose of clearing snow from the tramway (which cannot be so easily cleared by any other means) without occasioning a nuisance, I think the interdict should be in the qualified form proposed by your Lordships.

ORDERED, that the interlocutors appealed from be reversed: And it is hereby declared that the appellant (complainer) is entitled to have the respondents, the Aberdeen District Tramways Company, interdicted, prohibited, and discharged from removing

snow from their tramway lines in the Great Western Road, Holburn Street, Union Street, and George Street, in the city of Aberdeen, and from scattering salt thereon, in the manner hitherto practised by them, to the nuisance of the appellant and of the public using said streets for the purpose of traffic with horses: Further ordered, that the cause be remitted to the Second Division of the Court of Session, Scotland, to pronounce decree of interdict to the effect foresaid, and to find the appellant (complainer) entitled to the expenses of process hitherto incurred by him in the Court of Session: Further ordered, that the respondents do pay to the appellant his costs of the appeal to this House.

No. 2.
Dec. 14, 1896.
Ogston v.
Aberdeen
Tramways Co.

GRAHAMES, CURREY, & SPENS—AULD & MACDONALD, W.S.—MARTIN & LESLIE—
MORTON, SMART, & MACDONALD, W.S.

NORTH BRITISH RAILWAY COMPANY, Pursuers (Appellants).—

D.-F. Asher—Sol.-Gen. Dickson—Grierson.

NORTH-EASTERN RAILWAY COMPANY, Defenders (Respondents).—

Lord-Adv. Murray—Cripps, Q.C.—C. J. Guthrie—

A. O. M. Mackenzie.

No. 3.

Dec. 17, 1896.
North British
Railway Co. v.
North-Eastern
Railway Co.

Railway—Running Powers—Right of owning company to exclude running power company—Railway Commission.—The East Coast Route between Edinburgh and London consisted of the lines of the North British Railway Company from Edinburgh to Berwick, of the North-Eastern Railway Company from Berwick to Shaftholme Junction, in Yorkshire, and of the Great Northern Company from Shaftholme Junction to London.

By an agreement incorporated in an Act of Parliament in 1862, it was provided that “for the purpose of maintaining and working in full efficiency in every respect the East Coast Route . . . the North British Company shall at all times hereafter permit the [North-Eastern] Company to run over and use the North British Company’s railway . . . between Berwick and Edinburgh and Leith, all inclusive . . . subject to the payment” of such rates as should be settled by agreement, or failing agreement by arbitration.

Down to 1869 the through traffic was conducted by each company working the through trains on their own line. In 1869 the North-Eastern Company claimed to send on certain trains as running-power trains, and in that year an arrangement, terminable on three months’ notice, was made, by which the through trains were hauled by North-Eastern engines between Edinburgh and Berwick. The carriages composing the through trains were for the most part carriages jointly owned by the three companies.

On 30th April 1894 the arrangement was terminated, and the North British Company raised an action to have it declared, *inter alia*, that the through trains run since 1869 were “their trains,” that they were entitled in the future to run the same service of trains between Edinburgh and Berwick as their own trains, and that the defenders were not entitled to work those trains. The defenders maintained that the trains run since 1869 had in fact been run by them in the exercise of their running powers, and pleaded that in any event they were entitled in the exercise of their running powers to run such a number of trains between Edinburgh and Berwick as might appear to them to be necessary or advisable, and that they had an exclusive right to run the East Coast trains between Edinburgh and Berwick.

The First Division sustained the defences and assolized the defenders.

In an appeal the House held (*alt. judgment of the First Division*) (1) that the agreement of 1869 having come to an end on 30th April 1894, the original statutory rights of the parties then emerged unaffected by the prac-

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tice under the agreement; (2) that the claims of the pursuers and of the defenders respectively were in excess of their respective legal rights; (3) that the extent to which, and the terms on which the running powers should be exercised, fell to be determined by agreement, or failing agreement by the Railway Commissioners; and (4) that the judgment sustaining the defences and assoilzieing the defenders fell to be recalled, and the action to be dismissed.

Process—All parties not called—Action by one of several joint owners against another.—The railway carriages on the East Coast Route from Edinburgh to London were the joint property of three companies, A, B, and C.

In an action by A against B concluding, *inter alia*, for declarator that B was not entitled to use the joint property without the consent of A, held (*aff. judgment of the First Division*) that the conclusion fell to be *dismissed* in respect that the third joint owner C had not been made a party to the action.

Ld. Chancellor
(Halsbury.)
Lord Watson.
Lord Mac-
naghten.
Lord Shand.
Lord Davey.

THE EAST COAST ROUTE between Edinburgh and London was formed of the railways belonging to three companies. Between Edinburgh and Berwick the line was owned by the North British Railway Company; between Berwick and Shaftholme Junction in Yorkshire by the North-Eastern Railway Company; and between Shaftholme Junction and London by the Great Northern Railway Company.

The East Coast Route was opened in 1848. A large proportion of the carriages used in the through trains belonged jointly to the three companies, and were known as East Coast joint stock. The three companies shared the receipts from the through traffic in proportion to their respective mileages.

From 1848 down to 1869 the East Coast trains were worked by the North British Company on their own line to and from Berwick.

By an agreement, dated 14th May 1862, between the North British Company and the North-Eastern Company, which was scheduled and incorporated with the North-Eastern and Carlisle Railways Amalgamation Act, 1862, the North-Eastern Company acquired running powers over the line between Edinburgh and Berwick.* This agreement was in implement of a private agreement dated 12th May 1862.

In January 1865 the North-Eastern Company intimated to the North British Company that they intended to exercise their running powers, but no change was made till August 1869.

On 27th July 1869 an interim arrangement was agreed to, without prejudice to the rights of either company, by which the North British Company were to pay to the North-Eastern Company 1s. per mile for haulage, and to get the whole receipts. The arrangement bore to be till 1st September 1869.

* The agreement contained the following clause:—"Eightly, For the purpose of maintaining and working in full efficiency in every respect the East Coast Route by way of Berwick, for all traffic between London and other places in England and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British Company shall at all times hereafter permit the company [North-Eastern], with their engines, carriages, waggons, and trucks, to run over and use the North British Company's railway, sidings, stations, wharves, and stopping, loading, and unloading places, water, watering-places, and other conveniences at and between Berwick and Edinburgh and Leith, all inclusive, . . . subject to the payment by the company to the North British Company for such user of such tolls, rates, or dues, or such share or proportion of tolls, rates, or dues, as have or has been or shall from time to time be agreed upon by and between the said companies, or in default of such agreement, as shall be fixed by arbitration in manner hereinafter provided."

On 7th August 1869 a minute of agreement was entered into between the two companies. No. 3.

This agreement, which was set out in the minutes of a meeting of deputations from the boards of the respective companies, contained the following clause :—" 10. That this arrangement be without prejudice to, and be not mentioned or referred to in connection with any further or subsequent arrangements or arbitrations which may become necessary, and be terminable at three months' notice on either side." Under this minute of agreement the whole through trains by the East Coast Route were to be hauled between Edinburgh and Berwick by North-Eastern engines, driven by North-Eastern servants, and were under the control of North-Eastern guards. Carriages were to be found at the expense of the North British Company, and the North British Company received the whole receipts, subject to payment of an engine mileage allowance of 9d. a-mile to the North-Eastern Company.

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On 18th January 1894 the North British Company gave notice to terminate the agreement of August 1869 on 30th April 1894, in so far as it related to haulage. The North-Eastern Company accepted this "as a formal notice terminating that arrangement."

Thereafter the North-Eastern Company maintained that the through trains which their engines had been and were then hauling between Edinburgh and Berwick had been, and continued to be, North-Eastern running-power trains, and that they were entitled to run them as such.

On 12th December 1894 the North British Company raised the present action against the North-Eastern Company.

The conclusions of the summons were as follows :—" (First) it ought and should be found and declared, by decree of the Lords of our Council and Session, that the trains from Edinburgh to London, *via* Berwick and York, and to other places south of Berwick, by the railways of the pursuers and defenders and the Great Northern Railway Company or of the pursuers and defenders, and the trains from London *via* York and Berwick, and from other places south of Berwick, by the said railways, to Edinburgh, have all along hitherto, or otherwise since August 1869, been and are, while on the railway of the pursuers between Edinburgh and Berwick, trains of the pursuers and not trains run by the defenders in the exercise of the running powers conferred by the articles of agreement made between the defenders and pursuers, of date 14th May 1862, scheduled to and confirmed by the North-Eastern and Carlisle Railways Amalgamation Act, 1862, or by the agreement made and executed by and between the defenders and pursuers, of date 12th May 1862, or by any Act of Parliament; (second) it ought and should be found and declared, by decree foresaid, that from and after 1st January 1895, or such other date as our said Lords may fix in course of the process to follow hereon, the pursuers are entitled to run between Edinburgh and Berwick, with their own engines and guards, and otherwise as their own trains, the trains shewn in the schedule hereto annexed, subject always to such alterations as may from time to time be made by mutual consent of the pursuers and defenders and of the Great Northern Railway Company so far as the consent of the defenders or of the last-mentioned Company may be necessary, and that from and after 1st January 1895 the defenders are not entitled, in the exercise of their said running powers or otherwise, to work between Edinburgh and Berwick with their engines, guards, or other servants the said

No. 3. trains, or any of them, while and so long as the pursuers as the owners of the railway are able and willing and continue to run and work said trains in an efficient way; (third) it ought and should be found and declared, by decree foresaid, that the defenders are not entitled to use the East Coast joint stock carriages mentioned in the condescendence hereto annexed in any trains they may run on the pursuers' railway in the exercise of their said running powers without the consent of the pursuers; (fourth) the defenders ought and should be interdicted, prohibited, and discharged, by decree of our said Lords, from and after 1st January 1895, from attaching their engines at Edinburgh or elsewhere north of Berwick to such of the said trains shewn in said schedule (subject to alteration as aforesaid) as run from Edinburgh to the south, and from entering by their guards and other servants or in any way interfering with or molesting the pursuers in the control and management of such trains north of Berwick, and from attaching their engines at Berwick or elsewhere north of Berwick to such of said trains as run to Edinburgh from the south, and from entering by their guards and other servants or in any way interfering with or molesting the pursuers in the control and management of such last-mentioned trains at or north of Berwick; and (fifth) the defenders ought and should be decerned and ordained, by decree of our said Lords, from and after 1st January 1895, to hand over at Berwick to the pursuers the said last-mentioned trains, or otherwise the said East Coast joint stock carriages upon such trains, and to detach the engine or engines of the defenders from such trains at Berwick, and to remove from such trains at Berwick their guards and other servants."

On record, averments were made by the parties *hinc inde* relative, *inter alia*, to the question raised by the first conclusion of the summons, viz., whether the through trains run between Edinburgh and Berwick subsequent to 7th August 1869 were the trains of the pursuers, or were trains run by the defenders in the exercise of the running powers conferred by the agreements of 1862, but having regard to the ground upon which the judgment of the House of Lords was based, it is unnecessary to state them.

The pursuers pleaded, *inter alia*;—(1) The East Coast trains in question between Edinburgh and Berwick being trains of the pursuers, and not having been run in virtue of the defenders' running powers, the pursuers are entitled to decree of declarator in terms of the first conclusion of the summons. (2) In respect the pursuers, as the owners of the railway, are able and willing to continue to run between Edinburgh and Berwick after 1st January next as their own trains the trains set forth in the said schedule hereto annexed (subject to alteration as aforesaid), the defenders are not entitled, in the exercise of their running powers, to work the said trains, or any of them, as running-power trains of the defenders, and the pursuers are entitled to decree of declarator in terms of the second conclusion of the summons, and to interdict and decree in terms of the fourth and fifth conclusions respectively of the summons. (3) The East Coast joint stock being the joint property of the pursuers, the defenders, and the Great Northern Railway Company, the defenders are not entitled, without the consent of the pursuers, to make use of the said East Coast joint stock upon any trains run by the defenders between Edinburgh and Berwick in the exercise of their running powers, and the pursuers are entitled to have decree of declarator in terms of the third conclusion of the summons. (6) Upon a sound construction of

the scheduled agreement and the private agreement [of 12th May 1862], the pursuers are entitled to decree as concluded for. (7) *Esto* that all or any of the trains in question have hitherto been running-power trains of the defenders, the pursuers, as owners of the line from Edinburgh to Berwick, and in virtue of their statutory rights and powers, are entitled to have the defences repelled, and *separatim*, to insist that the said trains shall hereafter be run as their trains, *et separatim*, they are entitled to do so as long as they run the said trains so as to maintain an efficient service.

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The defenders pleaded;—(1) All parties not called. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) The East Coast trains in question between Edinburgh and Berwick having been and being trains run by the defenders in the exercise of their running powers, the defenders should be assoilzied from the first conclusion of the summons. (4) The defenders are entitled, under the powers conferred upon them by the agreements of 12th and 14th May 1862, to run such number of East Coast trains between Edinburgh and Berwick as may appear to them to be necessary or advisable. (5) The defenders being entitled, under the powers conferred upon them by the agreements of 12th and 14th May 1862, to run such number of East Coast trains between Edinburgh and Berwick as may appear to them to be necessary or advisable, the pursuers have no interest to insist in the action. (6) The defenders, being under no obligation to hand over East Coast trains to the pursuers at Berwick, should be assoilzied from the fifth conclusion of the summons. (7) Under the agreement of 12th May 1862, the defenders have an exclusive right to run the East Coast trains between Edinburgh and Berwick.* (8) Under the conditions regulating the use of the East Coast joint stock agreed upon between the pursuers, defenders, and Great Northern Railway Company, the pursuers are not entitled to object to the defenders using such stock upon the East Coast trains run by them. (9) The pursuers' averments, so far as material, being unfounded in fact, the defenders should be assoilzied, with expenses.

Proof having been taken, the Lord Ordinary (Low), on 10th December 1895, pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, sustains the first plea in law for defenders, so far as regards the third conclusion of the summons, in reference to the East Coast joint stock carriages, and dismisses the same: And as regards the remaining conclusions of the summons, sustains the defences, assoilzies the defenders therefrom, and decerns: Finds the defenders entitled to expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report."

The pursuers reclaimed, and on 5th March 1896, the First Division adhered.†

* Plea 7 was founded upon certain clauses of a private agreement concluded between the companies on 12th May 1862. The plea was not maintained either in the Inner-House or House of Lords, but was not withdrawn.

† The Lord Ordinary and the First Division decided the question of fact raised by the first conclusion of the summons in favour of the defenders.

After reviewing the evidence and stating his opinion on the question of fact, the LORD PRESIDENT proceeded,—If the question tabled by the pursuers in the first conclusion of their summons must be decided against them, then, in my judgment, they cannot prevail under the second. On

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The pursuers appealed.

At delivering judgment, after consideration,—

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LORD CHANCELLOR.—In this case two railway companies have placed contentions before the Railway Commissioners, neither of which appear to me well founded. The North-Eastern Company claim to have running powers, which they certainly possess. The North British Company are the owners of the line over which the North-Eastern claim to run. The object of each of them is by means of facilities to reach London and obtain the profit of that traffic. The North British used to start a train upon their own line, which in due course went over some parts of the North-Eastern line and the Great Northern line. It is admitted that up to the 1st of June 1869 the trains to London were worked by the North British on their own line. At that date a controversy arose which was settled by an agreement, which, however, was one which the parties had reserved power to put an end to upon three months' notice. It was put an end to. The

the hypothesis which I state the question stands thus: Given that the whole trains in question are North-Eastern trains, can the Court ordain that in future North British trains are to be run in place of them?

I must own that an initial, and, as I think, an ultimate difficulty arises from the want of harmony between the theory of the summons and the facts and conditions of through railway communication by these East Coast railways. The summons begins by personifying a "train," and assigning to it an identity and a continuous and apparently perpetual existence. To this fanciful notion I make no demur, so long as it corresponded with the facts, as was the case in the historical question submitted under the first conclusion. But, when we pass into the region of the future, the fallacy vitiates the argument. The summons assumes that certain "trains," so numerous as to require a schedule for their enumeration, are such well-established institutions that they will, of themselves, run from Edinburgh to London and back at their appointed hours, and that the only question is which company shall have their control in Scotland. All this is flagrantly contrary to—I shall not say anything wider than—the admitted conditions of the traffic in question. There is no law of nature—there is no law of railways or of railway facilities—by which the pursuers, having their will and running what they call the 10 A.M. train from Edinburgh to Berwick, will get their passengers sent straight on in the same train from Berwick to London. The pursuers have no running powers beyond Berwick; and the practical result of our adopting the theory of the second conclusion would be that we should set up a new series of local trains from Edinburgh to Berwick, clearing the North British line of through trains for this futile purpose, which nobody desires. What the pursuers really desire is that they, as the owning company of the North British line, shall be held in law, by our decree, entitled to run a series of trains from Edinburgh to Berwick, which shall have the legal quality of running right on to London. No decree that we could pronounce will have this stimulating effect. In this imaginary journey from Berwick to London the pursuers would, without the consent of the two English companies, override the vested rights of both the defenders and the Great Northern Railway Company, over whose lines the pursuers have no running powers whatever. Corresponding difficulties beset the pursuers' theory, when they picture themselves as waiting at Berwick, with a purely North British train, for a North-Eastern train, which, so far as we know, and so far as we have jurisdiction, need never arrive. The essential difference in the strategical strength and in legal right between the pursuers and the defenders, in relation to through traffic between

controversy again arose, and the parties proceeded before the Railway Commissioners to do that which the Railway Commissioners are empowered by the statute to do, namely, to arrange upon what terms the running powers should be exercised and what facilities afforded. When there each party appears to have been impartially unreasonable. The North British Company, relying upon the practice up to the 1st of June 1869, maintained that they had a vested right in what they were pleased to call their train, which started at a particular hour, and that the Railway Commissioners had no right to deal with the North British right to start a through train at that hour. The North-Eastern Company, on the other hand, founding their supposed rights on the agreement to which I have referred, and the practice under it, claimed themselves a right to start that train as theirs. The Railway Commissioners did not feel themselves competent to deal with these claims set up as absolutely legal rights, and accordingly this action has been raised to determine what they are.

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It appears to me that neither of the claims put forward can be sustained. The possessive pronouns used by either party are inaccurate, at least they

London and Edinburgh, is that the defenders have running powers for the conduct of such traffic over the pursuers' line, and the pursuers have no running powers over the defenders' line. The summons adopts the easy course of ignoring this distinction.

The Court has no material before it for determining the complicated question what would be a fair exercise of the running powers of the defenders as to the hours of their trains. That question would have to be determined according to the equitable principles which regulate the possession or use of one subject by two persons having rights of different qualities. No such question is stated. We are not asked to frame a scheme for the use of this line by the owning company and the running-power company, nor are the facts before us so that we could decide it, even assuming that it is within our jurisdiction and not within that of the Railway Commissioners, a subject on which only a very meagre argument was offered by the pursuers.

On the third conclusion, I believe the Lord Ordinary to be right. For my own part, I think that the question raised by that conclusion legitimately enters the consideration of the first conclusion; but it is right that, in the absence of the Great Northern Railway Company, and as the pursuers must be held to decline to call them as defenders, we should not give any decree upon it.

The fourth and fifth conclusions follow the fate of the first and second.

On the question—at first sight not very clear—what matters the summons really meant to submit for our decision, counsel were not well agreed; and we had read to us passages from what was said to be the shorthand writer's notes of the proceedings before the Railway Commission, as to the result of which counsel did not profess a common understanding. Upon this I have only to observe that, while I am sure that this Court would be desirous to facilitate the settlement of disputes originating in the Railway Commission, by determining questions of legal right, it rests with the party resorting to a Court of law to state the question which he desires to have decided, and upon that question as defined in the writ, by which it is submitted, and upon no other, can the Court give judgment.

I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM and LORD KINNAR concurred.

The LORD PRESIDENT intimated that LORD M'LAREN, who was absent at the advising, also concurred.

No. 3. do not express what either party in truth means to claim. What each means to claim is the exclusive right to start a train which is to go through to London at a particular time. The right of the North British to start a train at some time or another on their own line I should have thought was incontestable. The right of the North-Eastern to apply for and get from the Railway Commissioners some times for the exercise of their running powers is, I should have thought, equally incontestable; but neither company can claim to exclude the other, and the questions of what facilities shall be given, or under what regulations the running powers shall be exercised, are questions which the Legislature has remitted to the Railway Commissioners.

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I confess that I am unable to follow the reasoning which is supposed to establish that the through trains to London were North-Eastern trains. The objection which the Lord President so forcibly urges against the second conclusion of the summons, and in which I entirely concur, seems to me equally applicable to the first. "I must own that an initial, and, as I think, an ultimate difficulty arises from the want of harmony between the theory of the summons and the facts and conditions of through railway communication by these East Coast railways. The summons begins by personifying a 'train,' and assigning to it an identity and a continuous and apparently perpetual existence. To this fanciful notion I make no demur, so long as it corresponded with the facts, as was the case in the historical question submitted under the first conclusion. But when we pass into the region of the future, the fallacy vitiates the argument. The summons assumes that certain 'trains,' so numerous as to require a schedule for their enumeration, are such well-established institutions that they will, of themselves, run from Edinburgh to London and back at their appointed hours, and that the only question is which company shall have their control in Scotland. All this is flagrantly contrary to—I shall not say anything wider than—the admitted conditions of the traffic in question. There is no law of nature—there is no law of railways or of railway facilities—by which the pursuers, having their will and running what they call the 10 A.M. train from Edinburgh to Berwick, will get their passengers sent straight on in the same train from Berwick to London."

I agree in every word of this except the statement that the fanciful instance corresponds with the fact in the historical question submitted under the first conclusion. The moment that it is admitted that the practice was under the agreement, even if this agreement had not been "without prejudice," it seems to me no part of that practice can be looked at to establish a right. Upon the termination of that agreement, the parties were, I think, remitted to the *status quo ante*, whatever that was, but I do not think that *status quo ante* necessarily establishes the right now claimed by the North British Company. I decline to go into the question of the haulage agreement, the joint property in the carriages, or the modes of payment by the North-Eastern, or what either party have said or done in the nature of admissions against themselves. Nothing that either party could have said or done would, in my judgment, determine the question which the Railway Commissioners have the jurisdiction to solve, and which it appears to me they are just as much able to solve now, unfettered by anything either company has done, as if they were hearing their respective

applications the day after the running powers were granted. They would probably respect any convenience which the owning company had been in the habit of enjoying, because the problem to be solved is to what extent the owning company should be ordered to permit the company having running powers to exercise those powers. But whether they would or not is a question for them, and not for your Lordships. I think the only question which your Lordships can answer is whether the absolute rights claimed exist in law. I am of opinion that neither company possess the absolute rights they claim, and that therefore this action ought to be dismissed.

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For these reasons I move your Lordships that both the interlocutors appealed from be reversed; that the cause be remitted to the Court of Session to dismiss the action, and find neither party entitled to their costs in this House, nor to the expenses of process in either of the Courts below.

LORD WATSON.—The direct East Coast route between London and Edinburgh is by the main line of the Great Northern Company from King's Cross to a point between Selby Junction and York, from that point by the main line of the North-Eastern Company to Berwick, and from Berwick to Edinburgh by the main line of the North British Company.

By the eighth article of an agreement between the North-Eastern and the North British Companies, which is scheduled to and incorporated with "The North-Eastern and Carlisle Amalgamation Act, 1862," it is provided as follows:—"For the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick, for all traffic between London and Scotland, and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British Company shall at all times hereafter permit the company" (*i.e.* the North-Eastern Company), "with their engines, carriages, waggons, and trucks, to run over and use the North British Company's railway, sidings, stations, wharves, and stopping, loading, and unloading places, water, watering-places, and other conveniences at and between Berwick and Edinburgh, all inclusive." . . . "Subject to the payment by the company to the North British Company for such user of such tolls, rates, or dues, or such share or proportion of tolls, rates, or dues, as have or has been, or shall from time to time be agreed upon by and between the said companies, or in default of such agreement, as shall be fixed by arbitration in manner hereinafter provided."

For a period of forty-five years prior to the institution of this action in December 1894, there had been a regular and daily service of passenger trains both ways between Edinburgh and London. The number of these trains, their times of departure and arrival, and their rates of speed had been raised from time to time. It is not matter of dispute, that until the year 1869 these trains were the joint adventure of the three companies, who shared the receipts in proportion to their respective mileages. The rolling stock chiefly used for them was the joint property of the three companies, but their engine power was supplied between King's Cross and York by the Great Northern Company, between York and Berwick by the North-Eastern, and between Berwick and Edinburgh by the North British Com-

No. 3. pany. When carriages belonging to one of the companies were required to make up the train, that company received a mileage allowance for their use.

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In 1869 a new arrangement was made in regard to these trains, under which the position of the Great Northern Company appears to have remained the same as it previously had been. In January 1865 the North-Eastern intimated to the North British Company their intention to commence using the running powers conferred upon them by statutory agreement; but no change was made, of any kind, until August 1869, when certain heads of agreement were settled between the representatives of the two companies, which contained the proviso that the arrangement which they embodied should be without prejudice to, and should not be mentioned or referred to in connection with any further or subsequent arrangements or arbitrations which might become necessary, and also that it should be terminable at three months' notice on either side.

Apart from the terms of the arrangement of August 1869, the only apparent change which it effected in the working of the trains, and in the distribution of their earnings, consisted in the fact that thenceforth the haulage of the trains from Berwick to Edinburgh, and *vice versa*, was performed by the North-Eastern Company with their own engines, and that a mileage allowance for such haulage was deducted from the proportion of receipts paid to the North British Company. That fact is not, in my opinion, conclusive of the question argued at your Lordships' bar, and largely discussed by the Lord Ordinary (Lord Low), as well as by the Lord President, in delivering the opinion of the First Division—whether, in working under the agreement, the North-Eastern Company were or were not exercising their running powers. I have no intention of entering upon that discussion, because, in the view which I take, its determination one way or another cannot affect the present position or rights of the parties to this litigation.

The North British Railway Company, on the 18th January 1894, gave notice to terminate the agreement of August 1869 on the 30th day of April next, in so far as it related to haulage between Edinburgh and Berwick. As that notice affected what the North-Eastern Company regarded as a cardinal feature of the arrangement contained in the agreement, they accepted the notice "as a formal notice terminating that arrangement." At that time the object of the North British Company apparently was to restore in substance the arrangement which prevailed before August 1869, by substituting their own haulage of the trains for that of the North-Eastern Company between Edinburgh and Berwick, and getting rid of the payment made on that account out of their share of earnings to the latter company. Before examining the record, I think it may be advisable to consider what the respective rights of the parties were in law on the 30th April 1894, because these remained unaltered at the time when the present action was brought by the North British Company. At that date the agreement of August 1869 had come to an end, and the arrangement which had been operative before it had been superseded for five-and-twenty years. Neither the one nor the other of these arrangements could any longer affect the legal interests of the two companies, who were, in my opinion, remanded to their respective statutory rights. The North British Com-

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pany were the owners of the railway between Edinburgh and Berwick, and in that capacity had an absolute right to use it as they chose, save in so far as that right might be qualified and restricted by the due exercise of the running powers competent to the North-Eastern Company under the statutory agreement of 1862. They also had, or might have, the right to insist upon facilities being afforded by the North-Eastern Company for the forwarding of their traffic beyond Berwick; but the existence and extent of that right are matters beyond the cognisance of the ordinary Courts of the country, and can only be considered and determined by the proper tribunal—the Railway Commissioners. On the other hand, the North-Eastern Company have unquestionably running powers over the railway between Edinburgh and Berwick; but to my mind it is clear, from the terms in which these powers are conferred, that they have not the right to intrude, at their own hand, upon the North British system, and to use them according to their own will and pleasure. Until the extent of their legitimate use has been determined by the proper tribunal, or by mutual consent, these powers will continue to exist, but the right to exercise them will be practically suspended.

The remedy asked by the North British Company is expressed in declaratory conclusions, and two other conclusions, one for interdict and another for a peremptory order, both of which are consequential upon the declaratory conclusions being affirmed. The declaratory conclusions refer to and incorporate a schedule setting forth all the through trains which ran during the year 1894 until the date of the summons, with their monthly times of departure from and arrival at Edinburgh and London, and certain intermediate stations where they stopped. The substance of the first conclusion is to have it found and declared that these trains “have all along hitherto, or otherwise since August 1869, been and are,” while on the railway of the pursuers, between Edinburgh and Berwick, trains of the pursuers, and not trains run by the defenders in the exercise of the running powers conferred by the articles of agreement. The substance of the second is a declaration that the pursuers are entitled to run these trains between Edinburgh and Berwick, with their own engines and guards and as their own trains; and that the defenders are not entitled to do so, so long as the pursuers are able to work these trains in an efficient way. The third conclusion relates to a separate matter which I shall subsequently notice.

I fail to see what possible interest the North British Railway Company has to insist in either of these conclusions. The object of a declaratory decree in a case like the present is to establish the right of the pursuers as it existed at, and will continue to exist after, the date of the action. But the judicial ascertainment of what the North British Company's rights in relation to these trains were, either under the agreement of 1869, or under the arrangement which preceded it, cannot, in my opinion, afford any aid towards determining what their rights were at the commencement of this action, and are now, which is the only real subject of controversy between the parties. In order to arrive at an intelligible construction of these conclusions, in so far as they relate to the through trains which continued to run after the determination of the agreement of 1869, I have found it necessary to assume,—what I understood to be admitted as matter of fact

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by both sides of the bar,—that both parties, who were then at issue as to their respective rights, in their own interest very properly consented to the continuance of the trains until their rights were settled. An arrangement of that kind cannot give rise to any right in either of them, or detract from any right which they possess. It is also clear to my mind that the North British Company are not in a position to ask a Court of law to determine what their rights were or are to be in relation to through trains, after the date of the summons, and that is a matter which, as I have already pointed out, must depend upon the arrangement which the parties may make for themselves, or have settled for them by the Railway Commissioners.

The leading pleas stated in defence to the action by the North-Eastern Company were—that under their running powers they are entitled “to run such number of East Coast trains between Edinburgh and Berwick as may appear to them to be necessary or advisable”—that they may have exclusive right to run the East Coast trains between Edinburgh and Berwick. As already indicated, it appears to me that these pleas are in excess of their legal rights. To this extent—that they have no power, at their own hand, and with no authority beyond their own—I do not hesitate to express my opinion. But I purposely abstain from pursuing the question further, because that course would necessarily involve considerations which are beyond my jurisdiction. If the parties choose to resort to the proper authority, that authority will be able to determine the cognate questions whether, and how far, the North British Company are in a position to insist for forwarding facilities at Berwick, and also to what extent and in what manner the North-Eastern Company ought to use its running powers.

The third conclusion is for a declaration to the effect that the North-Eastern Company are not entitled to use the East Coast joint stock carriages in any trains which they may run on the railway of the pursuers without their consent. It is admitted that these carriages are the joint property of the three companies; but it is pleaded in defence that the conditions regulating the user of these carriages excluded the objection taken by the North British Company, and also that it could not be disposed of in this suit, inasmuch as the Great Northern Company had not been made a party to it.

The Lord Ordinary (Lord Low) sustained the plea of all parties not called, as regards the third conclusion, and dismissed the same; and as regarded the whole other conclusions of the summons, he sustained the defences stated to the action, and assoilzied the respondents therefrom, with expenses. Upon a reclaiming note to the First Division of the Court, his Lordship's interlocutor was affirmed, with additional expenses.

I think that the third conclusion of the summons was rightly disposed of by the Courts below. The use which has been or was being made of the carriages in question by the North-Eastern Company was in reality one in which the Great Northern Company participated, and from which it derived pecuniary benefit; and a decree, in the terms craved, against the North-Eastern Company would have the effect of compelling that company to eliminate their carriages from the train when or before it reached Berwick, and would so deprive the Great Northern Company of the right to use the carriages for the conveyance of passengers from King's Cross to Edinburgh. It

appears to me that they ought not to be deprived of that right without an opportunity of being heard for their interest. No. 3.

For the reasons which I have endeavoured to explain, I am of opinion that the North British Company have shewn no interest entitling them to insist in the other declaratory conclusions of the action, the affirmance of which would not ascertain, or assist in the ascertainment, of their legal rights, as in a question with the North-Eastern Company, either at the present time, or at and after the date of the summons. The logical result of that opinion is, that these conclusions also ought to be dismissed, together with the remaining conclusions of the summons, which are dependent upon them. The interlocutors of the Courts below go a great deal further,—they sustain the defences and assoilzie,—the effect of which is to make the affirmance of each and every plea in law put on record by the respondents *res judicata* as between the litigants. There are several of these pleas, including the most important of them, which I should be prepared to repel, if it were necessary.

I have, in these circumstances, come to the conclusion that the proper course for your Lordships to take is to reverse both interlocutors appealed from, and to remit the cause to the Court of Session in order that the action may be dismissed. Having regard to the nature of the litigation, and to the purposeless or extravagant claims advanced by both these litigants, I think the justice of the case will be met, as your Lordship has proposed, by allowing costs to neither of them, either here or in the Court of Session.

LORD MACNAGHTEN.—I entirely agree in the motion which has been proposed, and in the reasons which have been assigned for it.

LORD SHAND.—Apart from the arrangements or agreements which have been made between the parties for the regulation of the traffic on the North British Railway from Berwick to Edinburgh during the last twenty-five years, the relative position of the pursuers and defenders is that, on the one hand, the pursuers are vested with the right to their own line, and to the use of their own line with all the powers which their statutes confer on them; and on the other hand, it is not disputed that the defenders, the North-Eastern Railway Company, under the Statute of 1862, have the right to running powers over the pursuers' line.

The true purpose of this action, as it appears to me, in the circumstances in which it has been raised, is not that the Court should define the respective rights of the parties as binding upon them in all future time, but rather that it should determine the question of possession, with reference to the working of the numerous through trains which have been in existence since 1869, as such possession might affect the relative positions of the parties before the Railway Commissioners, by whom the regulation of the mode of exercising the running powers has to be determined. The pursuers on the one hand maintain that these numerous trains have been what they describe as their trains, and not the trains of the defenders, the North-Eastern Railway Company. The defenders on the other hand maintain that the trains, on the contrary, were their trains, and that they are entitled to the entire control of them. I observe that the learned Lord Ordinary in his judgment, in sustaining the defences, as has been pointed out by my noble and

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No. 3. learned friend Lord Watson, has expressly said, "I am of opinion that the agreement of the 7th August 1869 was entered into because the defenders were exercising their running powers, and for the sole purpose of regulating the working of the running-power trains, and if that view is sound, then the trains to which that agreement is applicable have continued to be running-power trains of the defenders ever since." Substantially, therefore, his Lordship finds that these trains were North-Eastern Railway trains, and under the control of that company. And the learned Lord President, in delivering the opinion of the First Division of the Court, in a similar way observed,—“I have come to think that the better opinion is that the trains were run by the defenders in exercise of their running powers, and that the agreement was not a compromise by which those running powers were waived, but was merely the necessary adjustment of the terms on which the running powers were exercised.”

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My Lords, I am unable to agree in these opinions. The effect of the judgments, which proceed on the grounds now stated, undoubtedly would be that no fewer than ten important trains have been daily running on the pursuers' line for so many years as North-Eastern Company trains—and the North-Eastern Railway Company would seem to have the practical possession of the North British line during a very great part of every day. When we look at the language of the statute which refers to these working powers as to be used by permission of the North British Company, it would seem to follow that that company have really themselves permitted the North-Eastern Railway Company practically to absorb their line, and to oust them, though the owners of it, during a very great and important part of every twenty-four hours. My Lords, I agree in thinking that the North British Railway Company cannot be said to have made any such large concessions, and I think that neither of the parties can say that these numerous trains were the trains either of the one company or of the other.

It appears to me in the circumstances to be unnecessary to consider the details of the arrangements that were actually made and carried out, because I agree with your Lordships in thinking that these arrangements must be regarded as having been temporary arrangements, made by agreement for the very purpose of avoiding the determination or the admission on either side of the alleged legal rights of the parties, and that they were made without prejudice to these rights. It is true, on the one hand, that the North-Eastern Railway Company, by their own engines, engine-drivers, and guards, ran the through trains to and from Edinburgh; but, on the other hand, it is clear that, while running these trains, they were paid for the haulage of them by the North British Company. It is further clear that the whole of the pecuniary arrangements as between the parties were quite such as one would naturally expect if each company were working the traffic on its own line; and, as has been pointed out by my noble and learned friend Lord Watson, not only were the pecuniary arrangements of that nature, but they certainly did not proceed upon the footing that either party was giving up his rights. It is in these circumstances difficult to draw the inference that these trains were the trains of either the one party or the other, even if the agreements did not exclude that idea, but in truth I am satisfied that the whole of the arrangements were of a temporary

character, and made for the convenience of the time, and under reservation of all rights. No. 3.

The agreements of 1869 expressly bear on their face that they were intended to be temporary. It is true that they have lasted for a very long time—for no less than twenty-five years—but the minutes of 1869 in which the agreements were expressed make it clear that they were not intended to be in any sense permanent. I refer especially to what is said in the minute of the meeting of the 27th of July 1869, in which it was said, “after some conversation” (which took place between the representatives of the different companies) “it was agreed, as an interim arrangement, and without prejudice to the rights of either company, which are reserved entire, that the North British Company shall pay to the North-Eastern Company one shilling per mile for the use of their engines, the North British Company finding the carriages and using the trains in every respect as though they were their own, but so as not to prejudice the through traffic, and receiving the whole receipts accruing between Edinburgh and Berwick.” Again referring to the minutes of a subsequent meeting of the 7th of August 1869, not only was it intended, as their language plainly shews, to be a temporary arrangement, but there is this provision,—“That this arrangement be without prejudice to, and be not mentioned or referred to in connection with, any further or subsequent arrangements or arbitrations which may become necessary, and be terminable at three months’ notice on either side.” My Lords, I can scarcely conceive language which parties could use more clearly intended to indicate that the arrangements were not arrived at as an admission of legal rights, but were under reservation of each party’s rights, and that in any future question, whether arising for judicial determination or otherwise, the parties had carefully provided that this particular agreement, and the working of the trains under it, should not even be referred to as the basis of an argument for the determination of any dispute or difference.

There is no doubt that these arrangements were made in consequence of the right to the running powers having been given to the defenders; and in order to avoid settling precisely what the rights of these parties were as to the exercise of their running powers, either as regards the times at which trains should be run or the terms on which the powers should be exercised. It appears to me that although they are arrangements made in consequence of the powers which the North-Eastern Railway Company possessed, they cannot be represented as being arrangements which were in the actual exercise of these powers.

My Lords, the result, in my view, is as has been stated by your Lordships. It is admitted that up to the 1st of June 1869 the North British Railway Company worked their own trains and carried their own traffic. From that date downwards during the intervening five-and-twenty years there have been only temporary arrangements, which cannot be founded upon by either party as conferring a right against the other. The Commissioners, in taking up any question which may arise for their determination, will therefore be in the same position as if the question had arisen in June 1869, or, in other words, if I may use the expression, the parties in going before the Commissioners will present “a clean sheet” as regards the period after 1869. The Commissioners will have the consideration, on the one

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No. 3. hand, that the North British Company are the owners entitled, in the first instance, to the possession and use and working of their own line and the trains upon it; but upon the other hand, that the North-Eastern Railway Company have obtained running powers which they will be entitled to exercise. There is this difference, of course, between the year 1869 and the present, that there is a much larger traffic to be dealt with now than would have had to be taken into consideration then, and this circumstance, and the public necessities and convenience, may require some arrangements of a kind different from what they would have been if the question had arisen for determination then. Perhaps with the light which the parties have, I hope, received from what has fallen from your Lordships to-day, they may find that their wiser course is still to continue some mutual arrangement between themselves; but failing that, the Commissioners will take up the question with reference to the legal position of the pursuers and defenders which your Lordships have now defined.

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On the other question—I mean with regard to the use of the railway carriages—I agree entirely in thinking that the Court was right in dismissing that conclusion of the summons, because all parties were not called.

My Lords, each party in this case has made demands so much in excess of their legal rights that I agree that in dismissing the action on the grounds which have been already so fully stated, it should be dismissed awarding costs to neither party.

LORD DAVEY.—I agree entirely in the order which has been proposed by my noble and learned friend on the woolsack, and in the reasons which have already been given by your Lordships in support of that order. It is quite unnecessary to repeat them. I will only say that I think both parties in this litigation have put their claims far too high, and in fact that the claims put forward in some of the pleas in law, both of the pursuers and the defenders, are, in my opinion, extravagant.

THE HOUSE remitted to the Court of Session to dismiss the action, and find neither party entitled to the costs in this House, nor to the expenses of process in the Courts below.

LOCH & Co.—**J. WATSON, S.S.C.**—**WILLIAMSON, HILL, & Co.**—**COWAN & DALMAHOY, W.S.**

No. 4. **ALEXANDER M'NAB, Complainer (Appellant).**—*Lord-Adv. Murray—Cosens Hardy, Q.C.—Abel.*

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G. M. ROBERTSON AND OTHERS (Sir George Campbell's Trustees), Respondents.—*Cripps, Q.C.—Macfarlane.*

River—Lease—Lease of water in ponds and "streams leading thereto"—Whether water percolating to pond from spring a "stream."—Under the lease of a distillery there was let to the tenant the distillery and a piece of land, with two ponds, "with right to the water in the said ponds, and in the streams leading thereto." A stream from the hills entered the upper pond, from which the water flowed in a stream into the lower pond. A few yards from the lower pond, but not within the land leased, was a spring, from which water percolated through marshy ground into that pond. After the date of the lease the landlord collected the water from the spring already mentioned, and from other springs, into a tank, and by means of a pipe carried part of this water to the house of another of his tenants, the

remainder of the water collected in the tank passing through an overflow pipe into the pond. The tenant of the distillery brought an action to have the landlord interdicted from interfering with the water from the spring.

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Held (diss. the Lord Chancellor, *aff.* judgment of Second Division) that the tenant was not entitled to interdict, in respect that water percolating from a spring to a pond did not constitute a stream in the sense of the lease.

Held further (by the whole House) that assuming that there was an implied obligation on the landlord not to execute any operations which would have the effect of decreasing the amount of water in the ponds, the tenant had failed to prove that the landlord's operations had this effect.

Opinion (*per* Lord Shand) that such an implied obligation was to be inferred from the terms of the lease.

(In the Court of Session, March 11, 1896, 23 R. 1098.)

The complainer appealed.¹

Ld. Chancellor
(Halabury).
Lord Watson.
Lord Shand.
Lord Davey.

LORD WATSON.—My Lords, the first question which it is necessary to consider in this appeal is whether the spring which the respondents have impounded by means of a tank was, at the date of the lease, connected with the lower pond by a flow of water constituting a stream or streams within the meaning of the lease. If it were, there would not appear to me to be any room for doubting that the operations of which the appellant complains have encroached upon his legal rights as tenant.

According to my apprehension, the word "stream," in its primary and natural sense, denotes a body of water having, as such body, a continuous flow in one direction. It is frequently used to signify running water at places where its flow is rapid, as distinguished from its sluggish current in other places. I see no reason to doubt that a subterraneous flow of water may in some circumstances possess the very same characteristics as a body of water running on the surface; but, in my opinion, water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream. And I may add that the insertion of a common rubble or other agricultural drain in these strata, whilst it tends to accelerate percolation, does not constitute a stream as I understand that expression.

The spring in question, which is a very small one, is situated at a short distance from and above the level of the lower pond. There is little evidence, and that neither explicit nor altogether satisfactory, in regard to the condition of the spring and its effluents at and before the granting of the lease in September 1889. Most of the witnesses speak to their condition after the operations of the agricultural tenant, which were subsequent to that date, and before the year 1892. But I am satisfied, upon the proof, that, whilst a small proportion of the water escaping from the spring may have gone in another direction, the bulk of its water must have gravitated

¹ *Appellant's Authorities*.—Whitehead v. Parks, 1858, 2 H. and N. 870; Cowan v. Kinnaird, Dec. 15, 1865, 4 Macph. 236, 38 Scot. Jur. 131; Blair v. Hunter, Finlay, & Co., Nov. 29, 1870, 9 Macph. 204, 43 Scot. Jur. 169; Chasemore v. Richards, 1858, 7 H. L. C. 349; Wheeldon v. Burrows, 1879, L. R., 12 Ch. Div. 31; Suffield v. Brown, 1863, 4 De G. J. and S. 185.

Respondents' Authorities.—Taylor v. Corporation of St Helens, 1877, L. R., 6 Ch. Div. 264.

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Galbraith, the agricultural tenant, describes the land between the spring and the pond, before he commenced his operations, as a marsh which did not come quite close up to the side of the pond. He, in order to dry the soil, put a drain into the marshy part, which he continued by means of an iron pipe three feet long to a tub sunk on the edge of the pond, from which he drew water for domestic use, and the overflow from which went into the pond. Lawson, who was assistant factor for the estate of Garscube, at the date of the lease, describes the intervening land as "soft spongy ground"; and there are other witnesses who describe the water as "seeping" from the adjacent land into the pond—a Scottish expression equivalent to "oozing"—which is an accurate description if applied to the escape of percolating water from the strata through which it has passed, and is to my mind altogether inconsistent with its running in a stream. Boyne, one of the appellant's witnesses, no doubt says that there was a sort of channel formed by the water from the spring; but he is the only person who appears to have detected it, and the bulk of the evidence upon the point, as well as the natural inference to be derived from facts established *aliunde*, alike lead me to the conclusion that, until the time of Galbraith's operation, the water of the spring reached the pond by the natural process of percolation, and that no part of the supply derived from the spring flowed in a body which could with any degree of accuracy be described as a stream.

I therefore differ in opinion from the Lord Ordinary, who came to the conclusion that the water of the spring in question was one of the streams specifically let to the appellant. Had I been able to arrive at that result, I should not have thought it necessary to consider whether, by interfering with the spring, the respondents had injured the appellant's water supply. In that case, every drop of water which they took from the spring, otherwise than in the due exercise of their reserved right in connection with farm purposes, would have been an illegal diminution of the supply secured to the appellant by the terms of his lease.

The result of my opinion, so far as hitherto expressed, is that the waters of the spring in question were not demised to the appellant, subject to a reservation permitting a certain user of them to agricultural tenants, but remained with the respondents under their title as proprietors. The appellant, upon that view of the case, maintained alternatively that the respondents are under a contractual obligation to allow as much of the water of the unlet sources from which the pond is fed to continue to enter it as may be equivalent to the average of the water supply derived from these sources at the date of the lease; and in aid of that contention he relied upon the general principle of law—that the grantor of a right cannot himself do anything in derogation of his own grant. The application of that principle must depend upon the extent of the right which the tenant got under his lease, whether by demise or by contract. I see no reason to doubt that such a contract right as the appellant alternatively claims, seeing it may be the subject of express stipulation, may also be derived by reasonable implication from the terms of the lease. But any such implication is attended with difficulty in cases like the present, where certain sources of supply are

specified and let. I am not prepared to affirm that a contract to the effect pleaded is implied in the stipulations of the lease of 1889; but I am willing, for the purposes of this appeal, to assume its existence. Upon that assumption, it is incumbent upon the appellant to establish that the result of the respondents' operations has been to diminish the supply of water now finding its way from the spring into the pond, as compared with the supply which came from the same source at and before the date of the lease.

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I think the necessary effect of Galbraith, the agricultural tenant's, operations, which were subsequent to the granting of the lease, was to convey the water of the spring more rapidly and more directly to the pond, and to prevent its dissipation in the soil or its evaporation. If so, their tendency would necessarily be to increase and not to lessen the quantity of water reaching the pond from the spring. The immediate effect of the respondents' operation which followed was to collect, as soon as they came to the surface, the whole waters issuing from the spring, including a proportion of them which had not previously gravitated towards the pond, and to make them available for transmission in undiminished volume. The water collected in the tank serves, in the first place, to supply a pipe which is not used for agricultural purposes, and the remainder is directly conveyed by another pipe to the tub sunk by Galbraith through which the water of the spring previously entered the pond. A comparison between the quantity of water which now runs over the tub and that which previously escaped from it must therefore afford the means of ascertaining whether there has been a diminution of the supply since the arrangement made by Galbraith was superseded.

The whole evidence which bears on the alleged diminution in the amount of the spring water which now enters the pond, as well as on the amount which entered it before the lease was granted, is,—it may be necessarily,—somewhat vague. In considering that evidence, it is, in my opinion, not immaterial to keep in view the fact that, in the time of his predecessors, the weekly output of the distillery never exceeded 1300 gallons of whisky, whereas during the tenancy of the appellant it was increased to about 1700 gallons, which represents an addition of about 30 per cent to the quantity of water used for distillery purposes at the date of the lease. I have also to observe that the scarcity of water in such an exceptional season as that of the year 1894 cannot throw much, if any, light upon the average quantity derived from the spring at and before the date of the lease—a question which in the absence of more reliable data can, in my opinion, best be solved by ascertaining whether or not the overflow from the tub has been sensibly diminished since, and by reason of the respondents' operations. Upon that point there is conflicting evidence; but, on the whole, I prefer the testimony which is favourable to the respondents; and, in any view, I have no difficulty in holding that the appellant has failed to prove diminution.

For these reasons I am of opinion that the interlocutor appealed from ought to be affirmed and the appeal dismissed, with costs, and I move your Lordships accordingly.

LORD SHAND.—My Lords, I am also of opinion that this appeal fails and

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towards the pond, and that a considerable proportion of it must ultimately have found its way into the pond.

Galbraith, the agricultural tenant, describes the land between the spring and the pond, before he commenced his operations, as a marsh which did not come quite close up to the side of the pond. He, in order to dry the soil, put a drain into the marshy part, which he continued by means of an iron pipe three feet long to a tub sunk on the edge of the pond, from which he drew water for domestic use, and the overflow from which went into the pond. Lawson, who was assistant factor for the estate of Garscube, at the date of the lease, describes the intervening land as "soft spongy ground"; and there are other witnesses who describe the water as "seeping" from the adjacent land into the pond—a Scottish expression equivalent to "oozing"—which is an accurate description if applied to the escape of percolating water from the strata through which it has passed, and is to my mind altogether inconsistent with its running in a stream. Boyne, one of the appellant's witnesses, no doubt says that there was a sort of channel formed by the water from the spring; but he is the only person who appears to have detected it, and the bulk of the evidence upon the point, as well as the natural inference to be derived from facts established *aliunde*, alike lead me to the conclusion that, until the time of Galbraith's operation, the water of the spring reached the pond by the natural process of percolation, and that no part of the supply derived from the spring flowed in a body which could with any degree of accuracy be described as a stream.

I therefore differ in opinion from the Lord Ordinary, who came to the conclusion that the water of the spring in question was one of the streams specifically let to the appellant. Had I been able to arrive at that result, I should not have thought it necessary to consider whether, by interfering with the spring, the respondents had injured the appellant's water supply. In that case, every drop of water which they took from the spring, otherwise than in the due exercise of their reserved right in connection with farm purposes, would have been an illegal diminution of the supply secured to the appellant by the terms of his lease.

The result of my opinion, so far as hitherto expressed, is that the waters of the spring in question were not demised to the appellant, subject to a reservation permitting a certain user of them to agricultural tenants, but remained with the respondents under their title as proprietors. The appellant, upon that view of the case, maintained alternatively that the respondents are under a contractual obligation to allow as much of the water of the unlet sources from which the pond is fed to continue to enter it as may be equivalent to the average of the water supply derived from these sources at the date of the lease; and in aid of that contention he relied upon the general principle of law—that the grantor of a right cannot himself do anything in derogation of his own grant. The application of that principle must depend upon the extent of the right which the tenant got under his lease, whether by demise or by contract. I see no reason to doubt that such a contract right as the appellant alternatively claims, seeing it may be the subject of express stipulation, may also be derived by reasonable implication from the terms of the lease. But any such implication is attended with difficulty in cases like the present, where certain sources of supply are

specified and let. I am not prepared to affirm that a contract to the effect pleaded is implied in the stipulations of the lease of 1889; but I am willing, for the purposes of this appeal, to assume its existence. Upon that assumption, it is incumbent upon the appellant to establish that the result of the respondents' operations has been to diminish the supply of water now finding its way from the spring into the pond, as compared with the supply which came from the same source at and before the date of the lease.

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I think the necessary effect of Galbraith, the agricultural tenant's, operations, which were subsequent to the granting of the lease, was to convey the water of the spring more rapidly and more directly to the pond, and to prevent its dissipation in the soil or its evaporation. If so, their tendency would necessarily be to increase and not to lessen the quantity of water reaching the pond from the spring. The immediate effect of the respondents' operation which followed was to collect, as soon as they came to the surface, the whole waters issuing from the spring, including a proportion of them which had not previously gravitated towards the pond, and to make them available for transmission in undiminished volume. The water collected in the tank serves, in the first place, to supply a pipe which is not used for agricultural purposes, and the remainder is directly conveyed by another pipe to the tub sunk by Galbraith through which the water of the spring previously entered the pond. A comparison between the quantity of water which now runs over the tub and that which previously escaped from it must therefore afford the means of ascertaining whether there has been a diminution of the supply since the arrangement made by Galbraith was superseded.

The whole evidence which bears on the alleged diminution in the amount of the spring water which now enters the pond, as well as on the amount which entered it before the lease was granted, is,—it may be necessarily,—somewhat vague. In considering that evidence, it is, in my opinion, not immaterial to keep in view the fact that, in the time of his predecessors, the weekly output of the distillery never exceeded 1300 gallons of whisky, whereas during the tenancy of the appellant it was increased to about 1700 gallons, which represents an addition of about 30 per cent to the quantity of water used for distillery purposes at the date of the lease. I have also to observe that the scarcity of water in such an exceptional season as that of the year 1894 cannot throw much, if any, light upon the average quantity derived from the spring at and before the date of the lease—a question which in the absence of more reliable data can, in my opinion, best be solved by ascertaining whether or not the overflow from the tub has been sensibly diminished since, and by reason of the respondents' operations. Upon that point there is conflicting evidence; but, on the whole, I prefer the testimony which is favourable to the respondents; and, in any view, I have no difficulty in holding that the appellant has failed to prove diminution.

For these reasons I am of opinion that the interlocutor appealed from ought to be affirmed and the appeal dismissed, with costs, and I move your Lordships accordingly.

LORD SHAND.—My Lords, I am also of opinion that this appeal fails and

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should be disallowed; and I agree with my noble and learned friend who has just spoken in thinking that the water of the spring in question which rises at a comparatively short distance from the pond to which the tenant has a right was not within the subjects which were let or demised by the lease. At the date of the lease, and before the operations either of the tenant, in making a short drain through the ground, or of the landlord at a later period, that water oozed or trickled from the spring into the ground between it and the pond, and lay in that marshy and spongy ground which was afterwards by drainage made of some use for agricultural purposes. It did not, I think, flow, in any proper sense of the term, towards the pond. The witnesses, speaking in Scottish terms, talk of it as water which "siped" or "seeped" down towards the pond; and in Jameson's Dictionary these words are thus described: "Siping or seeping means to ooze or distil very gently as liquids do through a cask which is not quite tight." It being the fact that the water merely oozed or percolated towards the pond through ground of that character, I turn to the lease to see whether such water was demised or let. What is there demised is the distillery as described, and the two ponds specially mentioned, together with "right to the water in the said ponds and in the streams leading thereto." The subjects of the lease appear to me, therefore, to be distinctly defined as being the water in the ponds and the water in the streams leading thereto. I am of opinion that water of the character which has been thus described cannot be regarded as water in any stream leading to the pond; I think that the term "streams" necessarily means flowing water, and not water which oozes from a piece of marshy ground, and that unless water flows more or less in a channel, and continuously, it cannot be described as water that flows in "streams" leading to the ponds.

There remains, however, the question whether, although the water is not included in the grant, there is not from the whole terms of the lease an implied obligation on the landlords that they shall not withdraw water which would naturally find its way into the ponds or streams to an extent which would diminish the supply as it was at the time when the lease was granted, and I am disposed to hold that there is such an obligation implied. The purpose of the lease is the working of a distillery, which, of course, without a proper supply of water could not be carried on. The ponds and streams are themselves directly leased; and, in addition, we find that there is an obligation on the landlord to "maintain the subjects hereby let, with the sluices, water supply, roads, and fences." It appears to me that although the water in question is not directly conveyed, there is an obligation here on the part of the landlords that they will not in any way diminish the water supply.

But, my Lords, assuming such an obligation to exist, this differs very materially in its legal effect from a lease in which the water itself is let. I agree in thinking, as the Lord Ordinary says, that "if the water of the spring was part of the subjects let to the complainer, *prima facie* the respondents were not entitled to interfere with it in spite of the complainer's remonstrances, and the *onus* lies with them to shew that the complainer has not been prejudiced by their operations." But if the water is not so let the position of the parties is different. It then follows that the tenant

is only entitled to complain, and to have a remedy if he is able to prove, that the landlords have diminished the water supply. This raises a question of fact for the consideration of the House; and in that question it appears to me that the *onus* is on the tenant, who founds on an obligation not to diminish the water supply. It lies on the tenant to prove that the water supply has been diminished. On that question I agree with my noble and learned friend that the tenant has failed to establish this averment.

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The Lord Ordinary, in the elaborate judgment which he has delivered, has examined with great care and minuteness the evidence upon this subject. His Lordship, after going in detail over the statements made by the different witnesses, and expressing his views as to the weight to be attached to them, concludes in these terms,—“The question upon the evidence is very narrow, but I have come to the conclusion that the respondents have failed to prove that by interfering with the spring they have not injured the complainer's water supply.” He was then looking at the question with the *onus* lying upon the landlord according to his view, and all that he is able to say in the result is not that there has been any diminution of the water, but that the landlords have failed to prove that by interfering with the spring they had not injured the water supply.

There are several considerations which are material upon the question of fact. It is to be kept in view that by the recent operations of the landlord which formed the occasion for interdict being applied for, there was a material addition made to the water that was turned towards the pond. From one spring which was close to the pond, the water, in so far as it did not remain in the intervening marshy ground, found its way to the pond; but there were smaller springs surrounding it, the water from which did not find its way to the pond, but in a totally different direction—in the direction of the blacksmith's house which is referred to in the proceedings. I am satisfied upon the evidence that there was a material addition made to the water sent towards the pond by the landlord's operations, for he included the springs to which I now refer. These were caught and enclosed with puddle so as to send the water to the pond.

There is no doubt a conflict of evidence as to the effect which the tank or cistern and pipe put in by the landlord had; but it appears to me that the weight of the evidence is with the landlords rather than with the tenant; at all events, I am satisfied that there is not proof on the part of the tenant sufficient to shew that there was a diminution of the water supply as the effect of the tank and pipe.

My Lords, I agree with my noble and learned friend in thinking that it is also not unimportant to observe that the operations of the distillery have been largely growing in recent years, requiring therefore a greater supply of water than was previously necessary. That circumstance may have induced some of those who were connected with the distillery to think that the water supply was somewhat diminished, when the truth was that it was rather the distillery's demands which were increased. I also agree in thinking that one cannot judge with any safety of the result of these operations from taking a very dry season, such as that of 1894, as a test for examination, and on the whole I agree that the appellant has failed to prove that

No. 4. this water supply, as it was at the date of the lease, has been diminished by the landlords' operations.

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LORD DAVEY.—My Lords, I am also of opinion that the interlocutor of the Inner-House should be affirmed.

The subjects demised are the distillery of Tambowie, with certain cottages and lands, and with the two ponds numbered 140 and 134 on the Ordnance Map, "together with right to the water in the said ponds and in the streams leading thereto." The first question is the construction of the lease. It appears that the land between the spring in question in this appeal and the lower pond was not included in the land demised to the distillery, and at the date of the lease it was just a marsh through which the water from the spring soaked and percolated, and some of it no doubt ultimately found its way into the pond. But the water did not flow from the spring in any defined or visible channel. The appellant contended that all the sources of supply to the pond, and, if I understood his counsel rightly, all the water which, if left to itself, would by gravitation find its way into the pond, were within the subjects demised. And the Lord Ordinary by his interlocutor found that the water of the spring was a stream leading into the pond within the meaning of the lease, although the said water did not flow into the pond by any definite or visible channel, but by percolation through marshy ground. I find myself unable to agree with the construction put upon the words of the lease by the Lord Ordinary. I think that the word "streams" in the lease is used in its ordinary dictionary sense, and means a rivulet or course of running water, and that neither the spring nor the water soaking or percolating through the marshy ground can with propriety be termed a "stream." I find no context in this instrument to induce me to put what I consider an unusual and inaccurate meaning upon that word. I agree with the opinion of Lord Trayner on this point.

But the lease contains a clause of warrandice against the facts and deeds of the lessors, and the appellant also relies on the well-known maxim—that a grantor may not derogate from his own grant. Like my noble and learned friend opposite I have a difficulty in holding that, when certain feeders or sources of supply are expressly granted, the operation of the lease can be extended by implication so as to impose an additional burden or servitude on the grantor. But I will assume, without deciding, that there is in the present case an implied covenant that the lessors will not by their facts and deeds diminish the quantity of water in the streams or ponds, which, I think, is the most favourable way of stating the case for the appellant. Of course, if the spring and the water from it is in the demise, it is no defence to say, "We give you other water in compensation, and have not on the whole diminished your supply." The lessors on that hypothesis have no right to touch the spring at all. But if the rights of the appellant are in contract, or in implied covenant, the situation is entirely different. The burden is in that case upon him to prove breach of the covenant, or (in other words) to prove that he has suffered a material loss of water by the operations of the respondents. If the Lord Ordinary had thought that the burden of proof was on the appellant, I am not sure that he would have found in his favour on this point. But however that may be, I agree with

Lord Young in the Court below, and with your Lordships who have already addressed the House, that on the evidence it is not proved that the respondents by their operations have diminished the water in the streams or ponds, and I agree with the interlocutor pronounced in the Inner-House, and think the appeal should be dismissed, with costs.

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LORD CHANCELLOR.—My Lords, I regret to say I am unable to concur in the opinion which the majority of your Lordships entertain. I agree with the Lord Ordinary that “by the lease two ponds are let to the tenant, ‘together with right to the water in the said ponds and in the streams leading thereto.’” That the learned Judge says in his opinion “includes as between lessor and lessee all the sources of supply of the ponds,” and I am of that opinion. I think that the demise of the pond and all streams leading thereto was intended to convey, and did convey, all sources of supply. Though it be true that the word “stream,” in its more usual application, does point to a definite stream within defined banks, I do not think it is confined to that meaning. We speak of a stream of tears flowing from the eyes, and we speak of blood streaming from a vein—I think we may well speak of “streams” in the plural as meaning water passing over the superficies of a plane—we may call such a flow of water a stream. I think that the root idea is water in motion from one place to another as distinguished from stagnant water. Each gush of water from this small spring formed a stream whether big or little, and whether under ground or over ground. I cannot think that any sound distinction can be made between the smallest rill which passes over ground or under ground, in its being a stream or a streamlet, and a rill or other little supply of water coming down, as these sources of supply are alleged to have come down into the pond. But in this case, in order to get rid of the plural “streams,” one has to make two heads of the same stream mean two streams—it is necessary to read the word “streams” in an unnatural sense. There is but one stream in the ordinary sense, and you must read that stream as being two streams, or at least more than one, by taking different parts of the same stream. So far as one can get any light from the nature of the thing, the subject-matter with which the parties were dealing, it appears to me that what the grantor intended to convey to the grantee, and what the grantee, who was a distiller, was getting, was every source of supply which it was possible to get by general words—it was intended that he should get all the water that could be conveyed to him by any general words.

I confess I think that the pollution by the grantee of the other sources of supply is irrelevant. I think the greater flow of water procured by the grantor at other times is irrelevant; and I regret to some extent the decision at which your Lordships have arrived, because I think it will tend to multiply words in every conveyance by the parties in future. If, however, the true construction of the grant be what your Lordships have considered it to be, I should not differ or disagree from what in that case would be the rights of the parties.

APPEAL dismissed, with costs.

FLUX, THOMPSON, & FLUX—GILL & PRINGLE, W.S.—NICHOLSON & PATTERSON—
TAIT & CRIGHTON, W.S.

No. 5.

Feb. 18, 1897.
Lord Advocate
v. Robertson.

THE LORD ADVOCATE (Pursuer), Appellant.—*Lord-Adv. Murray—Sol.-Gen. Sir R. B. Finlay—E. Charteris.*
MRS ELIZABETH FLEMING OR ROBERTSON (Defender), Respondent.—*Shaw, Q.C.—A. M. Anderson.*

Revenue—Insurance Policy—Succession-Duty Act, 1853 (16 and 17 Vict. c. 51), secs. 2 and 17.—The Succession-Duty Act, 1853, sec. 2, enacted that,—“Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently . . . shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition . . . a ‘succession.’”

A father who had for many years paid the premiums upon policies of insurance on his own life, assigned the policies, seven years before his death, gratuitously, but absolutely, to his daughter, who, from the date of the assignation, kept up the policies by herself paying the premiums. Upon the father's death the Crown maintained that the assignation of the policies disposed of the moneys payable under them, so as to create a “succession” in the sense of section 2 of the Succession-Duty, 1853, and to make the daughter liable for succession-duty.

Held (aff. judgment of First Division) that the daughter did not become entitled to the sum in the policy by the disposition of her father, but partly by her own payment of premiums, and that the section did not apply.

Revenue—Account-duty—Succession-duty—Policy of insurance—Premiums—Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), sec. 11.—The Customs and Inland Revenue Act, 1889, section 11, enacted that account-duty should be chargeable upon money received “under a policy of assurance effected by any person dying on or after 1st June 1889 on his life where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money, in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.”

A person who had for many years paid the premiums on an insurance policy on his own life for his own behoof, assigned it to his daughter, who thereafter paid the premiums.

In a claim by the Crown against the daughter for account-duty, *held (aff. judgment of First Division)* that the section did not apply, as the payments made by the father were not made for the benefit of a donee.

Ld. Chancellor
(Halsbury).
Ld. Herschell.
Lord Mac-
naghten.
Lord Morris.
Lord Shand.]

(In the Court of Session, March 20, 1895, 22 R. 568.)

The Lord Advocate appealed.

LORD CHANCELLOR.—It appears to me that in this case there is a plain interpretation to be put upon plain words. I am only reiterating what has been said over and over again in dealing with taxing Acts, when I say that we have no governing principle of the Act to look at, we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature has enacted.

This claim has been put in two ways. It appears to me to be susceptible of a very simple answer in respect of either of them.

The first question is whether it comes under the 2d section of the Succession-Duty Act, 1853.

This policy of insurance has been in existence a considerable number of years. The person entitled ultimately to this money herself in one sense

created the property—that is, she continued the contract under which, if she continued to pay premiums, certain money would be payable upon the death. She continued that for a period of seven years, and therefore, reading simply the words as they stand, I do not think she has “become beneficially entitled” “upon the death of any person,” because she has become entitled by reason, among other things, of her own payments during the period of seven years; and it appears to me, under that section, in order to make this a “succession” we must introduce some words of this kind,—“disposition of property by reason whereof either partly or wholly a person has become entitled.” If those words were introduced, in a certain sense it is true she did partly become entitled by reason of premiums previously paid, the policy effected and the assignment then made, supposing she continued to pay the premiums. But I find no such words in the statute, and I decline to do anything else than construe the words which I find there. I therefore am of opinion that under that part of the statute it is impossible to maintain the claim of the Crown on this first ground.

I then turn to the alternative claim, which is for account-duty, and it appears to me that it is susceptible of an equally plain answer. I do not know that I can state it more plainly than Lord Adam has done. He says, —“I confess I have never been able to understand in this case how a policy of insurance could be kept up for the benefit of a donee when no donee was in existence.” Here again, in order to apply the tax to the particular case in dispute, one must introduce words into the statute such as, “for the benefit of any existing or future donee or person who may become a donee.” I find no such words. Unless you introduce by construction those words into the statute it is impossible, as Lord Adam says, to understand how it could be kept up for the benefit of a donee when no donee was in existence; I agree with him. The Lord Ordinary’s view seems to have been that the moment a policy of insurance is taken out, the person who takes out the policy keeps it up not only for his own benefit, but for the benefit of some possible donee at a future time. That really is an essential condition of the construction contended for by the Crown, and I am unable to agree with that construction.

Under these circumstances I think that this appeal should be dismissed, with costs, and the interlocutors affirmed, and I move your Lordships accordingly.

LORD HERSCHELL.—I am entirely of the same opinion.

The first question is whether the money payable under the policies was property to which the lady became entitled on the death of her father by reason of the disposition which he made when he assigned the policies to her. I do not intend to lay down any principle or to say anything applicable to any case but the one with which we are dealing. I shall solely consider whether that comes within the words of the enactment or not. In my opinion it does not. I do not think it is accurate to say that the sum payable by the insurance company became hers by reason of the disposition which her father made. It is admitted that the entire sum cannot be said to have become hers by reason of that disposition; she would never have got it but for the fact that the premiums continued to be paid upon the

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No. 5. policy. Therefore the suggestion is that it must be split up into two portions, the one to be attributed to the payment of premiums by her father before the donation, the other to be attributed to the payment of premiums by her afterwards; and that being so divided, upon the former of those sums the duty would be payable. I can find nothing in the words of the Act to warrant and give support to such a contention. For these reasons I think that the appeal entirely fails so far as the Succession-Duty Act is concerned.

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Then it is said that account-duty is payable by virtue of the Act of 1881 and the 11th section of the Act of 1889. In order to bring the case within those statutes it is necessary to shew that the policy, the duty on the proceeds of which is in question, has been either "wholly kept up" "for the benefit of the donee"—which of course is not the case here—or has been partially kept up for the benefit of the donee. In my opinion it would be really an abuse of words to say that the policy was "kept up for the benefit of the donee" at the time when payments were being made by the father of the lady, not for her benefit as far as appears, or for anybody's benefit but his own. The contention is that, because he afterwards creates a donee, the payment of premiums which he made, when for aught that appears he had no donee at all in his mind—I do not mean merely any individual donee, but no notion of creating a donee—must be regarded, if he creates a donee, as having been made for her benefit. I do not think it is reasonable to treat the language of the Act of Parliament in that way. I think that it would really be not using the words of the statute but abusing them if we put such a construction upon them.

LORD MACNAGHTEN.—I am of the same opinion.

LORD MORRIS.—I concur.

LORD SHAND.—I am of the same opinion, and while quite concurring in what has fallen from your Lordships, I think the grounds of judgment have been very clearly and accurately stated by the learned Lord President and Lord Adam in the Court of Session.

APPEAL dismissed, with costs.

FRANCIS F. GORE, Solicitor for England of the Board of Inland Revenue—P. J. H. GRIERSON, Solicitor for Scotland of the Board of Inland Revenue—KEEPING & GLOAG—WILLIAM GUNN, S.S.C.

No. 6.

PERTH GENERAL STATION COMMITTEE (Petitioners), Appellants.—
D.-F. Asher, Q.C.—Balfour, Q.C.

July 27, 1897.
Perth General
Station Com-
mittee v. Ross.

ALEXANDER ROSS (Defender), Respondent.—*Thesiger.*

Railway—Right of Railway Company to exclude from stations persons other than travellers.—Railway companies are entitled, as proprietors of their stations, to exclude from them all persons except passengers and persons entitled to enter them in virtue of any order or regulation of the Railway Commissioners.

Railway—Facilities—Jurisdiction—Railway Commissioners.—The Railway Commissioners have an exclusive jurisdiction to determine what rights of access members of the public who are not travellers may have to a railway station.

Process—Interdict—Competency of declarator in process of interdict— No. 6.

Railway.—In a petition by a railway company for interdict to prevent a hotelkeeper, by himself or his servants, entering the station to meet customers arriving by train, except as permitted by the company, *held (diss. Lord Morris)* that the pursuer was entitled to a declaration that, subject to any order or regulation which might thereafter be made by the Railway Commissioners, the defender, as tenant of his hotel, had no right to enter by himself or his servants, except with leave of the pursuers, and under such conditions as they might prescribe, and that in respect of the declaration it was unnecessary to dispose of the prayer for interdict.

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(In the Court of Session, June 26, 1896, 23 R. 885.)

The pursuers appealed.¹

The proceedings in the action are fully narrated in the opinion of Lord Watson.

Id. Chancellor
(Halsbury).
Lord Watson.
Lord Davey.
Lord Mac-
naghten.
Lord Morris.

LORD CHANCELLOR.—In this case I have no doubt whatever of the power of the station committee to regulate the use of the station—"to regulate it even in the case of passengers actually going and arriving"; and these words I have quoted from the judgment of the Lord Justice-Clerk. His Lordship adds that they must be subject nevertheless to being put right if they take any steps in the "regulation of the station which are not truly steps of reasonable regulation, but steps which they have no right to take." And so far I do not differ, if those words point to the station committee of the railway company itself being set right by the appropriate tribunal. But I am of opinion that the station is absolutely the property of the railway company, and that the rights of the railway company are just as absolute in the first instance as those of any other proprietor. That by appeal to the appropriate tribunal they may be compelled to permit passengers and traffic under a variety of conditions under proper orders of Court is true; but that against their will any member of the public has a right to force himself upon the platform or into the booking-office I cannot agree.

The public has a right to go, and has a right to enter into a contract with them; and the railway company may be compelled if they refuse, either by action at the suit of the complaining party or by an application to the Railway Commissioners. But I should be sorry to throw any doubt on the absolute right of the railway company in the first instance to regulate their own traffic in their own way, and to refuse access to their station under the circumstances stated in this case. Of course it would be represented as a ludicrous exercise of authority to prescribe the dress in which persons may approach their station; but I can quite understand the inconvenience which might result to the passengers,—that is to say, to the public, if apart

¹ *Appellants' Authorities.*—Case v. Storey, 1869, L. R., 4 Ex. 319, 326; Barker v. Midland Railway Co., 1856, L. R., 18 C. B. 46; Beadell v. Eastern Counties Railway Co., 1857, 2 C. B. (N. S.) 509; Ilfracombe Public Conveyance Co. v. London and South-Western Railway Co., 1868, 1 Nev. and Mac. 61; Painter v. Brighton Railway Co., 1857, 1 Nev. and Mac. 58; Johnson v. Midland Railway Co., 1849, 4 Ex. 367, 372.

Respondents' Authorities.—Mulliner v. Midland Railway Co., 1879, L. R., 11 Ch. Div. 611, 619; Marriott v. London and South-Western Railway Co., 1857, 1 C. B. (N. S.) 499, 1 Nev. and Mac. 47.

No. 6. from the annoyance of actual solicitation of custom for various hotels outside, the persons who rush in to solicit custom should do it by conspicuous badges describing the hotel to which they belong.

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I do not believe that any actual inconvenience to the public can result from the recognition of the right of the railway company to carry on their business in their own way. Their own interest is the best security that their strict legal right will not be abused.

I think there would be some difficulty in framing an interdict in the language originally asked, but the order which your Lordships have agreed to is such that I think no inconvenience will arise; and I am of opinion that the interlocutor appealed from ought to be reversed, and the order which your Lordships have agreed upon, which is as follows, substituted. [His Lordship then read the order.]

LORD WATSON.—This appeal is from a judgment of the Second Division of the Court of Session, which recalls, and in substance reaffirms, two interlocutors pronounced in the Sheriff Court of Perthshire by the Sheriff-substitute and the Sheriff. Your Lordships are therefore bound to treat the findings of fact contained in the interlocutor appealed from as having the force and effect of the special verdict of a jury. The effect of these findings cannot, in the present case, be fully appreciated without referring to the circumstances which gave rise to the litigation, which appear on the face of the record, and are not in dispute.

The respondent, Alexander Ross, is a hotel-keeper, being tenant of the Royal British Hotel, Leonard Street, Perth, in the vicinity of the General Railway Station, the property and management of which are vested by statute in the appellants, for behoof of certain companies who use the station for the purposes of their traffic. Until the date of this action the appellants, who have a hotel of their own within the limits of the station, permitted all the hotel-keepers in Perth, including the respondent, to have free access to the platforms by themselves and their servants, for the purpose of accompanying their guests to the train by which they were departing, and of meeting them upon their arrival; but that privilege was qualified by the condition that no servant should, on these occasions, wear a distinctive badge or livery.

The respondent was dissatisfied with the condition, of which he admittedly had notice, and on July 1, 1895, he intimated by letter to the appellants' station-master, "I am resolved to send my 'boots' to Perth General Station wearing the badge and uniform of my hotel, whereby my customers may be attended to on arrival here, as they are at other railway and steamboat stations over the country." That intimation was followed up by the respondent sending his "boots," with badge and uniform, to the passenger platforms on numerous occasions during the month of July 1895, who on all these occasions refused to leave the station when requested to do so by the officials of the appellants.

On July 26, 1895, the appellants presented a petition to the Sheriff Court of Perthshire at Perth, craving to have the respondent, by himself or by his servants, interdicted (1) from unlawfully entering or trespassing upon any of the railways, stations, or other works or premises of the appellants;

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(2) in particular from so entering or trespassing in or upon the Perth General Railway Station, or other works or premises therewith connected, while wearing the uniform or badge of the Royal British Hotel; and (3) from waiting the arrival of passenger trains therein for the purpose of obtaining customers for said hotel. The respondent by his defence denied that he or his servants had committed any trespass, and alleged that the object of the appellants in preventing hotel servants from coming to their platforms with badges, or in uniform, was to give a preference to their own Station Hotel, to his prejudice. His fifth plea in law is to the effect that "the object of the petition being an attempt to restrict the liberty of the defender Ross, or his servants, in the matter of wearing a uniform or badge, is illegal, and the pursuers are not entitled to interdict."

A proof was led before the Sheriff-substitute, who, on 13th February 1896, issued an interlocutor containing various findings of fact and law, by which he refused the prayer of the petition. The basis of the decision is indicated in one of the learned Judge's findings, which is to the effect that the appellants, "as proprietors of said station, hold their said property under the condition of their not preventing its convenient use by any member of the railway travelling public, or with the presence therein of the keeper or servants of the hotel where such traveller has been staying, or which he may propose to go to, except in so far as is necessary for the proper management and control of the station, and for the securing of which the pursuers have power to make such regulations or bye-laws as they may think necessary." The learned Judge appears to have been of opinion that, it not having been proved to his satisfaction that the presence of the respondent in the station by himself or his servants, interfered with the proper control and management thereof, their exclusion would, in point of law, constitute an illegal interference with the convenience of the members of the railway travelling public. The Sheriff, on 17th April 1896, affirmed the judgment of his Substitute, apparently in deference to these or similar considerations.

On appeal to the Court of Session, the Second Division of the Court, on 26th June 1896, by the judgment submitted to review, recalled the interlocutors of the Sheriff and his substitute, and found in fact,—“(1) That the defender did not, by himself or his servants, enter the pursuers' station except for the purpose of accompanying passengers who were leaving his hotel, or of meeting passengers who had intimated that they were to arrive at the defender's hotel; and (2) that neither the defender nor his servants ever caused any obstruction to or inconvenience at the pursuers' station.” Their Lordships found in law, upon these findings in fact, that the appellants were not entitled to interdict, and they therefore refused the petition, with expenses in the Court of Session and in the inferior Court.

The logical connection between these two findings of fact, and between them and the conclusion of law which is deduced from them, is not supplied by any finding, and is not very apparent. The first would be a pertinent finding if it could be affirmed that every hotel-keeper and his servants have, at common law or by statute, an absolute right to enter any railway station and use its platform if they go there for the purpose of

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accompanying or meeting passengers who are either leaving or have intimated an intention of coming to their hotel, so long as their presence does not cause obstruction or inconvenience. In that case it would be within the competency of an ordinary Court of law to enforce such legal right. It is obvious that the second finding might apply, with equal truth, to many persons who enter a station without having any legal right to do so. The judgment, as framed, does not deal directly with that which is the real and only question in the case, namely, what legal right has the respondent to use the General Station at Perth without the leave and against the will of its proprietors? As to the views entertained by the learned Judges of the Court of Session upon that point, very little information can be gleaned from the opinions which they delivered at the advising of the case. I find in all of them great stress is laid upon the circumstance that it is within the power of the appellants, if they think fit, to frame regulations for the use of their station, and to submit them for the sanction of the Board of Trade; and that these regulations, if approved of by the Board, will be enforceable under penalties. Some of the learned Judges have expressly said, whilst others have plainly suggested, that the proper course for the appellants, in dealing with such claims as are advanced by the respondent, is to proceed by way of regulation, subject to the sanction of the Board of Trade, and not by interdict in a Court of law. I cannot concur in that opinion. It appears to me that such regulations are only intended to govern the conduct of those persons whom the owner of the station cannot exclude, or whom he may choose to admit. When their right is permissive merely, and the permission is conditional, I can see no reason why, in order to enforce the condition, a regulation sanctioned by the Board of Trade should be required. I do not think it was intended by the Legislature that the Board of Trade, in sanctioning regulations of that kind, should have jurisdiction to determine what members of the public, if any, being neither travellers nor interested in goods traffic, shall have the right to use a station, or what facilities are to be allowed to those who are entitled to use it.

The claim which the respondent sets up is, in substance, that he and his hotel servants have an absolute legal right to enter upon and use the passenger platforms of Perth General Station without observing the conditions which the appellants have attached to their admission. In my opinion that is a claim beyond the cognisance of a Court of law, which can only deal with legal rights as they exist, and not with rights as they might possibly have existed if the Railway Commissioners had been applied to and had affirmed their existence. The learned Sheriff-substitute, in affirming by his interlocutor as one of the grounds of his decision that the recognition of the respondent's claims to their full extent would be of convenience to members of what he terms the railway travelling public, does not seem to have thought that he was invading the province of the Railway Commission. Yet it hardly admits of doubt that jurisdiction to determine, in the first instance, whether the respondent has a statutory title to demand the privilege which he claims, and, in the event of his having a title, to determine whether and how far his claim ought to be allowed, belongs exclusively to the Commissioners. Accordingly, these

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are questions with which I conceive that I have nothing to do in the present case, and upon the merits of which I desire to express no opinion.

Apart from any facilities which might by possibility be given him by the Railway Commissioners, whose intervention has never been invoked either by the respondent or by anyone in his behalf, has the respondent any right, capable of being legally enforced, to use the appellants' station at all or upon any other conditions than the appellants choose to prescribe? That is the cardinal question in this case, and one to which I cannot find that any attempt has been made to give a satisfactory reply in the Courts below. The respondent makes no claim as one of the members of the travelling public, or as a person interested in goods conveyed by rail to or from the appellants' station. His counsel, in the absence of any materials for a stronger argument, very fairly and plausibly maintained that the respondent was invited to use the station, and that, when using it in response to such invitation, he could not be deprived of his natural liberty to clothe his servant with any badge or garment which he chose; and also that the adoption of an hotel badge or uniform was required in the interest and for the convenience of railway travellers who were to arrive at the station on their way to his hotel. The first of these arguments fails, because it is not shewn that any invitation was held out to the respondent which was not coupled with the intimation that he was not to send any servant to the station with a badge or uniform. As regards the second, it is sufficient for the purposes of this case to say that the respondent is not one of the railway travelling public who frequent his hotel. So far as appears, none of them have complained that facilities to which they were entitled have been withheld from them by the appellants; and, even if they had just cause of complaint, they could have no redress except by an application to the Railway Commissioners.

It is no doubt true that whilst the appellants are vested with the ownership and administration of the station, their statutory powers were conferred upon them by the Legislature, as in the case of railway companies, with a view to the accommodation of the public. But the Legislature has not committed to the ordinary tribunals of the country the duty of determining whether the implied obligation of giving accommodation to the public has been duly fulfilled. When a member of the public having the right to use a railway or a station has reason, or without reason thinks fit, to complain that some facility which he ought to have has been withheld from him, and that an undue preference had been shewn to others in the same position, a Court of law can give him no remedy. He must resort to the tribunal which the Legislature has constituted for that purpose, the Railway Commissioners; and, until they have decided in his favour, he is not in a position to say, and no Court would be justified in holding, that he stands possessed of the right which he asserts.

His claims to use the appellants' station, which have been maintained in defence by the respondent, appear to me to be in excess of any legal right which he possesses. In my opinion, so long as there is no decision to the contrary by the Railway Commissioners in an application to them by some person having a proper title, it is within the discretion of the appellants either to exclude him and his servants from the station, or to admit them

No. 6. upon such conditions as may be thought fit. The right of the respondent, if he can be said to have any right, must depend upon the extent of the licence accorded to him by the appellants. It might have been a reasonable course, had it been adopted at an earlier stage of these proceedings, to stay the present suit until the respondent had an opportunity, either by himself or through some other person having a more direct interest, of endeavouring to bring his claims, such as they are, under the consideration of the Railway Commissioners. But, seeing that the respondent has persisted in relying upon his supposed legal rights, with the barren result of three years' unprofitable litigation, I think your Lordships ought now to dispose of the case as it stands.

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This action, although in the form of a petition for interdict, was obviously brought for the purpose of obtaining the judgment of a Court of law upon the relative rights of the parties as they existed at the date of the petition, and still exist. And, although the conclusions for interdict are so framed that they might be made to square with that view of their relative rights which I have ventured to suggest, I have come to the conclusion that the more expedient course for your Lordships to follow is to make a declaration in regard to the right, or want of right, of the respondent in such terms as will not exclude him from the benefit of any order or regulation which may hereafter be made by the Railway Commissioners. I am satisfied of the competency of taking that course; and I see no reason to apprehend that the respondent will proceed to act in excess of his rights as defined by the House.

LORD DAVEY.—The judgment I am about to read is that of my noble and learned friend Lord Macnaghten, who is engaged at the present time at the Judicial Committee of the Privy Council, and has requested me to read his opinion.

LORD MACNAGHTEN.—The real question at issue upon this appeal is a very simple one, though it has been complicated to some extent by the terms in which the pursuers have framed their prayer for relief, and by the mass of irrelevant matter with which both parties have encumbered the case.

The appellants are a committee nominated by three railway companies, whose lines meet at the General Station in Perth. They are incorporated by the Perth General Station Act, 1865. The Act vests the station in them for the benefit of their constituents. The respondent is the lessee and manager of an hotel in Perth known as the Royal British Hotel. On behalf of himself and his servants he claims to be entitled, as of right, to enter the station for the purpose of accompanying hotel visitors to the railway, and also for the purpose of meeting railway passengers who propose to stop at his hotel.

The appellants apparently do not object to the respondent and his servants escorting hotel visitors to the train, nor do they object to the respondent and his servants meeting railway passengers on their arrival, provided the uniform of the hotel is not worn. Reasonably or unreasonably they object to that, and particularly to a cap which is said to display the name and badge of the hotel in a very conspicuous manner.

It is obvious that, if the appellants have the right of excluding from

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their station all persons except those who use or are desirous of using the railway, they may impose on the rest of the public any terms they think proper as the condition of admittance. On the other hand, they can have no power to regulate the dress of persons whom they cannot exclude.

The question, therefore, seems to be this: Is the respondent, when not using or desirous of using the railway, entitled as of right, by himself or his servants, to enter the station? Or, to put the question in simpler form, Are the appellants entitled to exclude all persons other than those who use or are desirous of using the railway?

The learned Judges of the Second Division of the Court of Session have held that the appellants are not entitled to an interdict against the respondent.

Their Lordships find in fact (1) that the defender did not enter the station except for the purpose of accompanying passengers who were leaving his hotel or of meeting passengers who had intimated that they were to arrive at his hotel; and (2) that neither the defender nor his servants ever caused any obstruction or inconvenience at the station. Their Lordships all agree in thinking that the broad question, which seems to me to be the only possible question in the case, was not properly raised; but, with the exception of Lord Trayner, they all express an opinion adverse to the right claimed by the appellants. The Lord Justice-Clerk says,—“This is a somewhat novel case. Indeed,” he adds, “none of the cases which were referred to in the course of the argument come near to it at all.” He holds that a servant of an hotel going with passengers or going to meet passengers is “going on what is plainly, in itself, perfectly lawful business.” So he is, I should say; but it may be that he is going too far when he forces his way into a place which he is forbidden by a competent authority to enter. He says it would be “a very extraordinary thing” if an interdict should be granted against the respondent “from unlawfully entering or trespassing upon any of the railways, stations, and other works or premises of the pursuers.” Why so, I would ask, if the respondent insists on making an entry which is unlawful? “The station,” adds his Lordship, “is a place which he has a right to enter into, and in the course of business may require to enter.” Well, that is just the question. If the station is open, can he enter it at all times and under all circumstances, or only when he is travelling or about to travel by the railway, or can he, as the Court seems to think, give himself the right to enter by attaching himself with or without a special invitation to persons who have the right of entry? It can hardly be enough that in the course of business—that is, for his own profit—he may require to enter. Lord Young says that the general proposition advanced on behalf of the appellants is “not maintainable.” Lord Moncreiff calls it a startling “proposition,” which, as at present advised, he is, he says, not prepared to affirm.

My Lords, I have the misfortune to differ from the learned Judges of the Second Division on almost every point. I venture to think, with deference, that their findings in fact are not relevant. On the other hand, it seems to me that the general proposition which was advanced on behalf of the appellants, and which was put forward plainly enough in argument, whatever may be said about the pleadings, is well founded in law. I think, too, that

No. 6. that general proposition is sufficiently raised by the claim to interdict the defender from unlawfully entering or trespassing on the station, because I agree with the Court of Queen's Bench (*Foulger v. Steadman*¹) in their view that if a man not using or being desirous of using the railway enters upon the railway premises after being forbidden to do so, or stays on the railway premises after being requested to leave, he commits a wilful trespass within the Railway Regulation Act, 1840, and not the less so because he claims some right which cannot exist at law.

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Nor can I agree with the Lord Justice-Clerk that the case is a novel one. It seems to me that the question of law was decided, and decided rightly, forty years ago by the Court of Common Pleas in the case of *Barker v. Midland Railway Co.*,² to which, unfortunately, the attention of the learned Judges of the Second Division was not directed. In that case an omnibus proprietor claimed the right to enter a railway station with his omnibus bringing passengers and goods for conveyance by the railway or going to fetch railway passengers. The first count related to passengers; the second to goods. The third count stated that "on divers occasions the plaintiff was desirous of bringing his omnibus into the station for the purpose of taking away on each of such occasions a person who, expecting to be carried and deposited as a passenger by the defendants to and at the said station, had directed the plaintiff to meet such expected passenger with the said omnibus at the said station for the purpose of taking such passenger from the said station." Each of the first three counts alleged a malicious refusal on the part of the railway company to allow the plaintiff to enter. The fourth count alleged that the refusal of the railway company to allow the plaintiff to enter their station was a breach of their obligation under the Act 17 and 18 Vict. c. 31, to afford all reasonable facilities for receiving and delivering traffic. The defendants pleaded that the station was their private property, and demurred to the first three counts on the ground that they did not shew any right on the part of the plaintiff to enter the station, nor, consequently, any wrong by them in preventing him from entering. They demurred to the fourth count on the ground that it did not disclose any cause of action, and was founded on a misapprehension of the statute for facilitating traffic arrangements.

The Court gave judgment unanimously against the plaintiff. "The declaration," said Jervis, C. J., "proceeds upon the assumption that the station is the private property of the railway company, subject to the rights of the public using the railway. It is not contended that the plaintiff was using or seeking to use the railway. What right, then, can he have to say to the company, 'I will use your private property for my profit'? There is no pretence for the action. It has neither principle nor any colour of authority to sustain it. Nor does the 17 and 18 Vict. c. 31, give any such remedy as will support the fourth count." Cresswell, J., observed,—“The plaintiff had no intention to use the railway, and therefore he has experienced no obstruction which gives him any right of action. He merely desired that other persons should use the railway.” “It is said,” added Willes, J., “that it is the duty of a carrier to allow persons who bring pas-

¹ (1872) L. R. 8 Q. B. 65.

² 18 C. B. 46.

sengers or goods to be carried, to enter his premises for the purpose of delivering there the passengers or the goods. It would certainly be somewhat extraordinary if any such right could exist in one to whom the company owes no direct duty, but who merely brings to the station the individual with whom the company contracts."

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My Lords, I think the reasoning of the Court of Common Pleas is unanswerable, and I cannot think the learned Judges of the Second Division would have dissented from it if it had been brought to their notice.

It was made a matter of complaint that the appellants did not avail themselves of the summary mode of proceeding given them by the Railway Regulation Act, 1840. But it must be remembered that the respondent had ample warning, and that he insisted on entering the appellants' station as a matter of right. Having regard to the view that has been taken of this case by the different Courts in Scotland before whom the matter has been brought, I think it by no means unlikely that the magistrates would have refused to convict the respondent of wilfully trespassing upon the railway; and I may observe that, although according to the decision of the Court of Queen's Bench in 1872, to which I have already referred, the respondent was a wilful trespasser within the meaning of the Railway Regulation Act, 1840, there is an earlier decision (*Jones v. Taylor*¹) of the same Court, when presided over by Lord Campbell, in which it was held that the Justices were not bound to find a person who came on the land of a railway company under the belief that he was entitled to do so a wilful trespasser.

If your Lordships maintain the rights asserted by the appellants, I do not think there is any reason to apprehend that the decision will be followed by any of those painful separations between members of the same family which Lord Young seems to contemplate as possible. Railway companies are not insensible to public opinion or indifferent to motives of self-interest. They are more likely, I think, to be too lax than too rigorous in the exclusion of the public from their stations. Everyone knows that there have been occasions when railway stations have been used for purposes somewhat foreign to the accommodation of travellers.

As the respondent does not claim any special or peculiar right to enter upon the appellants' property, but rests his case on the supposed rights of the public, I do not think it is necessary that he should be placed under an interdict. It will probably be sufficient that a declaration should be made in general terms. It seems to me that it would be enough to make a declaration as proposed, to the effect in substance that the appellants are entitled to exclude from their premises all persons other than those who use or are desirous of using one or other of the railways served by their station. I think the appeal should be allowed.

LORD DAVEY.—I will only add, on my own behalf, that I so entirely agree in the judgment of my noble and learned friend, Lord Macnaghten, which I have just read, that I have not thought it necessary to prepare a judgment of my own.

¹ (1858), 1 E. and E. 20.

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The action in this case is an action upon a petition for interdict. The subject-matter on which the interdict is sought appears in the prayer of that petition. It is that the defender, Alexander Ross, "himself or by his 'boots,'" should be restrained "from unlawfully entering or trespassing upon any of the railways, stations, or other works or premises of the pursuers." Stopping there, it appears to me that that is entirely too vague standing by itself. I apprehend it would be necessary in a petition for interdict to state the circumstances and the specific terms on which the person who is to be interdicted is to be prevented from doing that which he seeks. This is merely a general statement that the defender in the action should not unlawfully trespass upon the station and premises of the pursuers. The mere use of the word "unlawfully" cannot give to it any particular validity. If it were private property absolutely, the entry upon it without the assent of the owner would be unlawful, but in this case it was conceded and admitted in argument on behalf of the appellants that a passenger had a perfect right to go upon the station if he intended to use the railway. Therefore in its generality this statement cannot, in my opinion, be sustained.

And that appears to have been the idea of the pleader, because, having stated it in these general terms, he points out and particularises the matters on which the defender should be interdicted. No. 1 is, "from so entering or trespassing in or upon the Perth General Railway Station, or other works or premises therewith connected, while wearing the uniform or badge of the defender Alexander Ross." The second is, "and from waiting the arrival of passenger trains therein for the purpose of obtaining customers for said hotel." The answer to the latter of those particular subjects for interdict is that the facts have been found against the appellants. It has been decided as a matter of fact that Alexander Ross or his "boots" were not there for the purpose of obtaining customers, or, as it is familiarly called, touting for customers, but were there for the purpose of meeting customers who had given an intimation that they were coming. Therefore that ground cannot be sustained, as a matter of fact it being found against the appellants.

Therefore, my Lords, the whole petition subsides into that portion of it which deals with the defender, or his servants, entering the station wearing a particular badge. Now, if he had a right to enter the station he had a right to enter it wearing any sort of badge or costume he wished. I do not feel inclined to follow this subject deeper, because it has been fully and adequately dealt with by Lord Trayner in the Court of Session, and I entirely adopt his reasoning. I am, therefore, of opinion that this petition for an interdict could not be sustained.

But, my Lords, it has not been dealt with in your Lordships' House upon the prayer of the petition. It has now been decided, or is about to be decided, that the appellants are not entitled to a grant of their petition of interdict, which, as I understand, would make the respondent amenable to contempt of Court if he violated it; but a declaration is to be made of the rights between the parties. I am of opinion that that should be done, if

at all, in a suit instituted by the appellants for that purpose, and that it should not be given as a relief upon a petition of interdict which, as I understand, is an entirely different species of suit, followed by entirely different consequences. There would have been nothing to prevent the appellants, if the order of the Court of Session was affirmed in this case, from instituting upon the grounds I have stated a suit for a declaration of right. What the course that would have been taken in that case by the present respondent would have been I cannot say. It is possible he might resist it—it is probable he would resist it. I do not know, but that is not the case which he came to meet. The case he came to meet was decided in his favour by the Sheriff-substitute of Perthshire, by the Sheriff's Court, and by the unanimous judgment of the Court of Session. In this case, however, the respondent is made to pay the costs of the entire suit in a matter in which there has been, as it appears to my mind, a change of front to a certain extent, inasmuch as the petition of interdict is not persevered in, but a declaration of right is substituted for it.

Upon these grounds, my Lords, I am of opinion that the order of the Court of Session should be affirmed.

"ORDERED AND ADJUDGED, that the interlocutor dated June 26, 1896, of the Lords of Session in Scotland, of the Second Division, complained of in the said appeal, be, and the same is hereby, reversed, except in so far as it recalls the interlocutors of the Sheriff-substitute and of the Sheriff of Perthshire, dated respectively February 13 and April 17, 1896: And it is declared that, subject to the terms of any order or regulation which may be hereafter made by the Railway Commissioners, the respondent, Alexander Ross, as tenant of the Royal British Hotel, Leonard Street, Perth, has no right, by himself or his servants, to enter upon or use the Perth General Railway Station, except with the leave of the appellants, and under such conditions as they may prescribe: Further declared, that, in respect of the preceding declaration, it is unnecessary to dispose of the conclusions of the present action for interdict: Further ordered, that the cause be, and the same is hereby remitted back to the Second Division of the Court of Session, with directions to find in terms of the above declarations, and to dismiss the appellants' petition, and to find the defender, Alexander Ross, respondent here, liable to the pursuers, the appellants here, in the expenses of process incurred by them both in the Court of Session and in the Sheriff Court: Further ordered, that the said respondent do repay, or cause to be repaid, to the said appellants the expenses paid by them to the said respondent under the said interlocutor of the Lords of Session in Scotland, of the Second Division: And it is further ordered, that the said respondent do pay, or cause to be paid, to the said appellants the costs incurred by them in respect of the said appeal to this House."

CASES

DECIDED IN

THE COURT OF JUSTICIARY.

1896-97.

JAMES DRUMMOND, Complainer.—*Guy.*

ROBERT DUNCAN MACMILLAN (Burgh Prosecutor of Rothesay),
Respondent.—*Clyde.*

No. 1.

Nov. 2, 1896.
Drummond v.
Macmillan.

Complaint—Bye-law—Stage carriage—Specification.—A bye-law issued by the magistrates of a burgh provided that “every stage carriage . . . shall be driven at a regular and steady rate, not exceeding six miles an hour, upon the journey, except when taking up or letting down passengers.”

The driver of a stage carriage was convicted on a complaint, which set forth that on a certain date and in a certain street within the burgh, and on a certain journey, he did fail “to drive said stage carriage at a regular steady rate not exceeding six miles an hour.”

Conviction *quashed* on the ground that the complaint was irrelevant for want of specification in respect that the bye-law might be contravened in a variety of different ways, and that the complaint did not specify the particular mode of contravention which it was proposed to prove against the accused.

ON 10th July 1896, James Drummond, bus-driver, 24 Watergate, Rothesay, was charged before the Magistrates of Rothesay on a complaint at the instance of the burgh prosecutor setting forth that the accused “did on 23d June 1896, while in charge as driver thereof of a stage carriage which was appointed by your Honours to depart from the stance at Albert Place, Rothesay, on the journey after-mentioned, at 1.10 afternoon on said date, fail in Albert Place, in the burgh of Rothesay, to drive said stage carriage at a regular and steady rate not exceeding six miles an hour upon the journey from Albert Place, in said burgh, to Mount Stuart, in the parish of Kingarth, Buteshire, contrary to the bye-laws, particularly No. 13 thereof,* made and enacted by the Magistrates of the burgh of Rothesay, on 5th February 1892, and duly confirmed for the regulation of omnibuses or other carriages for the conveyance of passengers plying within the burgh, and drivers, guards, and conductors thereof” in terms of the General Police and Improvement (Scotland) Act, 1862, whereby the accused was liable, &c.

HIGH COURT.
Lord Justice-
Clerk.
Ld. Moncreiff.
Lord Low.

Drummond was convicted of the contravention charged and fined.

* The bye-law referred to was in the following terms :—13. “Every stage carriage shall depart from the place where the journey commences, and from any other place within the burgh at which it statedly calls for taking up passengers, punctually at the time fixed for such departure, and shall be driven at a regular and steady rate, not exceeding six miles an hour, upon the journey, except when taking up or letting down passengers. No driver, guard, or conductor shall stop a stage carriage to take up or let down passengers upon a crossing.”

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He brought a suspension, pleading, *inter alia*;—The warrant or sentence complained of ought to be suspended *simpliciter*, and the complainer ought to be found entitled to expenses, in respect—(1) That the complaint is irrelevant. (2) That there is an insufficient specification of the crime or offence libelled.”

Counsel for the prosecutor, who admitted at the hearing that the foregoing objections had been stated in the Court below, was called upon to support the conviction, and argued;—The complaint was sufficiently specific. The accused was charged with a contravention of a particular bye-law of which he had ample notice, in that he had failed to maintain a steady pace, except when taking up or letting down passengers. It was unnecessary to state whether the contravention consisted in his having driven too fast or too slow.

Counsel for the complainer was not called upon.

LORD JUSTICE-CLERK.—Whatever may have been decided as to certain bye-laws and statutes, and admitting the excellent purpose the bye-law before us had in view, I cannot for one moment hold that this bye-law, which can be contravened in several ways, is sufficiently libelled by saying, “You did, at a particular time and place, fail to drive at a regular and steady rate not exceeding six miles an hour.” The accused may have done that in either of two distinctly opposite ways. He may have driven slower than six miles an hour, but not at a regular and steady rate, or he may have driven at a regular rate of over six miles an hour. Other alternatives may easily be conceived.

Now, in such a case it is not only reasonable, but it is the right of the accused, that such specification be given as may be necessary to let him know what it is that the prosecutor proposes to prove against him.

There may be bye-laws and Acts of Parliament where such specification may be sufficiently given by repeating the words of the bye-law or statute, because there may be no ambiguity or alternative involved. But here, where two modes of contravention are possible, and these modes are contrary to one another, the one a stopping when you are not picking up passengers, and the other a driving at a regular rate of more than six miles an hour, I cannot hold that it is sufficient in the libel to repeat the words of the bye-law.

I am therefore of opinion that the suspension must be sustained.

LORD MONCREIFF.—I am of the same opinion, and would merely add that all difficulty in our sustaining the objection is obviated in this case by the objection having been stated at the proper stage in the inferior Court.

LORD LOW.—I am of the same opinion. I do not think the meaning of the bye-law is at all doubtful, but it can be contravened in a variety of ways, and it is the right of the accused to know the kind of case to be made against him.

THE COURT suspended the conviction.

A. C. D. VERT, S.S.C.—J. B. DOUGLAS & MITCHELL, W.S.—Agents.

ANDREW SANGSTER AND OTHERS, Complainers.—*Salvesen—Crabb Watt.*

HER MAJESTY'S ADVOCATE, Respondent.—*Sol.-Gen. Dickson—C. N. Johnston, A.-D.*

No. 2.

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Procedure—Separation of trials—Oppression—Fraudulent Bankruptcy.—Five persons were charged upon an indictment which contained eight charges of concealing property falling under bankruptcy, with intent to defraud the creditors of the bankrupt. The charges related respectively to the bankruptcy of one or other of three persons. All the acts charged were of a similar kind and were committed about the same time, and in the same neighbourhood. Two of the bankrupts were among the accused. One of the accused (not a bankrupt) was charged under one of the charges only. Each of the remaining accused was charged under two or more of the charges, but none of the accused was charged under all the charges. At the first diet the Sheriff granted a motion for separation of the trials in the case of the accused who was charged under one charge only, and refused the motion as regarded the remaining accused, three of whom were convicted. Suspension brought on the ground that the Sheriff had acted oppressively in refusing to separate the trials *refused*.

Fraudulent Bankruptcy—Art and part—Aiding or abetting a fraudulent bankrupt.—Aiding or abetting a bankrupt or insolvent person on the eve of bankruptcy in putting away or concealing his effects with intent to defraud his creditors is a crime at common law.

Robertson v. Caird, Aug. 17, 1885, 5 Couper, 664, 13 R. (Just. Cases) 1, *distinguished*.

ANDREW SANGSTER, farmer, Artamford, parish of New Deer, Thomas Henderson, farmer, Whitehill, parish of Strichen, John Roger, farmer, Clayfords, parish of Strichen, William Roger, farmer, Burngrains, parish of Old Deer, and John Craib, farmer, Blackhill, Adziel, parish of Strichen, all of Aberdeenshire, were charged in the Sheriff Court at Aberdeen on an indictment which set forth, “ (first) that William Henderson, farmer, lately residing at Mains of Fortrie, parish of Ellon, Aberdeenshire, and whose present residence is to the complainer unknown, having, on 26th February 1896, declared himself bankrupt, you the said Andrew Sangster did, in concert with the said William Henderson, in February and March 1896, conceal property consisting of two horses and two cows, falling under the bankruptcy of the said William Henderson, in order to defraud the creditors of the said William Henderson, by removing said animals from the farm of Mains of Fortrie, parish of Ellon aforesaid, then occupied by the said William Henderson, to the premises at Artamford, parish of New Deer aforesaid, occupied by you the said Andrew Sangster; (second) that the said William Henderson having declared himself bankrupt as aforesaid, you the said Andrew Sangster and Thomas Henderson did, in concert with the said William Henderson, in February and March 1896, conceal property, consisting of a horse and a cow, falling under the bankruptcy of the said William Henderson, in order to defraud the creditors of the said William Henderson, by removing said horse from the said farm of Mains of Fortrie to Artamford aforesaid, thence to the farm of Milltown, Anquhorthie, parish of Strichen, Aberdeenshire, occupied by James Cameron, farmer, and thence to the farm of South Littlehill, parish of New Deer aforesaid, occupied by John Fowlie, farmer, and by removing said cow from said farm of Mains of Fortrie to Artamford aforesaid, thence to Maud in the said parish of

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Ld. Moncreiff.
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New Deer, and thence to the farm of Whitehill aforesaid, occupied by you the said Thomas Henderson ; (third) that you the said John Roger having, on 6th January 1896, declared yourself bankrupt, and having thereafter, on 25th January 1896, been declared bankrupt, you the said John Roger and Thomas Henderson did, in January or February 1896, conceal property consisting of a horse, falling under the bankruptcy of the said John Roger, in order to defraud the creditors of the said John Roger, by removing said horse from the farm of Clayfords, in the parish of Strichen aforesaid, occupied by you the said John Roger, to the farm of Whitehill in the said parish of Strichen, occupied by you the said Thomas Henderson ; (fourth) that you the said John Roger having declared yourself bankrupt as aforesaid, you the said John Roger and Andrew Sangster did, in February or March 1896, conceal property consisting of a cow, falling under the bankruptcy of the said John Roger, in order to defraud the creditors of the said John Roger, by removing said cow from the said farm of Clayfords to Artamford aforesaid, thence to the farm of Dykeside, Artamford, in the said parish of New Deer, occupied by John Milne, farmer, and thence to the farm of Mains of Asleed, parish of Monquhitter, Aberdeenshire, occupied by Alexander Ironside, farmer ; (fifth) that you the said John Roger having declared yourself bankrupt as aforesaid, you the said John Roger and John Craib did, in April and May 1896, conceal property consisting of " certain specified articles of harness " falling under the bankruptcy of the said John Roger, in order to defraud the creditors of the said John Roger, by removing the same from the said farm of Clayfords to the farm of Blackhill, Adziel, parish of Strichen aforesaid, occupied by you the said John Craib ; (sixth) that you the said William Roger having, on 3d March 1896, declared yourself bankrupt, you the said William Roger and Andrew Sangster did, in February or March 1896, conceal property consisting of 1 cow and 3 stirks, falling under the bankruptcy of the said William Roger, in order to defraud the creditors of the said William Roger, by removing said cow and 3 stirks from the farm of Burngrains in the parish of Old Deer, Aberdeenshire, then occupied by you the said William Roger, to Artamford aforesaid, occupied by you the said Andrew Sangster ; (seventh) that you the said William Roger having declared yourself bankrupt as aforesaid, you the said William Roger did, in February or March 1896, conceal property consisting of " certain specified articles of furniture " falling under your bankruptcy, in order to defraud your creditors, by removing the same from the said farm of Burngrains to the dwelling-house at Auchreddie, parish of New Deer aforesaid, occupied by George Milne, mason, and thence to the farm of Bruxie, parish of Old Deer aforesaid, occupied by James Scott, farmer ; (eighth) that you the said William Roger having declared yourself bankrupt as aforesaid, you the said William Roger, Andrew Sangster, and Thomas Henderson did, in April 1896, conceal property consisting of a horse, falling under the bankruptcy of the said William Roger, in order to defraud the creditors of the said William Roger, by removing said horse from the farm of Burngrains aforesaid to Artamford aforesaid, thence to the farm of Whitehill aforesaid, occupied by you the said Thomas Henderson, and thence to Braeside, New Byth, parish of King Edward, Aberdeenshire, occupied by George Stewart, farmer."

At the first diet on 14th July 1896 the relevancy of the indictment was objected to on behalf of all the accused, on the ground that " it

was incompetent to charge the accused under one indictment for what were distinctly separate charges." No other objection to the relevancy of the complaint was stated in the Sheriff Court.

The Sheriff-substitute (Brown) sustained the objection as regarded the accused John Craib, who was associated with John Roger in the fifth charge, and the procurator-fiscal thereupon deserted the diet against Craib *pro loco et tempore*.

The rest of the accused pleaded not guilty.

A motion for a separation of the trials was made for the accused, but refused by the Sheriff.

The trial proceeded upon 27th July and following days, and was concluded at two o'clock in the morning of the 30th. The following was the verdict:—"The jury, by a majority, find the pannel Andrew Sangster guilty of the first charge in the indictment as libelled, and also of the second charge in the indictment in respect of the cow libelled, and otherwise find the said second charge, as regards the horse, not proven; by a majority find the said Andrew Sangster guilty of the fourth charge in the indictment as libelled; unanimously find the sixth charge against the said Andrew Sangster in the indictment not proven; and unanimously find him not guilty of the eighth charge in the indictment; by a majority find the pannel Thomas Henderson guilty of the second charge in the indictment, in respect of the cow there libelled, and unanimously find the said charge, as regards the horse there libelled, not proven as against the said Thomas Henderson; by a majority find the said Thomas Henderson guilty of the third charge in the indictment as libelled, and unanimously find him not guilty of the eighth charge in the indictment; unanimously find the pannel John Roger guilty of the third and fifth charges in the indictment as libelled, and by a majority find the said John Roger guilty of the fourth charge in the indictment as libelled; unanimously find the sixth charge in the indictment, as against the pannel William Roger, not proven; and unanimously find the said William Roger not guilty of the seventh and eighth charges in the indictment."

Sangster was sentenced to six months', John Roger to five months', and Thomas Henderson to two months' imprisonment. William Roger was assolizied.

They brought a bill of suspension, in which they pleaded;—The said conviction and sentence were illegal and unwarrantable, and ought to be suspended as craved, in respect (a) the said proceedings were oppressive; (b) the libel was irrelevant; (c) the complainers were not charged with or convicted of a crime known to the law of Scotland.

Argued for the complainers;—(1) An individual might be charged in one indictment with many, even dissimilar, crimes. But here there was an accumulation of charges involving different acts and different individuals. The accused were not all implicated in the various acts charged—there was not even one charge which embraced the whole of the accused—and it was not said that there existed amongst the accused anything of the nature of a confederacy to commit the crime of fraudulent concealment. By the joint trial the complainers were deprived of the benefit of each other's evidence; and besides, the duration of the trial, and the conjoining of so many charges relating to three different bankruptcies, must have tended to confuse the minds of the jury and thus prejudice the complainers' chance of a fair trial. The Sheriff-substitute had acted oppressively

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in not separating the trials.¹ (2) The indictment was irrelevant. The first charge stated that William Henderson having, on 26th February 1896, declared himself bankrupt, Sangster, in February and March 1896, concealed his property. That was capable of being read as a charge relating to a period when there was no bankruptcy or insolvency, and when there could be no crime on the part of anyone except the bankrupt or insolvent.² (3) It was not said that the complainants had "knowingly" defrauded. Knowledge was of the essence of the charge. (4) Aiding or abetting a bankrupt or insolvent person on the eve of bankruptcy in putting away or concealing his effects with intent to defraud was not a crime at common law.³

Argued for the respondent;—The question of separation of trials was one which the Court always left to the discretion of the Sheriff, and in this case he shewed that he had applied his mind to it, because he had separated the trials as regarded Craib. The indictment disclosed what was, on the face of it, a conspiracy among the accused. The offences took place about the same time, the acts being of the same kind, and each of the accused was more or less involved in all the acts charged.⁴ (2) The indictment was relevant. Fairly read, the first charge meant that Sangster had been guilty of removal and concealment after the bankruptcy. In any case the objection should have been taken in the Court below. (3) The word "knowingly" was unnecessary.⁵ (4) It was a crime at common law to conceal the effects of a bankrupt or insolvent person, on the eve of bankruptcy, with intent to defraud the creditors. *Robertsons v. Caird*⁶ was a case on the construction of the Debtors (Scotland) Act, 1878.

LORD MONCREIFF.—This bill of suspension is presented by three parties, Andrew Sangster, Thomas Henderson, and John Roger. In the indictment two other parties, John Craib and William Roger were charged, but we have nothing to do with them. At the first diet a motion was made for separation of the trials of the various prisoners, and the Sheriff-substitute, after consideration, sustained the motion with regard to John Craib, whose name appears only in the fifth charge, and the diet against him was deserted *pro loco et tempore*. The result of the trial of the other parties was that William Roger was acquitted, and therefore we have only to deal with the cases of Andrew Sangster, Thomas Henderson, and John Roger, who were convicted.

¹ Hume on Crimes, vol. ii. pp. 173 and 174; *Marr v. Stuart*, Feb. 4, 1881, 4 Couper, 407, 8 R. (Just. Cases) 21; *Kerr v. Phyn*, March 21, 1893, 3 White, 480, 20 R. (Just. Cases) 60; *cf.* H. M. Advocate v. Parker and Barrie, Nov. 5, 1888, 2 White, 79, 16 R. (Just. Cases) 5; *Rowbotham*, March 19, 1855, 2 Irvine, 89.

² *Clendinnen v. Rodger*, Dec. 2, 1875, 3 Couper, 171, 3 R. (Just. Cases) 3; *H. M. Advocate v. Sneden*, April 10, 1874, 2 Couper, 532, 1 R. (Just. Cases) 19.

³ *Robertsons v. Caird*, August 17, 1885, 5 Couper, 664, 13 R. (Just. Cases) 1.

⁴ Hume on Crimes, vol. ii. p. 117; *Coupland v. Beattie*, April 14, 1863, 4 Irvine, 370; *Marr v. Stuart*, 4 Couper, 407, 8 R. (Just. Cases) 21; *McGrath and Others v. Wingate*, May 15, 1869, 1 Couper, 260.

⁵ Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), sec. 8; *H. M. Advocate v. Swan*, Dec. 10, 1888, 2 White, 137, 16 R. (Just. Cases) 34; *H. M. Advocate v. Bourdais*, Jan. 28, 1889, 16 R. (Just. Cases) 68.

⁶ *Robertsons v. Caird*, 5 Couper, 664, 13 R. (Just. Cases) 1.

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Now, the first ground of suspension, which has been very fully argued, is that the conduct of the Sheriff in refusing to allow a separation of the trials was oppressive. A motion for separation of trial is very frequently made, but very seldom granted. Still more seldom does this Court quash a conviction on the ground that it has been refused. There may be other cases, but at present I know of no case except *Kerr v. Phym*.¹ The reason is that the question is one for the discretion of the presiding Judge, and unless it can be made out conclusively that he was wrong in the exercise of that discretion, we will not interfere. Now, in the present case it would seem that the Sheriff has carefully applied his mind to the question, with the result that he has allowed a separate trial in the case of John Craib, and refused it in the case of the other prisoners. All the accused were represented by competent procurators. There is therefore *prima facie* no sign of oppressive conduct. But we are bound to look at the indictment to see whether the case is one in which any real injustice would be done by refusal to separate the trials. The case is undoubtedly a peculiar one. There are three bankruptcies, those of William Henderson, John Roger, and William Roger, and there are five prisoners; but then we find that all the acts charged are of the same kind, and amount to a charge of fraudulent bankruptcy, by putting away and concealing the bankrupt's effects from the creditors. We find also that all the offences were committed about the same time. What is still more peculiar is that Andrew Sangster, Thomas Henderson, and John Roger were all more or less involved in all the acts alleged. Thus, in the first two charges, relating to the bankruptcy of William Henderson, Andrew Sangster and Thomas Henderson are charged. Turning to the bankruptcy of John Roger, we find that Andrew Sangster, Thomas Henderson, and John Roger are all implicated in the charges connected therewith. And in the bankruptcy of William Roger we find Thomas Henderson and Andrew Sangster again involved. That being the case as appearing on the face of the indictment, it indicates a close connection and contingency between the various charges. That in itself is a reason for a single trial stronger than we find in most cases where prisoners are charged together. The passage quoted from Hume seems to me to apply directly to the present case. He says (vol. ii. p. 177)—“For although, as I have said, our practice does disown this sort of cumulation in ordinary cases, and in respect to crimes and persons nowise connected with each other, yet in numerous instances the prosecutor has been allowed to accumulate his charges on account of an affinity among the pannels or their crimes, much less intimate than in the case of these two riots. And, indeed, wherever there was any natural contingency of the matters charged, as when the several crimes arose out of each other, or were directed towards the same object, or when the several pannels appeared to be in a society for committing crimes of a certain sort—nay, in some instances, where the offences were only of the same class, and were not the result of any such confederacy, or where all the pannels were charged with some of the articles in the libel though not with others—in any of these cases it seems to have been nowise unusual to allow the cumulated action.” It seems to me that on the face

¹ 3 White, 480, 20 R. (Just. Cases) 60.

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of this indictment there is disclosed a confederacy among the prisoners to assist in concealing the effects of those of them who were or pretended to be bankrupt from their creditors. We have not the evidence before us, neither had the Sheriff, but I think that, looking to the indictment, the Sheriff acted quite properly in refusing separation of the trials.

The second ground of suspension is an objection to the relevancy of the indictment. Such an objection ought to have been taken in the Court below. It would require an extreme case for us to sustain an objection of this kind when it was not so taken—a case in which the indictment was practically a nullity, no crime being charged. Now, let us examine the objections to relevancy which have been made. First, it is said that it is not a crime for a person who is not insolvent to conceal his effects from his creditors, nor is it a crime to assist a person in that position in such concealment. On that assumption, it is argued that this indictment admits of being read as applying to a period when there was no bankruptcy and no insolvency. I think this objection at most amounts to want of specification. On reading the indictment I think that the natural meaning of the charges is that the acts of concealment took place after bankruptcy was declared. Taking the first charge, the statement is that William Henderson, farmer, having “on 26th February 1896, declared himself bankrupt, you, the said Andrew Sangster, did, in concert with the said William Henderson, in February and March 1896, conceal property consisting of two horses and two cows, falling under the bankruptcy of the said William Henderson, in order to defraud the creditors of the said William Henderson, by removing the said animals from the farm of Mains of Fortrie, then occupied by the said William Henderson, to the premises at Artamford, occupied by you the said Andrew Sangster.” Now, I think the fair meaning of that charge of removal and concealment is removal and concealment after the bankruptcy. The words of the third charge lead to the same result. Even if there were any doubt about this, I think it was the duty of the agents for the prisoners to state the objection at the trial. They did not do so, and I think the argument fails in shewing that what is charged does not necessarily constitute an indictable offence. I recognise the authority of the case of *Clendinnen v. Rodger*,¹ but the present case is a charge against a debtor of putting away his effects after his bankruptcy.

With regard to the argument on relevancy, in respect that the word “knowingly” is not inserted in the indictment, it is sufficient to refer to section 8 of the Criminal Procedure Act, 1887.

There is one other argument which also was not stated before the trial, and which, if sound, would at once have set free two at least of the complainers, viz., that there is no such crime as aiding and abetting a bankrupt or insolvent person in concealing his effects in order to defraud his creditors. That is new to me; there is no doubt that the putting away by a bankrupt or insolvent person on the eve of bankruptcy of his goods, with intent to defraud his creditors, is a criminal offence at common law, and I cannot see any distinction between aiding and abetting the commission of that offence and aiding and abetting the commission of any other crime. We have only been referred to one authority on the point—*Robertsons v. Caird*.² Of

¹ 3 Coup. 121, 3 R. (Just. Cases) 3.

² 5 Coup. 664, 13 R. (Just. Cases) 1.

course we should be bound to follow that case if it were applicable, but in my opinion it is not in point. In that case the libel contained first a common law charge of fraudulent concealment of property by a person insolvent or on the eve or in contemplation of bankruptcy, as also a charge of certain statutory crimes set forth in section 13 of the Debtors (Scotland) Act, 1878, subsecs. (a) (3) and (b) (5). The parties charged were the insolvent David Robertson and Robert Robertson, who was charged with aiding and abetting David in putting away the goods, well knowing him to be insolvent. Both pannels were found "guilty as libelled." On a suspension being brought the conviction and sentence were suspended as regarded Robert Robertson, the ground of judgment being that the statutory charges on which he was convicted were offences which in the opinion of the Court could in terms of the statute only be committed by a debtor in a process of sequestration or cessio. The Court held that the terms of the statute excluded the liability of anyone else, and as the conviction, though it covered a charge at common law, was general, it was suspended *in toto* as regarded Robert Robertson.

That case, as I have said, has no application where the charge is that the accused is art and part in the commission of a crime at common law.

On these grounds I am of opinion that the bill of suspension should be refused.

The LORD JUSTICE-CLERK and LORD LOW concurred.

THE COURT refused the suspension.

ALEXANDER ROSS, S.S.C.—CROWN AGENT—Agents.

ANDREW MORTON, Appellant.—*M'Lennan*.
PETER FYFE, Respondent.—*Lees—Salvesen*.

No. 3.

Public Health—Sale of Food and Drugs Act, 1875 (38 and 39 Vict. c. 63), secs. 13 and 14—Sale of Food and Drugs Amendment Act, 1879 (42 Vict. c. 30), sec. 3—Analysis—Division of sample—Milk—Statute—Incorporation.—The Sale of Food and Drugs Act, 1875, creates certain offences connected with the sale of food and drugs, and, *inter alia*, by sec. 6 subjects to a penalty any person who sells, to the prejudice of the purchaser, any article of food or any drug which is not of the nature, substance, and quality, of the article demanded by the purchaser.

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Sec. 13 enacts that any of certain specified public officials "may procure any sample of food or drugs, and if he suspects the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analysed," and then follow certain provisions as to the conduct of the analysis.

Section 14 enacts:—"The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated, and each part to be marked and sealed, or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent."

The Sale of Food and Drugs Amendment Act, 1879, sec. 3, enacts that any of certain officials (being those specified in sec. 13 of the Act of 1875) "may procure at the place of delivery any sample of any milk in course of

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delivery to the purchaser or consignee, in pursuance of any contract for the sale to such purchaser or consignee, of such milk; and such "official" "if he suspects the same to have been sold contrary to any of the provisions of the principal Act [of 1875] shall submit the same to be analysed, and the same shall be analysed, and proceedings shall be taken, and penalties on conviction be enforced, in like manner in all respects as if such "official" "had purchased the same from the seller or consigner under section 13 of the principal Act."

An official procured a sample of certain milk in terms of section 3 of the Act of 1879, but did not notify his intention to have the same analysed, or follow out the other procedure specified in section 14 of the Act of 1875. The consigner of the milk was convicted of having sold the milk to the official in contravention of section 6 of the Act of 1875.

In an appeal, *held* that section 14 of the Act of 1875 did not apply to cases in which an official had procured a sample of milk under section 3 of the Act of 1879; and that the conviction was valid.

Rouch v. Hall, L. R., 6 Q. B. Div. 17; *Harris v. Williams*, 6 T. L. R. 47; *Rolfe v. Thompson*, L. R. [1892], 2 Q. B. 196, *followed*.

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Lord Justice-
Clerk.
Lord Trayner.
Ld. Moncreiff.

On 4th May 1896 Andrew Morton, farmer, Inchbelly Farm, Kirkin-tilloch, Stirlingshire, was charged in the Sheriff Court at Glasgow, on a summary complaint, at the instance of Peter Fyfe, Inspector of Nuisances of the city of Glasgow, setting forth that the accused "having, in pursuance of a contract of sale with William Pitcairn Robley, wholesale and retail dairyman," Glasgow, "forwarded, on the 1st of April 1896, to the said William Pitcairn Robley, eight gallons of sweet milk to the terminus of the tramway rails at No. 594 Springburn Road, Glasgow; and William Thomas Armstrong, ordinary sanitary inspector or police-constable, Glasgow, having, on behalf of the complainer, procured on said date, at the said terminus of the tramway rails, No. 594 Springburn Road aforesaid, being the place of delivery of said eight gallons of sweet milk, a sample of the said sweet milk for the purposes of the Acts after mentioned, and the said sample having, on analysis as prescribed by said Acts, been found to contain 14 per cent or thereby of added water, the said Andrew Morton did thus at said terminus of the tramway rails, No. 594 Springburn Road aforesaid, time above libelled, within the meaning of section 3 of the Sale of Food and Drugs Act Amendment Act, 1879, sell to the said William Thomas Armstrong for the complainer, to his prejudice, said sample of sweet milk, the same not being of the nature, substance, and quality demanded, in respect that it contained 14 per cent or thereby of added water"; then followed two similar charges with respect to two other butts of milk that were delivered by the accused to Robley at the same time and place: "all contrary to the Acts 38 and 39 Victoria, chapter 63, section 6, and 42 and 43 Victoria, chapter 30, section 3, whereby the said Andrew Morton for each of said offences is liable," &c.*

* The Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), creates certain offences connected with the sale of foods and drugs, and, *inter alia*, by sec. 6 enacts,—“No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser under a penalty,” &c.

Sec. 13 enacts,—“Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police-constable, under the direction and at the cost of the Local Authority appointing such officer, inspector, or constable, or charged with the execu-

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The accused pleaded not guilty, but was convicted and fined £4 for each offence.

He obtained a case. The case stated by the Sheriff-substitute (Fyfe) Nov. 2, 1896.
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bore :—

"Before the trial it was objected for the appellant that the trial should not proceed on account of the failure of the respondent, or person employed by him, to offer to divide each of the samples of milk taken into three parts, as, he averred, was required by section 14 of the said Act 38 and 39 Victoria, chapter 63, in order, if required to do so, to deliver one part of each sample to the appellant's servant at the time the samples were taken.

"I repelled said plea and proceeded with the trial. As bearing on this plea, the following facts were admitted or proved :—

"Two of the respondent's inspectors attended on the morning of Wednesday, 1st April 1896, at Springburn Road about 6 A.M. There they found one of Robley's milk-carts used for distributing the milk in the city waiting the arrival of the appellant Morton's milk. Shortly afterwards a van arrived in charge of a lad from the appellant's farm. This van contained, *inter alia*, three butts of sweet milk, each containing about eight gallons, consigned to Robley. The contents of the said three butts of sweet milk were about to be delivered by the appellant's man to Robley's man on the street, by being emptied from

tion of this Act, may procure any sample of food or drugs, and if he suspects the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analysed by the analyst of the district or place for which he acts, or if there be no such analyst then acting for such place, to the analyst of another place, and such analyst shall, upon receiving payment as is provided in the last section, with all convenient speed analyse the same, and give a certificate to such officer, wherein he shall specify the result of such analysis."

Sec. 14 enacts,—“The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated, and each part to be marked and sealed, or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent.

"He shall afterwards retain one of the said parts for future comparison, and shall submit the third part, if he deems it right to have the article analysed, to the analyst."

The Sale of Food and Drugs Act Amendment Act, 1879 (42 and 43 Vict. cap. 30), sec. 3, enacts,—“Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police-constable, under the direction and at the cost of the Local Authority appointing such officer, inspector, or constable, or charged with the execution of this Act, may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee, in pursuance of any contract for the sale to such purchaser or consignee of such milk; and such officer, inspector, or constable, if he suspect the same to have been sold contrary to any of the provisions of the principal Act, shall submit the same to be analysed, and the same shall be analysed, and proceedings shall be taken, and penalties on conviction be enforced, in like manner in all respects as if such officer, inspector, or constable had purchased the same from the seller or consigner under section 13 of the principal Act.”

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the butts on the appellant's van into the butts or barrels of Robley's milk van. As the milk was being so poured out, the respondent's inspector drew a sample from each butt into three bottles. It was on the samples so taken from each of the three butts that the three charges in question were founded. The said three samples the inspector sealed up and took the same morning to Dr John Clark, the city analyst, who opened the bottles, and at the request of the inspector divided the contents of each bottle and retained one half of each for analysis. He then resealed the bottles with the other half of the milk in them and returned them to the inspector, who produced them at the trial along with the analyst's report applicable to each portion of milk retained by him. At the time of taking the samples from the butts or afterwards, the respondent's inspector did not offer to the appellant or to the lad in charge of the appellant's van to divide each sample into three parts."

The question of law was,—“Whether the conviction in question is invalid by reason of the failure of the respondent or those acting for him to offer to divide each of the samples of milk in question taken into three parts, in order, if required to do so, to deliver one part of each sample to the appellant's servant.”

Argued for the appellant;—The offence here charged was constituted by section 6 of the original Act of 1875. Section 13 of that Act made provision for certain public officials procuring samples of food or drugs by actual purchase, and for the analysis of such samples when purchased. Then came section 14, which was undoubtedly, so far as the original Act went, a condition of any prosecution under section 6, on account of a sale to a public official under section 13. Coming next to the Act of 1879, the true view of section 3 of that Act was that it formed an addition to section 13 of the original Act, entitling the public officials mentioned in section 13 to procure samples of milk in course of delivery, and treat them as if they had been purchased. Section 13 was expressly referred to, because that was the section of the original Act which dealt with purchases by public officials. Express reference to section 14 of the Act of 1875 was not necessary in order to make section 14 applicable to prosecutions on account of milk procured under section 3, because once it was fixed that the procuring of milk under section 3 was to be regarded as a sale warranting a prosecution under section 6 of the original Act, then all the incidents and conditions of such a prosecution became applicable, including the provisions of section 14. The English Courts, in the decisions founded on by the respondent,¹ had applied too strict a construction. It was true that section 3 taken literally might mean that the whole sample should be submitted to analysis, but the same might be said of section 13 of the Act of 1875, yet it was past question that section 13 was controlled by section 14. “Proceedings” in section 3 did not mean judicial proceedings only; it included also proceedings for the division of the sample, as provided in section 14. The object of section 14, which was to give the accused an opportunity of obtaining an analysis of his own, was as applicable to cases under section 3 as to cases under section 13.

Argued for the respondent;—This question had been settled in England adversely to the contention of the appellant.¹ The grounds

¹ *Rouch v. Hall*, 1880, L. R., 6 Q. B. Div. 17; *Harris v. Williams*, 1889, 6 Times Law Reports, 47; *Rolfe v. Thompson*, L. R. [1892], 2 Q. B. 196.

upon which the English decisions proceeded were well founded, and ought to be adopted here. The utmost that could be said for the appellant was that the Act was capable of two constructions. That being so, the construction which would best enable the Act to be carried out ought to be adopted. But, as had been pointed out in the English cases, to read section 14 into section 3 would practically make section 3 a dead letter, for how could the official procuring the sample "forthwith" notify to the seller (that was to say, the consigner), or his agent, and offer to divide the sample, and deliver one of the parts to the seller or his agent, if, as would frequently be the case, the seller lived in a distant part of the country and had no agent on the spot for the purposes of such notification, &c. *In dubio*, at all events, the English decisions ought to be followed, the statute being applicable to the United Kingdom.

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LORD JUSTICE-CLERK.—In this case the appellant, who carries on business as a farmer in Stirlingshire, had a contract by which he had to deliver a quantity of milk to a dairyman in Glasgow. On a certain day the milk in transit was stopped at the place of delivery, and there the official authorised to do such an act took a quantity for analysis. It was duly analysed, and was found to be diluted with water, and there was a prosecution and conviction.

The question in the case is, whether that conviction is bad in respect that the statutory procedure under the Act of 1875 was not carried out, by which, on taking a sample of that kind, a division should be made into three parts, and one of these parts delivered to the opposite party. The contention on behalf of the appellant is that the Act of 1879 says that "proceedings shall be taken and penalties on conviction be enforced in like manner in all respects as if such officer, inspector, or constable had purchased the same from the seller or consigner under section 13 of the principal Act," and that this proceeding was not according to the former Act in respect of the non-division of the samples.

This is an important question, and had it not been one which has already been made matter of decision in the Supreme Courts of the country, I should think one requiring very careful attention. What opinion I might form upon it I do not say if the question had not already been made matter of decision. There are cases in England deciding the point unfavourably to the view taken by the appellant. And while we are by no means bound to follow these decisions, it is of the greatest possible consequence that the administration of the same law should be uniform in both countries if possible. I have considered the matter very carefully in this view, Can it be said that these Acts of Parliament cannot be read in the sense of the decision pronounced in the Court below? I have come to the conclusion that they can be so read.

Having come to that conclusion, and considering that they have been so read by Courts of equal jurisdiction with ourselves, I think we ought not to disturb the law thus established, and therefore the proper course is to refuse this appeal.

LORD TRAYNER.—The facts in this case are not in dispute. The appellant, a farmer in Stirlingshire, was under contract to deliver a quantity of milk to a retail dairyman in Glasgow. On 1st April last part of the milk

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so contracted for reached Glasgow, and while still under the control of the person sent by the appellant in charge thereof, samples of it were taken by an inspector acting under the powers conferred by the Sale of Food and Drugs Amendment Act of 1879. The inspector did not offer to divide the samples taken by him, or give any part thereof to the person in charge of the milk as representing the appellant, as required by the 14th section of the Sale of Food and Drugs Act, 1875. His failure to do so is said by the appellant to vitiate the whole proceedings taken against him, and consequently to entitle him to have the conviction which followed set aside. He maintains this on the ground that under the Act first above cited (the Amendment Act) it is provided (sec. 3) that "proceedings shall be taken, and penalties on conviction be enforced, in like manner in all respects as if such officer, &c., had purchased the same from the seller or consigner under section 13 of the principal Act," and that the "proceedings" here referred to include division of the sample taken in the manner provided in section 14 of the principal Act. I think there is great force in the appellant's contention, and had the question been quite an open one, one might have been disposed to give effect to it. But the same question has been more than once submitted to judicial consideration in England, and the judgments pronounced there have been adverse to the appellant. I cannot say that the reasons assigned for these judgments are so conclusive as to command my assent to them, but I would hesitate, in respect of the doubts I entertain, to pronounce a judgment on the meaning and construction of an imperial statute different from that which has already been pronounced in England. I am therefore prepared, in deference to the cases cited, to answer the question now put to us in the negative.

LORD MONCREIFF.—Having regard to the construction of the third section of the Act of 1879 which has been adopted by the English Courts, and the practice which has followed upon their decisions, I agree that we ought to adopt that construction unless we are clearly satisfied that these decisions are erroneous. Now, I confess I have great hesitation in following these decisions, the first of which, *Rouch v. Hall*,¹ was decided *ex parte*. The third section of the Act of 1879 provides that "after a sample has been taken of the milk, the person who takes it shall submit the same to be analysed, and proceedings shall be taken, and penalties on conviction be enforced, in like manner in all respects as if such officer, inspector, or constable had purchased the same from the seller or consigner under section 13 of the principal Act"—that is, the Act of 1875. Section 14 of the principal Act provides that any person purchasing under section 13, if he intends to submit the milk to an analyst, "shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts." Now, without unduly straining the words of section 3 of the Act of 1879, the direction that "the same shall be analysed," and so forth, "in all respects as if the purchase had been made under section 13 of the Act of 1875," might be held as including the preliminary steps which are enjoined by section 14 of the Act of 1875.

¹ L. R., 6 Q. B. D. 17.

I do not think that there would be any great difficulty in carrying out, in regard to cases covered by section 3 of the Act of 1879, the directions in section 14 of the Act of 1875. But at the same time the later enactment, taken literally, relates to analysis—actual analysis and proceedings following upon analysis. The reasons suggested by the English Judges for adopting different procedure with regard to such cases from that enforced in regard to cases falling under the Act of 1875 are possibly correct, and although I am not quite satisfied, I agree with your Lordships that for the sake of uniformity we should adopt the same construction and sustain the conviction and dismiss the appeal.

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THE COURT answered the question in the case in the negative and dismissed the appeal.

J. DOUGLAS GARDINER & MILL, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

GAVIN RITCHIE M'CALLUM, Complainer.—*Cullen.*

DAVID BARROWMAN, Respondent.—*Guy.*

No. 4.

Nov. 3, 1896.
M'Callum v.
Barrowman.

Conviction—Penalty—Omission of statutory award of penalty—Vaccination (Scotland) Act, 1863 (26 and 27 Vict. c. 108), sec. 26.—The Vaccination (Scotland) Act, 1863, sec. 26, enacts that “the Sheriff by whom any penalty shall be found due by virtue of this Act shall award such penalty to the funds for the support of the poor of the parish or combination in which the offence shall have been committed, and shall order the same to be paid over to the inspector of poor, or other officer of the parochial board, for that purpose.”

A person charged, at the instance of the inspector of poor of the parish, with a contravention of the above statute, pleaded guilty and was convicted by the Sheriff. The conviction adjudged the accused to pay a penalty of 20s., but contained no award and order regarding the penalty in terms of section 26 of the statute.

In a suspension, *held* that the conviction fell to be quashed in respect that it contained no award and order in terms of section 26.

ON 30th July 1896 Gavin Ritchie M'Callum, plumber, 201 Kilmarnock Road, Pollokshaws, in the parish of Eastwood, was charged, in the Sheriff Court at Paisley, with an offence against the Vaccination (Scotland) Act, 1863, in so far as he did, on 6th May 1896, within his house aforesaid, refuse to allow his child to be vaccinated. The complaint was at the instance of “David Barrowman, Inspector of Poor for the parish of Eastwood, on behalf of and as representing the Parish Council of that parish.”

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The accused pleaded guilty and was convicted.

The conviction was in the following terms:—“Paisley, 30th July 1896.—The Sheriff-substitute, in respect of the judicial confession of the said Gavin Ritchie M'Callum, convicts the said Gavin Ritchie M'Callum of the offence charged, and therefore adjudges him to forfeit and pay the sum of 20s. sterling of penalty, with the sum of 19s. 6d. sterling of expenses, and in default of payment thereof within seven days from this date, adjudges him to be imprisoned for the period of ten days from the date of his imprisonment unless said sums shall be sooner paid, and grants warrant to officers of Court to apprehend him and convey him to the prison of Glasgow, and to the keeper thereof to receive and detain him accordingly.”

M'Callum brought a suspension on the ground that the conviction

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was null, in respect that it did not contain an award of the penalty in terms of section 26 of the Vaccination (Scotland) Act, 1863.* He cited the undernoted authorities.¹

Argued for the respondent;—The conviction here was in the form given in schedule K of the Summary Procedure (Scotland) Act, 1864, and nothing more was necessary to satisfy the Vaccination Act. Unlike some of the cases founded on by the appellant, the inferior Judge here had no discretion as to whom he should award the penalty, and where the statute made it clear to whom a penalty was to go it was not necessary that the conviction should contain an express award.² Besides, if the conviction contained no award of the penalty, the prosecutor took it,³ and as the prosecutor here was the inspector of poor, the statutory result followed without the necessity of an award. There was nothing to prevent the Sheriff-substitute pronouncing an award now.

LORD JUSTICE-CLERK.—The Act of Parliament with which we are dealing says, in section 26, in words as distinct as words can be, that where a penalty is found due by the Sheriff in virtue of the Act, he shall award such penalty in a certain way, and shall order the same to be paid to a certain person. It is plain that no award can be given by a Judge, and no order can be pronounced by him, except an order in writing under his hand. He has no power of verbally ordering anything. Everything he does in the way of disposing of a case must be recorded and be signed by him. Now, it may be quite possible to argue that this clause of the statute was unnecessary, and to say that it is very difficult to find any special reason for its insertion in the statute. On the other hand, it would not be difficult to state reasonable grounds for its being in the statute. With this question, however, we have nothing to do. The Legislature has thought proper to order that where a penalty shall be found due, the Judge shall make an award and pronounce an order. That stands unrepealed, and that is necessarily imperative under the statute. In that view there is not much importance in any of the cases quoted to us, in regard to which Mr Guy's criticism certainly goes some way, that in these cases there was some necessity for the award, because a discretion was given to the magistrate which he must exercise. But these cases all bring out this, that where a conviction is pronounced by a magistrate in a summary case of this kind, and he is directed by statute to do any particular thing, he must do it in the conviction, and cannot do it afterwards. They seem to make it certain that he cannot afterwards make a separate award so as to dispose of the penalty.

* The Vaccination (Scotland) Act, 1863 (26 and 27 Vict. cap. 108), sec. 26, enacts, that "the Sheriff by whom any penalty shall be found due by virtue of this Act shall award such penalty to the funds for the support of the poor of the parish or combination in which the offence shall have been committed, and shall order the same to be paid over to the inspector of poor, or other officer of the parochial board, for that purpose."

¹ Lamont v. Baker, Feb. 9, 1860, 22 D. 718, 32 Scot. Jur. 277; Galt v. Ritchie, July 19, 1873, 11 Macph. 971, 45 Scot. Jur. 562, 2 Coup. 470; King v. Dimpsey, 1877, 2 T. R. 96; Rex v. Seale, 1807, 8 East, 568; Chaddock v. Wilbraham, 1848, 5 C. B. 645.

² M'Callum and Sealy v. MacLulich, Oct. 31, 1870, 9 Macph. 46, 1 Coup. 486.

³ Alison, vol. ii. p. 675.

Here the Sheriff has not, by any award or order, given directions as to the disposal of the penalty. I confess that if the matter had been open I should have had some doubt whether the magistrate, having the duty to award, might not do so by a separate deliverance from the conviction. But that appears to have been decided otherwise, and I therefore am compelled to hold that this conviction must be quashed.

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LORD MONCRIEFF.—I am of the same opinion. I am reluctant to interfere with the Sheriff's judgment on what seems a very technical ground. But we cannot disregard the provision in the statute which directs the Sheriff who convicts to award the penalty to a particular person. That has not been done in the present case. I think the result of the authorities quoted is that where a statute contains a direction to a magistrate to award or apportion a penalty on conviction, that must be done in writing at the same time as the conviction is signed, and cannot be done later. It is no answer to say that the person convicted and ordered to pay the penalty has no interest in the purpose to which the penalty is to be applied. If the statute had merely said that the penalty should belong to the inspector of poor or other officer of the parish or combination, there is authority for holding that it would be no objection to the conviction that this was not noted in the judgment. But here the Sheriff is directed to award the penalty to the inspector of poor or other officer, and although there may be no doubt that he would have awarded it to the prosecutor if he had made an award, his failure to make any award, in the light of the decided cases, invalidates the conviction.

LORD KINCAIRNEY.—I am of the same opinion. The Sheriff here was exercising statutory power, and had power only to do what the statute directs. Section 26 directs most distinctly the form which the conviction is to take. I cannot say that I see very clearly the reason of this direction. But this is the only conviction which the Sheriff is entitled to pronounce, and without the award it is not a conviction which the statute authorises. It is said that this award may be pronounced afterwards. But I cannot so read the statute, and I cannot believe that the statute authorises such an unnecessary double procedure. Anyone who is convicted has certainly interest and right to object that the conviction is not authorised by the statute on which the prosecution is founded.

THE COURT suspended the conviction.

DAVID DOUGAL, W.S.—F. J. MARTIN, W.S.—Agents.

GEORGE FOWLER, Appellant.—*Salvesen*—*Wilton*.

GEORGE HODGE (Interim Burgh Prosecutor, North Berwick),
Respondent.—*Graham Stewart*.

No. 5.

Nov. 3, 1896.
Fowler v.
Hodge.

Police—Regulation of traffic—Police-constable—Assault.—The driver of a hackney carriage having been convicted of assaulting a police-constable of a burgh while in the execution of his duty, appealed on a case stated. The facts stated were :—On the occasion in question a public entertainment was being held in a hall in the burgh. The police, without any special authority from the magistrates, ordered the carriages going to the hall to draw up

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in a single line. The appellant, who was taking his carriage to the hall, at first drew up accordingly, but afterwards broke out of the line and began to drive off towards the hall, when he was stopped by the constable in question, and the assault was committed.

The question of law was,—Whether, in the absence of any magisterial order for the regulation of traffic upon the occasion libelled, the constable was acting in the execution of his duty when the assault was committed?

The Court—being of opinion that it was the duty of every police-constable in a burgh to regulate the street traffic of the burgh—*dismissed* the appeal, and *found* that upon the facts stated there was no legal ground upon which the magistrate was bound to hold that the constable was not acting in the execution of his duty at the time when the assault was committed.

HIGH COURT.
 Lord Justice-
 Clerk.
 Ld. Moncreiff.
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 cairney.

On 28th September 1896 George Fowler, junior, cab-proprietor, 67 High Street, North Berwick, was charged in the Police Court there with having, on 24th September 1896, assaulted John M'Petrie, police-constable, North Berwick, while in the execution of his duty.

The accused pleaded not guilty, but was convicted and fined 15s., with the alternative of five days' imprisonment.

He obtained a case. The case set forth:—On the evening of 24th September 1896, when the assault took place, an entertainment was being held in the Foresters' Hall in the High Street. The police, having reason to apprehend that there might be danger to the public from the carriage traffic at the close of the entertainment, unless it were regulated, the street being a narrow one, called on all the coach-hirers in the town, including the appellant, late on the afternoon of that day, and informed them that, in order to prevent obstruction and danger, the carriages would require to be kept in line, facing westward, one behind the other, and that the police would call each cab as it was wanted.

On driving up the appellant was asked by a policeman where he was going, and he stated he was going to the Foresters' Hall to take up a party attending the entertainment. The policeman informed him that he must take his place in rear of the cabs then waiting, and this, after some objection, the appellant did, but soon afterwards he took his cab out of the line and commenced to drive rapidly westwards towards the Foresters' Hall. M'Petrie, the constable assaulted, who was on duty in the immediate vicinity, called on him to stop, but he paid no attention and continued to drive rapidly. M'Petrie thereupon caught hold of the appellant's horse by the head, whereupon the appellant repeatedly struck M'Petrie with his whip on the face, hands, and body, continuing at the same time to urge his horse on.

It was admitted by the prosecutor that the police, in regulating the traffic upon the occasion in question, were not acting under any special written authority of the magistrates of the burgh granted for the occasion in question, but only in discharge of what they considered to be their ordinary duty, and further, that the magistrates had not made bye-laws or issued any notices in terms of sec. 385 of the Burgh Police Act of 1892. It was further conceded by the prosecutor that the appellant was not transgressing the rule of the road in driving westwards as before stated, and that M'Petrie was assaulted when enforcing compliance with the requisition of the police.

The question of law for the opinion of the Court was,—“Whether or not, in the absence of any magisterial order for the regulation of

traffic upon the occasion libelled, police-constable M'Petrie was acting in the execution of his duty at the time the assault was committed on him?" No. 5.

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Argued for the appellant;—The police had no power to regulate the traffic in the way they did unless they had the special authority of the magistrates, and as they had not such authority here, the constable M'Petrie was not engaged in the execution of his duty when he was assaulted. The conviction therefore could not stand.¹

The respondent was not called on.

LORD JUSTICE-CLERK.—This case is most unfortunately stated. The question is one which we should not be called on to answer. It is largely a question of fact.

It is quite a new proposition to me that when a street is likely to be blocked by traffic, or the traffic is likely to be difficult to manage from whatever cause, the police-constable on duty is not entitled in the execution of his duty to do his best to regulate the traffic. If he did not do this he would fail in his duty. This street in North Berwick is an instance where a policeman would fail grievously in his duty if he did not do his best to make the traffic work smoothly for the benefit of the community. That every good citizen would support the police in such a case is, I think, undoubted. The citizens may have their own views as to the discretion which the policeman exercises, but he is the responsible person on the spot, and they will do their best to support him and obey his directions. It may be possible to conceive cases where it might be the duty of citizens to pay no attention to his orders, but such cases must be very rare, and I give no opinion on the point.

Here what happened was in accordance with what is carried on in all such cases that I have ever heard of. A large assemblage was gathered at a particular hall, the door of which abutted on a very narrow street. It was a very sensible thing for the police to give notice to the cab-hirers beforehand as to how they proposed to regulate the traffic for that night, but the case is not different from what it would have been if on the night in question each person had been told what the police wished them to do with their cabs and carriages. This is done every day in large cities without any special regulation of the magistrates in the matter at all. As Lord Kincairney pointed out in the course of the argument, in the case of a private house the matter is regulated by the policeman on duty. I have no difficulty in holding that this policeman was acting in the exercise of his duty in giving the appellant the instructions which he did, and in insisting on their being carried out. The question, however, is one of fact and not of law, and I do not think we should answer it.

LORD MONCREIFF.—I entirely agree with your Lordship that this is not a question which we should be called on to answer at all. I do not understand it to be maintained that there are no circumstances in which a police-constable is not entitled to stop a carriage being driven rapidly along a

¹ H. M. Advocate v. Cook, April 17, 1856, 2 Irv. 416; Gunn v. Procurator-fiscal of Caithness-shire, Nov. 24, 1845, 2 Brown, 554; Codd v. Cabe, 1876, L. R., 1 Excheq. Div. 352.

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street in a town unless there happens to be in existence a bye-law in virtue of which he exercises that right. If that cannot be maintained—and it is not—there are, no doubt, cases where a policeman would be thoroughly justified in stopping a carriage. And then the question is, whether in the particular case a policeman is or is not acting in the exercise of his duty, and that depends upon the circumstances. It is a pure question of fact, which the Police Commissioners ought to have decided. And therefore I do not think we should answer the question.

But on the facts stated, I have no hesitation in holding that the policeman was acting within his duty. The police had short notice of this entertainment. The streets of the town are very narrow, and in the opinion of the police the only safe course for the conduct of the traffic was to make those carriages which were going to take up parties from the entertainment go in single line. Apparently this appellant fell into the line. He then became impatient and left his position and drove rapidly westward. It is plain that if the other carriages had done the same thing there would have been serious danger to the safety of the lieges. It cannot be said that a policeman who in these circumstances stops a driver is not acting in the exercise of his duty. If we were called upon to answer this question I should have said that the conviction is good.

LORD KINCAIRNEY.—I am of the same opinion. It is one of the primary duties of police-constables to keep order in the streets, so as to promote and preserve both the safety and the comfort of those who frequent the streets. If a number of carriages be brought together in a public place in a narrow street, and if a policeman thinks that it will promote the convenience or the safety of the people that they shall all draw up in one line, it cannot be said that a policeman who objects to a person going outside of this line, and asks him to take his position in it, is not doing his duty, whether with a regulation from the magistrates or not. Whether he be right or wrong in doing so, he is not the less under the protection of his duty. I do not consider what is the extent of the chief constable's power to regulate the traffic, but I think it is the right of all policemen to keep the streets clear, and to act in such emergencies as this.

In this case I do not think it is possible to say that the policeman was not acting in the exercise of his duty. Even if he went to excess, he was still under the protection afforded to an officer who is in the exercise of his duty.

THE COURT pronounced the following interlocutor:—"Dismiss the appeal: Find that upon the facts stated there is no legal ground upon which the magistrate was bound to hold that the constable M'Petrie was not acting in the execution of his duty at the time when the assault was committed, and decern: Find the respondent entitled to expenses, which modify to seven guineas."

JOHN W. CHESSEY, S.S.C.—JOHN MACKAY, S.S.C.—Agents.

JAMES MARTIN, Appellant.—*Cullen.*

PETER BEATTIE (Inspector of Poor of Barony Parish), Respondent.

—*Deas.*

No. 6.

Jan. 27, 1897.
Martin v.
Beattie.

Procedure—Case stated—Refusal of inferior Judge to state case—Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. cap. 62), secs. 3 and 5.—Section 3 of the Summary Prosecutions Appeals (Scotland) Act, 1875, enacts,—“On an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge's determination as erroneous in point of law, appeal thereagainst . . . by himself or his agent applying in writing within three days after such determination to the inferior Judge to state and sign a case, setting forth the facts and the grounds of such determination for the opinion thereon of a superior Court of law. . . .”

Section 4 empowers the inferior Judge to refuse an application to state a case should he consider the application frivolous, and requires him to give the applicant a certificate of refusal should the same be asked for.

Section 5 enacts,—“When an inferior Judge shall refuse to state and sign a special case, the appellant may, within three days of such refusal, apply by a written note to the superior Court to which the case would, if stated and signed, have to be transmitted under this Act, for an order on such Judge and on the other party to shew cause why a case should not be stated. . . .”

A Sheriff-substitute refused to state a case for appeal against a conviction on the ground (as stated in his certificate of refusal) that “the only question discussed and decided was . . . a pure question of fact.” The accused presented a note under section 5 for an order on the Sheriff-substitute to shew cause why a case should not be stated, and set forth as reasons for granting the order a number of propositions which involved questions of law, but the note did not state that any of these questions had been raised before or decided by the Sheriff-substitute, or that the Sheriff-substitute had been asked to state any questions of law for appeal.

The Court *refused* the note, on the ground that it did not appear either from the Sheriff's certificate or from the note that any questions of law had been raised before or decided by the Sheriff-substitute, or that he had been asked to state any question of law.

JAMES MARTIN, wirework labourer, Bridgeton, was charged before the Sheriff-substitute (Strachan) at Glasgow, upon a complaint at the instance of the Inspector of Poor of Barony Parish, setting forth that the accused had contravened section 18 of the Vaccination (Scotland) Act, 1863 (26 and 27 Vict. cap. 108), in respect that he had refused to allow his child to be vaccinated.

HIGH COURT.
Lord Justice-General.
Lord Adam.
Lord Kinnear.

The accused having been convicted, applied to the Sheriff-substitute to state and sign a special case for appeal to the High Court under section 3 of the Summary Prosecutions Appeals Act, 1875 (quoted in the rubric).

The Sheriff-substitute refused the application, his certificate of refusal bearing,—“I refused the said application, on the ground that no question of law had been raised in the said complaint. The only question discussed and decided was whether or not the respondent had declined or refused to allow his child to be vaccinated, and that being a pure question of fact, I declined to state a case, the application being, in my opinion, frivolous.”

Martin then presented a note under section 5 of the Act (quoted in the rubric) for an order upon the Sheriff-substitute to shew cause why a case should not be stated.

No. 6. The note set forth the nature of the complaint, and contained a number of averments regarding the evidence led at the trial. In particular, it was averred that it had been proved that the refusal to allow the child to be vaccinated had been made by the appellant's wife, on 10th November 1896, during his absence from home. The note then continued:—"The appellant prays for an order on the inferior Judge and the said Peter Beattie to shew cause why a case should not be stated in terms of the Summary Prosecutions Appeals (Scotland) Act, 1875, which order ought to be granted for the following reasons:—

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"(1) The refusal by the mother during the father's absence, and without his authority, of liberty to the vaccinator to vaccinate a child, cannot in law be held to be the refusal of the father within the meaning of section 18 of the Vaccination (Scotland) Act (26 and 27 Vict. cap. 108). The appellant never refused to allow his child to be vaccinated. He never got the opportunity to refuse."

Then followed several other reasons, some or all of which appeared to raise questions of law arising out of the facts stated in the note, but which it is unnecessary here to detail.

The note did not state that any of the questions raised by these reasons had been raised before or determined by the Sheriff-substitute, or that he had been asked to state any question of law.

Argued for the appellant;—The case raised questions of law. It had been held that the question, whether on the facts stated a person had committed a statutory offence, was one of law.¹ The note was therefore competent.

Argued for the respondent;—The certificate shewed that none of the questions of law which the appellant sought to raise had been raised before the Sheriff-substitute, or decided by him. In these circumstances, the Court would be slow to interfere with his discretion.²

LORD JUSTICE-GENERAL.—The statement contained in the note shews that various questions might have been raised and discussed which would be points of law susceptible of determination under the provisions about special cases under the Summary Prosecutions Appeals Act, 1875.

But when we look at the note which has been presented to the Court and intimated to the Sheriff-substitute, it is to be observed that the appellant does not say explicitly that those points were taken before the Sheriff-substitute or decided by him. On the contrary, it would rather appear, upon the narrative of the appellant, that now he thinks over the evidence and the conviction he conceives that there are good legal objections to it.

But then the Act of Parliament requires that there should be a decision of the Sheriff upon the questions raised if there is to be a case stated. Section 3 provides that "on an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge's determination as erroneous in point of law, appeal thereagainst," and accordingly the Act contemplates, not that there shall be afterwards discovered some flaw in the Sheriff's determination, but that he shall have decided a point of law which may be reconsidered by the Supreme Court. The Sheriff-

¹ Campbell v. Jameson, Feb. 23, 1877, 4 R. (Just. Cases) 17, 3 Couper, 391.

² Ross v. M'Leod, Dec. 15, 1891, 19 R. (Just. Cases) 18, 3 White, 63.

substitute says,—“The only question discussed and decided was whether or not the respondent had declined or refused to allow his child to be vaccinated, and that being a pure question of fact, I declined to state a case.”

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Now, I read that as meaning that no such question of law as Mr Cullen says may be raised—whether the father, although not personally implicated in his wife's refusal, could be convicted by reason solely of her refusal—was in fact mooted before the Sheriff.

Accordingly, the provisions for a special case are not applicable to the conditions of the argument which we must take from the Sheriff-substitute. If he had stated that a question of the criminal liability of the father for his wife's refusal was raised and decided, I should be prepared to order a special case. But he does not say that any such question was raised. It is to be observed that any person aggrieved by a conviction pronounced upon wrong grounds has always the old remedies open to him, and what we are now considering is whether he has also the form of appeal contained in the Act of 1875. I am of opinion that he has not.

LORD ADAM concurred.

LORD KINNEAR.—I am of the same opinion. I find, neither in the statement of the case nor in the certificate of the Sheriff-substitute, anything that imports that the questions which Mr Cullen desires to raise here were raised before the Sheriff-substitute or decided by him, or that he was asked to state a case in order to raise these questions. The application to him was in general terms.

THE COURT refused the note.

DAVID DOUGAL, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

CHARLES GEMMELL, Complainer.—*G. W. Burnet.*

ROBERT WEIR AND ANOTHER (Procurators-Fiscal for the Justices of the Peace of Lanarkshire), Respondents.—*Lees.*

No. 7.

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Gemmell v.
Weir.

*Conviction—Alternative charge and general conviction—Public-House—Breach of Certificate—Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. c. 35).—*A publican holding a certificate in terms of Schedule A of the Public-Houses Acts Amendment Act, 1862, was charged with a breach of his certificate “in so far as he did” during prohibited hours “permit and suffer drinking” in his premises by a person named, “and did sell and give out to him excisable liquors” during prohibited hours. He was convicted of the “contravention charged.”

He brought a suspension, pleading that the conviction ought to be suspended on the ground that it was a general conviction upon an alternative charge.

The Court *repelled* the plea, holding that the charge was not alternative, but was a charge of committing the same statutory offence in two ways.

Prentice v. Linton, Feb. 7, 1883, 5 Couper, 210, *followed*.

Murray v. M'Dougall, Feb. 7, 1883, 10 R. (Just. Cases) 42, 5 Couper, 215, *distinguished*.

CHARLES GEMMELL, spirit-dealer, Strathaven, Lanarkshire, was charged before the Justices of Peace for Lanarkshire at Hamilton upon a complaint which set forth “That Charles Gemmell, spirit-dealer, residing at Strathaven, in the parish of Avondale, and county of Lanark, who holds a certificate for the sale of excisable liquors in the

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Lord Justice-
Clerk.
Ld. Moncreiff.
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public-house known as the Green Rest, occupied by him, and situated in Main Street, Strathaven, did, in breach of the terms, provisions, and conditions of his said certificate, and contrary to the Acts 25 and 26 Victoria, chapter 35, section 2, and 50 and 51 Victoria, chapter 38, section 6—after ten of the clock on the night of 22d June 1896, and before eight of the clock on the morning of 23d June 1896—said hour of ten o'clock being that directed for closing by the licensing authority of the district in which said public-house is situated, acting under 'The Public Houses Hours of Closing (Scotland) Act, 1887,' permit and suffer drinking in said public-house by John Muir, tailor, Strathaven, and did sell and give out to him excisable liquors," &c., and prayed the Court to convict the accused of "the foresaid contravention."

The accused pleaded not guilty, but was, on 27th July 1896, convicted "of the contravention charged."

He brought a bill of suspension, in which he pleaded, *inter alia*;—“(2) The conviction being a general conviction which proceeds on a complaint which charges two separate offences, and failing to specify which of these is found to have been committed by the complainer, is illegal and unwarrantable, and ought to be suspended.”

Argued for the complainer;—The conviction was bad¹ because it did not specify whether the accused was found guilty of the offence of “permitting and suffering drinking” or “of selling and giving out liquor.” These offences were different.

Argued for the respondents;—The charge was not alternative. It was a charge of an offence which could be committed in different ways, which might be charged cumulatively.² In *Murray v. M'Dougall*,³ the different modes of contravening a certificate under the Public-Houses Acts were charged alternatively—“did keep open house or permit or suffer drinking”—while the conviction was general.

At advising,—

LORD MONCREIFF.—The complainer was charged with a breach of the terms of his certificate under the Public-Houses Acts in so far as he permitted and suffered drinking in the public-house kept by him, by a certain John Muir, tailor, Strathaven, and sold and gave out to him excisable liquors after 10 o'clock at night on the 22d June 1896, and before 8 o'clock in the morning of the following day.

The Justices of the Peace for the county of Lanark at Hamilton found the complainer guilty of the contravention charged, and decerned against him for a modified penalty of £2, with an alternative of imprisonment of ten days in default of payment within fourteen days of the conviction.

The only arguable ground of suspension is that contained in the second plea for the complainer, to the effect that two separate offences are charged, while the conviction is general and fails to specify which of the charges he is convicted of.

In the absence of authority I should at first impression have been disposed to think, looking to the structure of the certificate, that the offence with which the complainer was charged, and of which he was convicted,

¹ *Murray v. M'Dougall*, Feb. 7, 1883, 10 R. (Just. Cases) 42, 5 Couper, 215; *Muir v. Campbell*, Nov. 21, 1888, 16 R. (Just. Cases) 20, 2 White, 97.

² *Prentice v. Linton*, Feb. 7, 1883, 5 Couper, 210; *MacNaughton v. Maddever*, Nov. 12, 1884, 5 Couper, 509.

³ *Murray v. M'Dougall*, *vide supra*, note 1.

was trading during prohibited hours, which offence might be committed in more than one way. I should have thought that the alternatives mentioned in that portion of the certificate were simply different modes in which the offence might be committed, and that even if they were libelled alternatively a charge might be so framed that a conviction of the contravention charged would be enough, without specifying in the conviction which particular mode of contravention was held proved. I think that examples are to be found in indictments before the High Court of thus stating alternatively the modes in which a crime or offence is said to have been committed; and a conviction of guilty as libelled would in such cases undoubtedly be sufficient—*H. M. Advocate v. Watson*.¹

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But we have been referred to the case of *Murray v. M'Dougall*,² in which opinions were expressed to the contrary in an appeal before the High Court, and I at once admit that if the complaint in the present case were framed in the same manner as that in *Murray v. M'Dougall*,² we should be bound to follow that decision, which has never been overruled to my knowledge.

But all difficulty is removed by the fact that on the same day the same Judges sustained a conviction pronounced in circumstances the same as the present, and that decision is necessarily distinguishable from the case of *Murray v. M'Dougall*,² and rules this case. The case I refer to is the case of *Prentice v. Linton*.³

The difference between the two cases is simply this: In *Murray v. M'Dougall*² the different modes of contravening a certificate under the Public-Houses Acts were charged alternatively, "did keep open house or permit or suffer drinking," &c., while the conviction was general.

Again, in *Prentice v. Linton*,³ which was a prosecution under a different statute (but that is immaterial), the charge was cumulative, viz., that the accused kept a brothel and harboured prostitutes. A general conviction was sustained without hesitation.

Now, here the complaint charges the accused with breach of his certificate, committed by suffering John Muir to drink in the public-house kept by the accused, and (not "or") on the same occasion selling and giving out excisable liquors to the said John Muir. The complaint prays the Magistrate to convict the said John Gemmell of "the foresaid contravention." The Justices "convict the accused John Gemmell of the contravention charged."

Now, I read that conviction as equivalent to a verdict of "guilty as libelled," that is, of contravening the conditions of the certificate by suffering drinking in the licensed premises, and giving out liquors during prohibited hours. An offence under the statute would no doubt have been committed either by suffering drinking or by giving out liquor, but what is charged, and held proved, is doing both.

I am therefore of opinion that the second plea in law for the complainer is bad, and the other grounds of suspension being plainly untenable, the conviction should be sustained.

LORD LOW.—The complainer in this case is a spirit-dealer, and he was charged with a breach of the conditions of his certificate.

¹ Dec. 23, 1875, 3 Couper, 214. ² 10 R. (Just. Cases) 42, 5 Couper, 215.

³ Feb. 7, 1883, 5 Couper, 210.

No. 7. The complaint ran thus—"That Charles Gemmell . . . did, in
 Jan. 28, 1897. breach of the terms, provisions, and conditions of his said certificate,
 Gemmell v. . . . after ten of the clock on the night of 22d June 1896, and before
 Weir. eight of the clock on the morning of 23d June 1896, . . . permit and
 suffer drinking in said public-house by John Muir, tailor, Strathaven, and
 did sell and give out to him excisable liquors."

The Justices convicted the complainer "of the contravention charged," and it was contended for him that two offences were charged, and therefore a general conviction was bad.

The complainer's certificate was in terms of Schedule A of the Public-Houses Amendment Act, 1862.

The certificate authorises the sale of victuals and excisable liquors on certain terms and conditions. The conditions are that the licensee shall not do certain things. Sometimes the thing which is prohibited can only be done in one way, sometimes it can be done in several ways. For example, one condition is that the licensee "do not use in selling the same" (*i.e.*, victuals or liquors) "any weight or measure which is not of the legal imperial standard." That is an example of a condition which can only be contravened in one way. Again, the licensee is prohibited from selling excisable liquor to persons to whom it is expedient in the public interest that such liquors should not be sold. There are two classes of such persons, and therefore the condition is expressed thus—"And do not sell or supply excisable liquors to girls or boys apparently under fourteen years of age, or to persons who are in a state of intoxication." That is an example of a condition which can be contravened in two ways.

It is to the latter class of conditions that the condition which the complainer here was charged with contravening belonged. It is expressed thus—"And do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out any liquors, before eight of the clock in the morning, or after such hour of the night of any day not earlier than ten, and not later than eleven, as the licensing authority may direct."

Now, that is a condition that the licensee shall not do business within certain hours, and the condition may be contravened in three different ways. In this case the complainer was charged with having contravened the condition in two out of three possible ways, and the Justices held that the contravention had been proved. I am of opinion that there was no incompetency in such a conviction.

The case appears to me to be indistinguishable in principle from the case of *Prentice v. Linton*.¹ That was the case of a conviction under the 258th section of the Edinburgh Municipal and Police Act, 1879. That section enacts that "every person who shall keep or manage any brothel, or who shall knowingly harbour prostitutes for the purpose of prostitution, or shall aid or assist or take part in the management of any brothel," shall be liable to a penalty or to imprisonment. The charge against the accused was that he "did keep and manage a brothel in High Street, Edinburgh, and did knowingly harbour in the said brothel, for the purpose of prostitution, the pros-

¹ 5 Couper, 210.

titutes after mentioned." The conviction found the complaint proved, and one penalty was imposed. Upon a bill of suspension it was argued that two offences were charged, and that therefore a general conviction was bad, but it was held that the conviction was competent.

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The complainer relied upon the case of *Murray v. M'Dougall*.¹ That was a case in which the accused was charged with a contravention of the same condition of the certificate as we are dealing with in this case. The complaint charged the accused with being guilty of an offence within the meaning of the Public-Houses Acts, in so far as he did within the prohibited hours "keep open house, or permit or suffer drinking on the premises belonging thereto." The Justices found the accused guilty of the contravention charged, and the conviction was quashed on the ground that the charge being alternative, a general conviction was not competent.

The same view was taken in the precisely similar case of *Duncan v. Laing*.² The ground of judgment was that the charge as laid was plainly alternative. Keeping open house and permitting drinking are two different things. A man may keep open house and yet may not permit drinking, and *vice versa*, and the charge was that the accused had committed an offence by doing one or other of these things, not that he had contravened a condition of his certificate by doing both of them. The distinction appears to me to be one of substance, and accordingly I am of opinion that the present case is not ruled by *Murray v. M'Dougall*,¹ but falls within the principle applied in *Prentice v. Linton*.³

LORD JUSTICE-CLERK.—I entirely concur in all that your Lordships have said, and think it should be noted at the outset that this offence has all along been treated as one contravention of the certificate. The complaint sets forth that it is one contravention which is charged, and the case went to trial on that footing without any objection being stated by the accused. I think the charge is that the accused contravened his certificate in two particulars, which, whether together or separately, constitute one offence. It was never intended that if a man was charged with these two acts as occurring at one time he should be visited with two penalties as for two separate contraventions; on the contrary, I think the intention of the statute was that either act should constitute a breach of the certificate, but that if the magistrate should find that a contravention had been committed in both particulars, that fact might be taken into consideration in fixing the amount of the penalty to be imposed.

I agree entirely with your Lordships that if the case of *Prentice v. Linton*³ was well decided, it is a precedent applicable to the present case, because there a general conviction on a complaint alleging two separate offences, each sufficient for a conviction, was sustained, although treated in the conviction as one contravention of the statute. As regards the case of *Murray v. M'Dougall*,¹ the verdict there was plainly void from uncertainty, because no one could tell from it what offence had been committed. The statement there was, "you either did this thing or that thing," and the

¹ 10 R. (Just. Cases) 42.

² Nov. 21, 1888, 16 R. (Just. Cases) 20.

³ 5 Couper, 210.

- No. 7. conviction was bad, because the accused could not be convicted of both things, they being stated alternatively, and no one could tell which he had been convicted of.
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The conviction must be sustained.

THE COURT refused the bill.

SIMPSON & MARWICK, W.S.—RONALD & RITCHIE, S.S.C.—Agents.

- No. 8. JOHN THOMAS CAMPBELL, Appellant.—*Johnston*—A. S. D. Thomson.
GEORGE NEILSON (Procurator-Fiscal in the Glasgow Police Court).
Feb. 6, 1897. Campbell v. Neilson.
—Respondent.—*Shaw*—*Lees*.

Public-House—Certificate—Transfer—Act 9 Geo. IV. cap. 58, sec. 19.—Section 19 of the Act 9 Geo. IV. enacted,—“That if any person duly authorised to keep a common inn, alehouse, or victualling house . . . shall remove from or yield up the possession of the house and premises for which such certificate shall have been granted, it shall be lawful for two or more Justices of the Peace or Magistrates respectively as aforesaid, sitting publicly in their ordinary place of meeting, to grant to any new tenant or occupier of such house and premises upon such removal, a transfer of the certificate to keep such house and premises as a common inn, alehouse, or victualling house as before such removal, until the next general or district meeting to be held under the authority of this Act.”

A transfer of a certificate running from May 1896 to May 1897 was granted in August 1896 on condition that it “be in force only . . . until the next general meeting to be held for granting such certificates, and be duly presented for entry at the collector’s office of excise, Glasgow, within six days from this date, otherwise the same to be null and void to all intents and purposes.” This latter condition was not complied with, but the transferee carried on the business of publican. Thereafter the magistrates at the general meeting in October 1896 refused to renew the transfer certificate. The original holder then resumed possession of the premises, and was afterwards convicted of trafficking in excisable liquors without a certificate.

In an appeal the original holder contended that the transfer certificate being merely temporary and conditional, and the condition not having been purified, the original certificate remained in force.

Held that he had been rightly convicted, the transfer having absolutely divested him of all right of trafficking under the original certificate.

Miller v. Linton, 15 R. (Just. Cases) 37, 1 White, 583, *commented on*.

HIGH COURT. JOHN THOMAS CAMPBELL was charged in the City Police Court Lord Justice-General. Lord Adam. Lord Kinnear. Glasgow, at the instance of the Procurator-Fiscal, with having on 14th November 1896 trafficked in excisable liquors, in premises at No. 11 Back Wynd, Glasgow, occupied or possessed by him or by Bernard Campbell, 107 Ingram Street, Glasgow, without having obtained a certificate in that behalf, in terms of the Public-Houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. c. 35).

He pleaded not guilty, but was convicted and fined ten shillings.

He obtained a case. The facts stated were:—“(1) Upon 14th April 1896 the appellant obtained from the Magistrates of Glasgow, at their general half-yearly meeting for granting and renewing publicans’ certificates, a renewal of his then existing public-house certificate for said premises situated at No. 11 Back Wynd, Glasgow, said renewed certificate to be in force from 15th May 1896 until 15th May 1897.

“(2) Upon 11th August 1896 Bernard Campbell, the appellant’s father, by arrangement with the appellant, applied for a transfer of the

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certificate, till then in the name of the appellant, and produced with his application the said certificate indorsed for that purpose by the appellant, that being the form of consent in use to be accepted by the magistrates. Upon 19th August 1896 the said Bernard Campbell obtained from a full bench of the Magistrates of Glasgow, in virtue of the powers contained in sections 19 and 20 of the Act 9 George IV. cap. 58, a transfer of appellant's said certificate for the premises in Back Wynd aforesaid, which transfer certificate bears:— 'This certificate to be in force only until the third Tuesday of October next, being the next general meeting to be held for granting such certificates, and to be duly presented for entry at the collector's office of excise, Glasgow, within six days from this date, otherwise the same to be null and void to all intents and purposes.'

"(3) The said transfer certificate was uplifted by the said Bernard Campbell on 24th August 1896, and in virtue thereof, and as in possession of the said premises he sold excisable liquors thereat till 20th October following, when his transfer certificate expired. He did not, however, present the said transfer certificate for entry, nor was it entered at the collector's office of excise, Glasgow, within the above-mentioned period of six days; but upon the sixteenth day of the month of September 1896 the appellant by a minute on the back of his excise license requested the excise authorities to transfer the same to the said Bernard Campbell, to whom he thereby 'consigned' his whole right and interest, which transfer the supervisor and collector of excise on the same date entered and minuted on the back of the said license.

"(4) Upon 5th October 1896 the said Bernard Campbell applied to the Magistrates of Glasgow for a renewal of the transferred certificate, which renewal was refused by a full bench of the said magistrates at their general half-yearly meeting for granting publicans' certificates on 20th October 1896.

"(5) The appellant, founding upon the original renewal certificate, and claiming that he had been reinvested therein, after notice sent by him to the Chief Constable of Glasgow, reopened the premises at No. 11 Back Wynd, Glasgow, and upon 14th November 1896, being the date libelled, and in the premises for which the said certificate was granted, trafficked in and sold excisable liquors."

The following was the question of law:—"Was the appellant, in view of the facts stated, on 14th November 1896, the date libelled, the holder of a certificate for the sale of excisable liquors within the meaning of the Public-Houses Acts, at No. 11 Back Wynd, Glasgow?"

Argued for the appellant;—The transfer of the certificate was conditional upon the transferee's presenting it for entry at the excise office within six days. As this condition was never purified, the transfer became null and void. The result was that the appellant's original certificate, which had thus never been effectually transferred, revived, and he was quite entitled to traffic under it. His radical right could not be annulled by a transfer which was merely conditional and temporary.¹ In *Miller's case*,² where it was held that there was no revival of an original certificate, the transfer was not voided as here, but came into force, and moreover the original holder could not carry on the business, because the transferee had forfeited and put an end to the certificate.

¹ *Hazell v. Middleton*, June 21, 1881, 45 Justice of the Peace Reports, 540.

² *Miller v. Linton*, Feb. 10, 1888, 15 R. (Just. Cases), 37, 1 White, 583.

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Argued for the respondent;—The appellant had resigned his certificate, and was absolutely divested of all right to use it.¹ The fact that the transferee had rendered the transfer null and void by his failure to comply with the condition of getting it could not revive in the appellant a right which was gone from him for ever.

At advising,—

LORD JUSTICE-GENERAL.—In my opinion the appellant was not at the date libelled in the complaint the holder of a certificate for the sale of excisable liquors.

The argument for the appellant begins with the proposition that the transfer of the certificate from him to his father became null and void so soon as six days had expired without the presentation of the transfer at the collector's office of excise. This, it is said, is a provision of nullity forming a statutory condition of the transfer which no actings of the excise officer could waive. Thus far I am disposed to agree with the appellant.

But it does not follow that when the right of the transferee came to an end, the right of the original holder revived. The decision in the case of *Miller*,² although it is not exactly in point, goes a long way against the theory of the appellant. There it was held that on the expiry of the period of the transfer and the refusal of a renewal by the Justices, there was no revival of the original certificate. But then, if the sound doctrine were that a certificate retains its original force, except in so far as the right of the transferee exists and prevails against it, the decision in *Miller*² must have been the opposite of what it was.

The true ground of judgment here, as in *Miller*,² is to be found in the terms of the section of the Home Drummond Act under which transfers are granted. The first case dealt with in that section is where the holder dies. Then comes the case (which we have before us) where the original certificate holder does not die but “removes from or yields up the possession” of the premises for which the certificate was granted. This, then, is the basis and condition upon which the magistrates transfer the certificate of a living man—that he has removed from or yielded up possession of the premises to which the certificate applied; and the transfer now before us bears this on its face. This being so, it is the transferee alone who can lawfully carry on business in the premises under the certificate. The transfer may become null and void, as here, or the certificate may not be renewed, as in *Miller*,² but nothing that can happen to the transfer or transferee will ever revive the right of a man who, *ex hypothesi*, has removed or yielded up possession of the premises to which the certificate relates. He can resume business only on a new certificate.

LORD ADAM.—I am of the same opinion. The appellant in this case held a public-house certificate authorising him to sell liquors in a particular shop for a year from 15th May 1896. He, by arrangement with his father Bernard Campbell, agreed that the latter should take his place so far as the law allowed him under this certificate, and according to the usual form he

¹ *Clift v. Portobello Pier Co.*, Feb. 10, 1877, 4 R. 462; *Miller v. Linton*, *supra*, p. 29, note 2.

² 15 R. (Just. Cases) 37, 1 White, 583.

applied to the Magistrates of Glasgow under the authority of a particular Act to have this certificate transferred to his father. Before considering this application the magistrates were satisfied of the appellant's consent to such transfer by the usual evidence, and they did in fact transfer this certificate to the father. The latter, whether rightly or wrongly, carried on the shop, and continued to sell liquor therein until the month of October 1896.

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The first question is, what is the effect of the transfer, not by the holder of the certificate himself, but by the magistrates in terms of a statute to that effect, from the son to the father. I agree with your Lordship, and with the reasoning in *Miller's*¹ case, that the effect of that was to divest the original holder of the certificate of any right in it, and that took place from the time when the magistrates transferred the certificate. There could not be two holders of the certificate. The transfer was not for a limited time only. It was an out-and-out transfer, and thereafter the present appellant was divested of any right or title to the certificate.

But the transfer certificate bore, in the statutory form, that it must be presented at the collector's office of excise, Glasgow, within six days from the date of granting, and that otherwise it should be null and void. It is said that the effect of this was, that as Bernard Campbell, the transferee, had not applied to the excise in Glasgow for entry of his certificate within six days, the whole thing became null and void, and the whole proceeding was at an end. It may be that the effect is, that if a transferee, after having obtained a transfer from the magistrates, does not apply to have it entered within the six days, *quoad* him it puts an end to the proceeding. The matter is entirely within his own power. No doubt the condition is introduced for this purpose, that in the interests of the excise the transferee shall be compelled to come and get the licence without undue delay. But I do not think this has the effect of reinstating the original holder in his right to the certificate, in which, in my view, after it had once been transferred by the magistrates, he was divested of all right, title, or interest. The result of the contention made to us for the appellant would be that the father, not having applied for this certificate within the six days, although he carried on the traffic from this date, was all the time shebeening. But I think what I have said is the true view, namely, that the transfer granted by the magistrates to the transferee has the effect of divesting the original holder of all title and interest, and, that being so, nothing afterwards taking place can reinvest him with any right.

I am therefore of opinion that when the transferee was refused a licence the appellant had no right whatever to commence trafficking as if he had never transferred it.

LORD KINNEAR.—I am of the same opinion, and for the same reasons. I think the right of the original holder of the certificate is absolutely determined when he has removed from his premises and has placed the assignee of his business in a position to apply to the magistrates for a transfer of the certificate, which the magistrates have granted. After that it appears to me that no right remains vested in the original holder.

It is of no consequence, in my opinion, whether the transferee may or

¹ 15 R. (Just. Cases) 37, 1 White, 583.

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may not have obtained a transfer effectual to him by reason of his complying or failing to comply with the statutory conditions on which a transfer is granted. His breach of these conditions can never reinstate the transferor in a right which, according to the view of your Lordships in which I concur, has been absolutely determined.

THE COURT answered the question of law in the negative, and dismissed the appeal.

JAMES PURVES, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

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HUGH RICHARDSON, Respondent (Appellant).—*Abel*.
SIR JAMES RAMSAY GIBSON MAITLAND, Baronet, Complainer
(Respondent).—*Cooper*.

Poaching—Game reserved to landlord—Verbal authority of tenant to kill rabbits—Ground Game Act, 1880 (43 and 44 Vict. c. 47), sec. 1, subsec. 1—Day Trespass Act, 1832 (2 and 3 Will. IV. c. 68).—The Ground Game Act, 1880, which by sec. 1 confers on the occupiers of land the right to kill ground game, by subsec. (1) imposes this limitation,—“The occupier shall kill and take ground game only by himself, or by persons duly authorised by him in writing.”

The tenant under a lease which reserved to the landlord the game, including the rabbits, hired A, who was not a servant on the farm, to kill rabbits, but did not grant written authority to A to do so. A having killed rabbits under this employment was convicted of a contravention of the Day Trespass Act, 1832.

In an appeal A contended that at common law a tenant had right to employ a person to kill rabbits as vermin, and that a person in taking such employment was not bound to inquire into the terms of the lease.

Held that, as the tenant had no right to kill rabbits except under the Ground Game Act, and as A had no written authority, the conviction was valid.

Jack v. Nairne, 14 R. (Just. Cases) 20, 1 White, 350, and *Calder v. Robertson*, 6 R. (Just. Cases) 3, 4 Couper, 131, distinguished. *Black v. Bradshaw*, 3 R. (Just. Cases) 18, 3 Couper, 209, and *Niven v. Renton*, 15 R. (Just. Cases) 42, 1 White, 578, commented on.

HIGH COURT.
Lord Justice-
General.
Lord Adam.
Lord Kinnear.

HUGH RICHARDSON, miner, Muir Cottage, Bannockburn, was charged, in the Sheriff Court at Stirling, upon a complaint at the instance of Sir James Ramsay Gibson Maitland, Bart., which set forth that the accused did, on 29th October 1896, in the daytime, commit a trespass, by entering or being upon the farm of Back o' Muir, on the estate of Sauchie, belonging to the complainer, without leave of the proprietor, in search or pursuit of game, or of conies, contrary to the Act 2 and 3 William IV. chapter 68, section 1.

The accused was convicted by the Sheriff-substitute (Buntine), who, at his request, stated a case for appeal to the High Court.

The case stated,—“The following facts were proved:—That on the day in question Hugh Richardson was found by David Strachan, gamekeeper, on the farm of Back o' Muir, of which Sir James Ramsay Gibson Maitland is proprietor, and Alexander Christie, farmer, is tenant, with a gun, and with the object and purpose of killing rabbits. It was further proved that the game on the farm, including the rabbits, were reserved to the landlord under the present lease of the farm, which is current till Martinmas 1898. That Richardson is a miner to trade, and resides at Muir Cottage, near the farm. That he is not a person coming within the description of the persons specified

in section 1, subsection 1 (b) of the Ground Game Act, 1880.* That he had no written authority from Mr Christie to kill rabbits, but he had been instructed by him verbally to kill the rabbits on his farm, and that he had done so for the last ten years, and that Mr Christie had provided him with a gun for that purpose, and had paid him about £2 a year for doing so." No. 9.
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The question stated by the Sheriff-substitute was,—“Whether, upon the facts stated above, I was justified in holding that the verbal instructions of Mr Christie did not protect Hugh Richardson against a prosecution under the Day Poaching Act, and in convicting him of the contravention charged?”

Argued for the appellant;—The Sheriff-substitute had convicted him because he had no written authority entitling him to kill rabbits. But at common law this was not necessary, for a farmer had a common law right to kill rabbits as vermin, either by himself or by anyone whom he might authorise to do so.¹ This right had not been taken away, either by the Day Trespass Act or by the Ground Game Act. The proposition was sound both in the case of an ordinary lease² and where (as here) the rabbits were expressly reserved to the landlord.³ A person employed by a farmer to kill rabbits was not bound to look at the lease in order to satisfy himself that the rabbits were not reserved.²

Argued for the respondent;—The rabbits were expressly reserved by the lease to the landlord, and the farmer's only right depended upon the Ground Game Act, 1880. That distinguished the case from *Jack v. Nairne*.³ *Calder v. Robertson*⁴ was not in point, because the ratio of the decision was that a farm servant was justified in obeying his master's orders. Here the appellant was not a farm servant, and his only right to shoot rabbits was under the Ground Game Act, and depended on his having written authority to do so.⁵

At advising,—

LORD ADAM.—In this case the appellant Hugh Richardson was convicted under the Day Trespass Act of having, on the 29th October 1896, committed a trespass by entering or being upon the respondent's farm of Back o' Muir, without his leave, in search or pursuit of game or conies.

* The Ground Game Act, 1880, sec. 1, enacts,—“Every occupier of land shall have as an incident to and inseparable from his occupation of the land the right to kill and take ground game thereon . . . Provided that the right conferred on the occupier by this section shall be subject to the following limitations:—(1) The occupier shall kill and take ground game only by himself, or by persons duly authorised by him in writing; (a) the occupier himself and one other person authorised in writing by such occupier shall be the only persons entitled under this Act to kill ground game with firearms; (b) no person shall be authorised by the occupier to kill or take ground game except members of his household resident on the land in his occupation, persons in his ordinary service on such land, and any one other person *bona fide* employed by him for reward in the taking and destruction of ground game.”

¹ *Moncrieff v. Arnott*, Feb. 13, 1828, 6 S. 530.

² *Jack v. Nairne*, Feb. 18, 1887, 14 R. (Just. Cases) 20, 1 White, 350.

³ *Smellie v. Lockhart*, June 1, 1844, 2 Broun, 194; *Calder v. Robertson*, Nov. 6, 1878, 6 R. (Just. Cases) 3, 4 Couper, 131.

⁴ *Calder v. Robertson*, *supra*, note 3.

⁵ *Black v. Bradshaw*, Dec. 16, 1875, 3 R. (Just. Cases) 18, 3 Couper, 209; *Niven v. Renton*, Feb. 10, 1888, 15 R. (Just. Cases) 42, 1 White, 578.

No. 9. From the facts found by the Sheriff it appears that the appellant, on the occasion in question, did enter and was upon the farm in question in pursuit of rabbits. His defence was that he was duly authorised to do so by Mr Christie, the tenant and occupant of the farm.

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It appeared that the appellant had no written authority from Mr Christie to kill rabbits, but had been instructed by him verbally to do so. Thereupon the Sheriff held he was not a person coming within the description of the persons specified in section 1, subsection 1 (b), of the Ground Game Act, 1880, that therefore he was not duly authorised to shoot rabbits, and convicted him of the trespass charged.

That the appellant was not a person duly authorised to shoot ground game, *i.e.*, hares and rabbits, under the Ground Game Act is sufficiently clear, but it was maintained to us that the fact that the appellant was on the ground with the permission of the tenant was sufficient to exempt him from liability to conviction for trespass under the Day Trespass Act.

In support of that proposition we were referred to the case of *Jack v. Nairne*.¹ In that case the tenant, who had the right of killing rabbits, instructed one of his farm servants to kill rabbits on his farm. He proceeded to do so, and was convicted for trespass. The Court quashed the conviction on the ground that the Ground Game Act did not interfere with the tenant's common law right of killing rabbits, and that a servant proceeding to kill rabbits on his verbal instructions could not be convicted of trespass.

In this case, however, it is found by the Sheriff that the game on the farm, including rabbits, is reserved to the landlord under the current lease. So that Mr Christie, the tenant, had no right to kill ground game on his farm other than that conferred by the Ground Game Act, and subject to the limitations therein contained, one of which is that he shall kill and take ground game only by himself or by persons duly authorised by him in writing, which the appellant was not.

In the case of *Calder v. Robertson*² it was held that the servant of a tenant farmer, who had shot rabbits on the farm by his master's instructions, was not guilty of a trespass in pursuit of game under the Day Trespass Act, although by the terms of the lease the rabbits were reserved to the landlord.

It will be observed, however, that that was the case of a farm servant who was in the ordinary service of the tenant, and who, the Court thought, was justified in obeying his orders without inquiry. I do not think that case rules the present case, in which, as the Sheriff has found, the appellant is a miner to trade, does not reside on the farm, and came upon it only for the purpose of killing rabbits. He was not obeying his master's instructions, and came there for hire.

In the case of *Black v. Bradshaw*,³ it was held that a person who resided with his sister on a farm of which she was tenant, and who assisted her in the management of it, without remuneration except his board, was guilty of trespass within the meaning of the Day Trespass Act in illegal pursuit of game. No doubt that was a case in which the person was in pursuit of game and not of rabbits merely, but it establishes the proposition that the

¹ 14 R. (Just. Cases) 20, 1 White, 350.

² 6 R. (Just. Cases) 3, 4 Couper, 131.

³ 3 R. (Just. Cases) 18, 3 Couper, 209.

permission or authority of the tenant to a person to be upon lands does not exempt him from liability to a conviction for trespass if he is there for an illegal object, as indeed had been decided in previous cases.

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In the case of *Niven v. Renton*¹ an agricultural tenant had given permission in writing for a day's shooting over his farm to a person who was neither a member of his household, in his employment, nor shooting for remuneration. He was found shooting on the farm and convicted of trespass. Upon appeal the first question put to the Court was whether the appellant, not being one of the persons defined in subsection (b) of subsection (1) of section 1 of the Ground Game Act, could be authorised by the tenant to kill ground game. The Court answered the question in the negative.

The second question was whether the appellant, in the circumstances stated, committed a trespass within the meaning of the Day Trespass Act. The Court answered this question in the affirmative.

The result appears to me to be that since the passing of the Ground Game Act the tenant of a farm whose sole right to kill ground game—that is, hares and rabbits—is derived from that Act, cannot validly authorise anyone to kill such game otherwise than in the way and under the limitations specified in that Act, and that anyone found on land shooting such ground game without having been so validly authorised is liable to conviction for trespass. In this case the tenant Mr Christie's right to kill ground game was solely derived from the Act, and the appellant was not duly authorised by him to kill ground game in respect that he was not authorised in writing. It is true that the authority given was only to kill rabbits, but the Act makes no distinction between hares and rabbits—in the sense of the Act rabbits are as much ground game as hares. I am therefore of opinion that the appellant was liable to conviction for trespass, and was rightly convicted, and that the appeal should be refused.

LORD KINNEAR.—I am of the same opinion.

In the course of the argument a great many points were discussed, some of them depending on very fine distinctions, which do not appear to me to be raised by the case. It appears to me to be a very simple case indeed, and I think the Sheriff has disposed of it on right grounds.

The offence constituted by the statute is “being or trespassing upon lands without the leave of the proprietor in search or pursuit of game or conies,” and the facts constituting that offence are held by the Sheriff to have been proved, inasmuch as he finds that the appellant on a certain day was found on a certain farm belonging to Sir James Gibson Maitland, with a gun, and with the purpose of killing rabbits. The only defence maintained by the appellant is that he was there with the verbal authority of Mr Christie, who was tenant of the farm. Mr Christie's sole right to grant that authority is admitted to be the Ground Game Act, 1880. Now, this Act makes it a condition of granting a valid authority to kill ground game, including both hares and rabbits, that the authority should be in writing, and therefore the verbal authority of the tenant is obviously no defence at all. I agree with the Sheriff, and for the reasons which Lord Adam has stated I think that the appellant was rightly convicted.

¹ 15 R. (Just. Cases) 42, 1 White, 578.

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Taking this view of the case, I do not think it necessary to inquire what are the common law rights of an agricultural tenant where the right to kill rabbits has not been reserved to the landlord, because it is part of the case stated to us that the tenant here had no such common law right, inasmuch as the right to kill rabbits was reserved in the lease to the landlord. Nor do I think it necessary to consider how far a farm servant may be justified by his master's order in doing things which the master has no power at law to authorise. That question is not raised, since the appellant does not fall within the class of farm servants at all.

On the whole matter I agree in the conclusion reached by Lord Adam, and for the reasons which he has given.

The LORD JUSTICE-GENERAL concurred.

THE COURT answered the question in the case in the affirmative, and dismissed the appeal.

WISHART & SANDERSON, W.S.—KEITH R. MAITLAND, W.S.—Agents.

No. 10.

Feb. 6, 1897.
Cormack v.
Mackenzie.

DAVID CORMACK, Complainer.—*A. S. D. Thomson.*
JOHN ALEXANDER MACKENZIE (Burgh Prosecutor of Lockerbie),
Respondent.—*John Wilson.*

Complaint—Relevancy—Clerical error in citation of section of statute—Penalty—Public-House—The Public-Houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. c. 35), section 2, enacted,—“ . . . and the penalties and forfeitures provided by the recited Acts or either of them for breaches of or offences against the terms, provisions, and conditions of certificates, shall apply to breaches of or offences against the terms, provisions, and conditions of certificates granted under this Act.”

One of the recited Acts was the Act 9 Geo. IV. c. 58 (Home Drummond Act), sec. 21 of which sets forth certain penalties.

A licensed grocer was convicted upon a complaint which set forth that the accused had been “guilty of an offence against the laws for the regulation of public-houses in Scotland, particularly the Public-Houses Acts Amendment (Scotland) Act, 1862, section 2 thereof, and the Act 9 Geo. IV. cap. 58, sec. 21 thereof, in so far as” he did on a certain day within his shop, and in breach of his certificate, sell whisky to a drunk man, “whereby the said accused is liable” in certain penalties specified, which were the penalties provided by the Act 9 Geo. IV. c. 58, sec. 21. He brought a suspension, in which he alleged that the figure 1 in the reference to section 21 of the Act 9 Geo. IV. cap. 58, had been added to the complaint after it was served upon him.

The Court *refused* the bill, holding that as the penalties were specifically set forth in the complaint it was unnecessary to refer to the Act 9 Geo. IV. cap. 58, and consequently that the error in the citation of that Act, assuming that there was an error, did not invalidate the conviction.

HIGH COURT.
Lord Justice-
General.
Lord Adam.
Lord Kinnear.

DAVID CORMACK, grocer, High Street, Lockerbie, was convicted upon a complaint, at the instance of the Burgh Prosecutor of Lockerbie, setting forth,—“That David Cormack, grocer, residing in High Street, of the said burgh of Lockerbie, who holds a certificate for the sale of excisable liquors at High Street, Lockerbie aforesaid, has been guilty of an offence against the laws for the Regulation of Public-Houses in Scotland, particularly the Public-Houses Acts Amendment (Scotland) Act, 1862, section 2 thereof, and the Act 9 George IV. chapter 58, section 21 thereof—in so far as on Saturday, the 5th day of De-

cember 1896, between the hours of four and five o'clock afternoon, No. 10. he, the said David Cormack, did within his shop occupied by him in High Street aforesaid, and in respect of which he holds said certificate, and in breach of the conditions of said certificate, sell or supply a flask bottle containing two gills or thereby of whisky or other excisable liquor, and a sample bottle containing one glass or thereby of whisky or other excisable liquor, to" R. M., "while he, the said" R. M., "was in a state of intoxication, and such offence is the first offence, whereby the said accused is liable to a penalty of £5 sterling, with the expenses of conviction, to be ascertained upon conviction, and in default of payment within fourteen days next after conviction, to imprisonment for a period not exceeding one calendar month; and further, to have his said certificate declared forfeited and void and null."

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Cormack brought a suspension, in which he averred, *inter alia*,—"The complainer has discovered since the conviction that the principal complaint is vitiated in *essentialibus*. The figure '1' of the section '21' of 9 George IV. chapter 58, has been, he avers, added since the complaint was served, and he believes also since the conviction and sentence were pronounced, and the addition, which is manifestly in a different hand from that by which the rest of the complaint has been written, is unauthenticated. He further avers that the principal complaint as thus altered is disconform to the copy complaint served upon him, the principal complaint having the words '9 George IV. chapter 58, section 21,' while the service copy has the words '9 George IV. chapter 58, section 2.'"

He pleaded;—1. The conviction and sentence complained of are null and void, and ought to be suspended in respect (1) the complaint is irrelevant and misleading; (2) the principal complaint is vitiated in *essentialibus*; and (3) the copy of the complaint served upon the complainer is disconform to the principal complaint.

Argued for the complainer;—1. The complaint was irrelevant without the figure 1 in the section, because there was no proper specification of the particular section of the Act of 9 Geo. IV. c. 58, which the complainer was said to have contravened.¹ 2. The service copy was not a copy of any existing complaint.²

Argued for the respondent;—1. The alteration was immaterial, because the section was not necessary to the complaint. The complaint stated specifically that the penalty was £5. 2. A mere clerical error in a complaint was not a ground of suspension, unless the accused could shew that he had suffered prejudice thereby.³

At advising,—

LORD JUSTICE-GENERAL.—Apart from the alleged blunder in the citation of a section, this complaint is not well drawn. It is quite plain that selling whisky by a licensed grocer to a drunk man is a contravention of the 2d section of the Act of 1862, that being the enactment which subjects the sale of liquor by a grocer to the conditions specified in the relative schedule, and makes a violation of any of those conditions an offence. Instead, however, of simply libelling the offence as an offence against the Act of

¹ Buchanan v. Wilson, July 16, 1896, 23 R. (Just. Cases) 86.

² Stewart v. Lang, Nov. 22, 1894, 22 R. (Just. Cases) 9, 1 Adam, 493.

³ Armstrong v. Stevenson, Dec. 12, 1892, 22 R. (Just. Cases) 21, 3 White, 373; Dunsmore v. Threshie, Nov. 3, 1896, to be reported, *infra*.

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1862, the complaint goes on to describe it as an offence also against the Home Drummond Act. The only bearing which the Home Drummond Act has on the matter is that the Act of 1862 says that the new offences which it creates shall be visited with the same penalties as are set out in the Home Drummond Act. Of course this does not make the new offences contraventions of the Home Drummond Act (which had nothing to say to grocers), and it only became necessary to mention the Home Drummond Act in the complaint at all if in setting out the penalties for the offence charged the complainer had chosen to refer to that Act. He did not require to do so, for he has taken what is perhaps the better plan of saying, in so many words, what those penalties are.

The conclusion, therefore, which I come to is that the mention of the Home Drummond Act was unessential and unnecessary; and that even assuming as true the averments of the appellant as to the alteration made on the number of the section cited, the conviction is not thereby invalidated.

I am therefore for refusing the bill.

LORD ADAM and LORD KINNENAR concurred.

THE COURT refused the bill.

JOHN FAIRMAN, S.S.C.—J. & A. HASTIE, Solicitors—Agents.

No. 11.
—
Feb. 6, 1897.
Jackson v.
Stevenson.

JOHN JACKSON, Appellant.—*James Clark*.
JAMES CHARLES STEVENSON (Procurator-Fiscal of Roxburghshire),
Respondent.—*John Wilson*.

Complaint—Penalty—Want of specification—Summary Jurisdiction (Scotland) Acts, 1864 (27 and 28 Vict. cap. 53), and 1881 (44 and 45 Vict. cap. 33).—A complaint brought under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, set forth a contravention of two Acts of Parliament, and in the prayer craved the Court to adjudge accused "to suffer the penalties provided by the said Acts." The body of the complaint contained no reference to penalties.

Held that the complaint was irrelevant for want of specification.

Fishing—Water-bailiff—Police-constable—Right to search before apprehension—Tweed Fisheries Act, 1857 (20 and 21 Vict. cap. cxlviii.), sec. 37.—Sec. 37 of the Tweed Fisheries Act, 1857, enacts,—“The superintendent and water-bailiffs appointed as aforesaid shall, after being sworn into office, have and be entitled to exercise the powers and authorities of constables in regard to all matters connected with this Act, in the same manner as if offences against this Act were breaches of the peace.”

Opinions per curiam that water-bailiffs are not entitled to search a person whom they suspect to be guilty of illegal fishing unless they have previously apprehended him upon what they believe to be good grounds, or unless they have a warrant to search him.

HIGH COURT.
Lord Justice-
General.
Lord Adam.
Lord Kinnear.

JOHN JACKSON, millworker, Hawick, was charged in the Sheriff Court at Jedburgh upon a complaint at the instance of the Procurator-fiscal, and bearing to be brought under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887.

The complaint set forth,—“That John Jackson, a millworker, residing in the burgh of Hawick, has contravened the 39th section of the Tweed Fisheries Act, 1857, in so far as, upon the 28th November 1896, he did, on the right side of the Ale Water, about 500 yards

below Ancrum House Dairy, in the parish of Ancrum and county of Roxburgh, resist and make forcible opposition to and assault George Cameron, sergeant of water-bailiffs, Nisbet Railway Crossing, and John Munro, water-bailiff, St Boswells, persons employed in the execution of said Act, and the Tweed Fisheries Amendment Act, 1859, by violently resisting them and throwing them down, and did also throw the said John Munro with great force into the water of Ale, whereby they were both hurt and injured in their persons." No. 11.
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"May it therefore please your Lordship to grant warrant to cite the said John Jackson to appear before your Lordship to answer to this complaint, and thereafter to convict him of the aforesaid contravention, and to adjudge him to suffer the penalties provided by the said Acts."

The accused objected to the relevancy of the complaint, "in respect that the penalty was not specified therein, and also in respect that it did not set forth that the panel was committing an offence against the Tweed Acts at the time and place the alleged contravention took place."

The Sheriff-substitute (Speirs) repelled the objections, and after hearing evidence convicted the accused and fined him.

Jackson obtained a case.

The case stated,—“It was proved by two bailiffs, who were on a scaur thirty or forty feet above the river, that the accused, though fishing with rod and line, was apparently not doing so in a legal manner. So convinced were the bailiffs that the accused was ‘snig-gling,’ that they went to the river-side and wanted to search him. The accused objected, but after a considerable struggle assented. The fishing-line was short, and attached to the reel on the rod, there was no gut-line or hook on the line, some bullets, such as are used for weighting a line when foul fishing, were found in the pockets of the accused, also some fine wire (such as is used for fastening on hooks in foul fishing), and large undressed hooks, salmon size. I held that the bailiffs were sufficiently justified in supposing that the accused was fishing in an illegal manner before they searched him (although they did not actually see any hooks on the line), and consequently that the accused was bound to submit to being searched; not having done so, but having assaulted and resisted the bailiffs while (as I held) they were in the execution of their duty, I found him guilty.”

The following questions of law were stated :—“(1) Was the prosecutor bound to insert in the body of the complaint the penalties which had been incurred by the alleged contravention of the 39th section of the Tweed Fisheries Act, 1857? (2) Were the bailiffs, under the circumstances disclosed in the foregoing narrative, entitled to insist on searching the accused?”

Argued for the appellant ;—(1) The complaint was irrelevant. It contained no statement whatever of the penalty sought to be enforced. That was a defect in substance which vitiated the whole proceedings.¹ (2) The conviction was bad. It was a conviction of assaulting water-bailiffs in the discharge of their duty. But it appeared from the Sheriff-substitute's statement that they were acting outwith their

¹ Thomson v. Wardlaw, Jan. 23, 1865, 5 Irvine, 45; Blains v. Rankine, March 15, 1892, 19 R. (Just. Cases) 96, 3 White, 221; M'Leod v. Tarras, Oct. 24, 1892, 20 R. (Just. Cases) 6, 3 White, 339; M'Ewen v. Lord Abinger, Jan. 19, 1894, 21 R. (Just. Cases) 14, 1 Adam, 314.

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duty, for they had searched the appellant without first apprehending him, and in order to find out whether the case was one upon which they could or could not arrest him.¹

Argued for the respondent;—(1) The penalty was sufficiently stated in the complaint, for it appeared in section 39 of the Tweed Fisheries Act, 1857, of which the complaint set forth a contravention. (2) Under section 37 of the Act the water-bailiffs had the same powers as constables, and they were within their right in searching a suspected person.

At advising,—

LORD JUSTICE-GENERAL.—This complaint bears to be under the Summary Jurisdiction Acts, but it departs in an important, and as I think an essential, particular from the statutory form of complaint. It contains no statement at all of the nature of the penalty sought to be enforced. The body of the complaint says not one word about penalty; the prayer of the complaint merely, in general terms, prays the Court to adjudge the accused “to suffer the penalties provided by the said Acts.”

While a departure from the statutory style of complaint may not be in all cases fatal, its effect must depend on the nature and quality of the deviation. Now, the matter of penalties is matter of substance, and I am not aware of any case in which such latitude has been tolerated as we have here. The complainer may either name the penalties, or he may refer by chapter and section to the enactment which sets them forth. But it will not do to libel two Acts of Parliament and then bid the accused read them through and find out what he is liable to. There is no reason at all for encouraging such lax practice.

My opinion is, therefore, that the conviction cannot stand.

This being so, it is not necessary to decide the further objection argued to us, but as a serious question is involved, it may be well that it should not pass unnoticed. The Sheriff's statement of the facts does not make it quite clear whether the appellant had been apprehended before the bailiffs searched his person, or only after. As I read the case they did not apprehend him, and had not resolved to apprehend him, until the result of their search confirmed their previous suspicions. If this were so, then I do not think that they were within their powers, and therefore I could not hold them to have been in the execution of the Acts when the appellant resisted them.

The right of the bailiffs, be it observed, is to exercise the powers and authorities of constables in the same manner as if the statutory offences were breaches of the peace. Now, a constable is entitled to arrest, without a warrant, any person seen by him committing a breach of the peace, and he may arrest on the direct information of eye-witnesses. Having arrested him, I make no doubt that the constable could search him. But it is a totally different matter to search a man in order to find evidence to determine whether you will apprehend him or not. If the search succeeds (such is the condition of the argument) you will apprehend him, but if the search does not succeed you will not apprehend him. Now, I have only to say

¹ Mauchline v. Stevenson, March 6, 1878, 5 R. (Just. Cases) 21, 4 Couper, 20.

that I know no authority for ascribing to constables the right to make such tentative searches, and they seem contrary to constitutional principle. If the constable requires to make such a search, it can only be because without it he is not justified in apprehending; and, without a warrant, to search a person not liable to apprehension seems palpably illegal. A constable or bailiff must make up his mind on what he sees (or hears on credible information) whether to arrest or not, and if he does arrest in good faith, the law will protect him, whether his opinion at the time of the guilt of the person arrested prove accurate or not. No. 11.
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As I have said, the Sheriff's findings of fact do not raise this question with clearness; but as they rather point to a grave irregularity, it seems right that all concerned should be warned of the true limits of a water-bailiff's authority.

LORD ADAM.—The prosecution in this case is brought under the Summary Jurisdiction Act, 1864, and the prosecutor professes to make use of the forms of complaint contained in the schedule to that Act. I agree with what has been said in previous cases, that the forms are merely directory, and that any deviation from them does not necessarily lead to the quashing of the conviction,—that is, however, always provided that such deviation is not material. The question in this case is whether the deviation from the statutory form is material or not. In a recent case, where the conclusion was that the accused should suffer the pains of law, instead of certain penalties inflicted by the Act under which the complaint was brought, the deviation was held not to be material because it was held that pains of law included penalties. But in this case there is what I never remember to have seen before, an absence of any statement in point of fact that the party complained against had incurred any penalties or pains of law whatever. The thing is an entire blank. All that is said is “whereby they” i.e., the two persons mentioned, “were both hurt and injured in their persons.” My difficulty is that I do not see how a Judge can be asked to convict a person in a case where it is not averred that he has incurred either a statutory penalty or the pains of law at all. What the Judge can be asked to do is to convict the person complained against, and to find him liable in certain penalties which he is said to have incurred. But if he is not said to have incurred any penalty, the Judge cannot be asked to convict, and I think that the omission in this case is a material blot on the complaint.

I agree with your Lordship as to the merits, although it may not be necessary to dispose of the case on that point. I have had the greatest difficulty in finding out from the statement by the Sheriff whether the alleged search, or attempted search and consequent resistance, took place before or after the appellant was apprehended. It is quite clear from what the Sheriff says that he thinks that if the bailiffs had in fact apprehended the appellant, they had good grounds for doing so, but he does not say whether they had apprehended him or not. And I agree with your Lordship that it appears rather that the bailiffs searched the prisoner with the hope of finding evidence which could enable them to apprehend him, and that the search was not made after they had apprehended him, with a view to secure evidence,

No. 11. which they would have had power to do. This difficulty I have in the case, and I am glad that it is not necessary to decide on this point.
 Feb. 6, 1897.
 Jackson v.
 Stevenson.

I agree with your Lordship as to the rights and duties of bailiffs and constables in such circumstances. If they have sufficient evidence before their eyes, or from proper information, that a person is guilty of an offence, they may apprehend him. They are not entitled to search anyone before his apprehension. On the other hand, I agree that if it be necessary that the person who has been apprehended should be searched on the spot, a constable or bailiff is within his rights in doing so. Of course he does so at the risk of being made civilly responsible if he does it unlawfully.

LORD KINNEAR.—I agree, both as to the ground on which this conviction should be quashed, and also in the observations which have been made by your Lordships on the general question raised.

I have the same difficulty as your Lordships as to whether the Sheriff intended to find that the bailiffs had searched the appellant before apprehending him and without having sufficient grounds for apprehending him, or whether they searched him after they had apprehended him on what they thought sufficient grounds. I have no doubt that a bailiff or constable has no authority to search the person of a man whom there is no sufficient ground for apprehending and no warrant to search.

THE COURT answered the first question in the case in the affirmative, found it unnecessary to answer the remaining question, and sustained the appeal.

W. & J. L. OFFICER, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

No. 12. ROBERT WEIR AND ANOTHER (Joint Procurators-Fiscal of Justice of Peace Court, Hamilton), Appellants.—*Lees—McClure*.
 Mar. 12, 1897.
 Weir v. Bryce.
 JAMES BRYCE, Respondent.—*Johnston*.

Public-House—Certificate—Confirmation—"New certificate"—*Publicans Certificate (Scotland) Act, 1876 (39 and 40 Vict. cap. 26), secs. 4 and 6*.—The Publicans' Certificate (Scotland) Act, 1876, sec. 4, defines "new certificate" to mean "a certificate granted by the competent authority for a licence for the sale of excisable liquors to any person in respect of any premises which are not certificated at the time of the application for such grant."

Sec. 6 enacts that "a grant of a new certificate . . . shall not be valid unless it shall be confirmed by a standing committee of Justices of the Peace for the county."

Held that a hotel certificate granted to a person who held a public-house certificate in respect of the same premises was a "new certificate" in the sense of the Act, and required confirmation in order to its validity.

HIGH COURT. ON 28th December 1896 James Bryce, spirit-dealer, Larkhall, was charged in the Justice of Peace Court at Hamilton on a complaint which set forth that the accused "who holds a public-house certificate for the sale of excisable liquors in the house or premises occupied by him in London Street, Larkhall," did in breach of his certificate, and in contravention of the Public-Houses Acts libelled, on Sunday, 15th November 1896, in his said premises, sell excisable liquor to a person named and designed.
 Lord Justice-Clerk.
 Lord Trayner.
 Lord Moncreiff.

The Justices acquitted the accused.

The Procurators-fiscal obtained a case. The following facts were

stated:—At the half-yearly Licensing Court, held in April 1896, the Justices renewed Bryce's public-house certificate for the year from 15th May 1896 till 15th May 1897. At the half-yearly Licensing Court, held on 27th October 1896, he applied for a hotel licence, and the Justices, without formally recalling his existing public-house certificate, granted a hotel certificate in his favour for the same premises. After obtaining the hotel certificate, Bryce proceeded to act on it, without having applied for or obtained confirmation; and on the Sunday libelled he sold excisable liquors in the premises to the person mentioned in the complaint, who was then a *bona fide* traveller, and as such entitled to be supplied with excisable liquor by the holder of a hotel certificate in Larkhall.

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The following was the question of law:—"Whether the respondent was entitled to act upon the hotel certificate obtained by him in October 1896, the same not having been confirmed by the Licensing Committee of the district, in terms of section 4 of the Publicans' Certificate (Scotland) Act, 1876?" *

Argued for the appellants;—The Justices ought to have convicted. The words in sec. 4 of the Act, "not certificated at the time of the application," meant not certificated in respect of a certificate of the same kind as that which had been applied for; and it was impossible to say that a hotel certificate was the same in kind as a public-house certificate; the former conferred much more extensive powers of supplying liquor. The question had been decided in this way in England upon the construction of a practically identical statute.¹ The full title of the Scots Act shewed that it was passed to assimilate the law of Scotland to that of England.

Argued for the respondent;—The English case was not in point, in the first place because it arose upon the construction of the English Licensing Act of 1873 (35 and 36 Vict. c. 94), which in its terms differed materially from the Scots Act; and secondly, because it proceeded upon the radical distinction in English licensing law between a beer-house licence and a public-house licence, which proceeded from different authorities, and were regulated by different statutes. No such distinction existed, according to the Scotch statutes, between a public-house certificate and a hotel certificate. The expression "not certificated" occurring in a Scots public-house statute was unambiguous, and therefore was not open to construction. It was impossible to describe premises for which a public-house certificate had been granted as being "not certificated," without reading a qualification into the words for which there was no warrant. The appellants'

* The Publicans' Certificate (Scotland) Act, 1876 (39 and 40 Vict. cap. 26)—the full title of which is "An Act to assimilate the law of Scotland relating to the granting of licences to sell intoxicating liquors to the law of England,"—enacts, sec. 4,—“A 'new certificate' means a certificate granted by the competent authority for a license for the sale of excisable liquors to any person in respect of any premises which are not certificated at the time of the application for such grant, but shall not apply to the rebuilding of certificated premises which have been destroyed by fire, tempest or other unforeseen and unavoidable calamity.”

Sec. 6 enacts that “a grant of a new certificate . . . shall not be valid unless it shall be confirmed by a standing committee of Justices of the Peace for the county (hereinafter in this Act called the county licensing committee).”

¹ Marwick v. Codlin, 1874, L. R., 9 Q. B. 509.

No. 12. construction led to this result, that where a public-house licence was granted in place of a hotel licence, confirmation was necessary ; which was surely a *reductio ad absurdum*.
 Mar. 12, 1897. Weir v. Bryce.

LORD JUSTICE-CLERK.—If I had any doubt in this case I should have asked for further argument. But I have no doubt how the case should be decided. Under the present state of our licensing laws anyone who applies for and obtains the renewal of a certificate already existing does not require to apply for confirmation, but anyone who applies for and obtains a new certificate must apply for its confirmation at the Confirmation Court, and unless it be confirmed he acts illegally in acting under it. Now, in this case the respondent held a public-house certificate which had still a certain period to run. He applied for and obtained a hotel licence at the October Court. He did not apply for confirmation of this licence, but proceeded to carry on business as under a hotel licence. The question is whether he acted legally in doing so. Now, I am unable to hold that he can do so merely because he already has a certificate, if he makes an application for a certificate of a different character entitling him to act in a manner which would be illegal under his former certificate. I am of opinion that such an application is an application for a new certificate. In the English case of *Marwick v. Codlin*,¹ the Chief Justice (Cockburn) said very distinctly that where a man who had a licence to sell wine and beer applied for a public-house licence, that was an application for a new certificate, even although it was an application for a certificate for premises already licensed. I can see no difference in principle between that case and this. A publican is entitled to sell excisable liquors on certain days and within certain hours, and that is all that he has any right to do. A hotelkeeper is in a totally different position. He is entitled to sell to certain persons, *i.e.*, to lodgers and *bona fide* travellers, at any hour and on any day of the week. He is also entitled to keep rooms for lodgers, and to supply them with drink in their rooms at all hours and on all days. It seems to me that when the respondent applied for a certificate of such a character he applied for a new certificate. I am therefore of opinion that in this case the applicant, in applying for a hotel-keeper's certificate, applied for a new certificate, and that he had no right to act under it until it was confirmed.

I accordingly answer the question in this case in the negative.

LORD TRAYNER and LORD MONCREIFF concurred.

THE COURT answered the question in the negative, and sustained the appeal.

RONALD & RITCHIE, S.S.C.—JAMES PURVES, S.S.C.—Agents.

No. 13. THOMAS AITCHISON, Complainer.—*Guy*.
 GEORGE NEILSON (Procurator-Fiscal of the Police Court, Glasgow),
 Respondent.—*Lees—Deas*.
 Mar. 12, 1897. Aitchison v. Neilson.
Conviction—General Statutory Charge under two subsections of same section—General Conviction—Glasgow Police Act, 1866 (29 and 30 Vict.

¹ L. R., 9 Q. B. 509.

cap. cclxxiii.), *sec.* 135.—The Glasgow Police Act, 1866, *sec.* 135, under the general heading, “offences against the rules of good conduct,” contains twenty-one subsections or articles, each specifying a particular offence or offences, the subsections or articles being arranged in groups according to the penalties specified in headings prefixed to the groups. The offences embraced in the section were of many varieties, including theft, swindling, disorderly conduct, assault, &c. Articles 5 and 6 under the heading, “To a penalty of £10, or alternatively, without penalty, to imprisonment for sixty days,” were as follow :—“(5) Every person who is riotous, disorderly, or indecent in his behaviour. (6) Every person who commits an assault upon any male child whose age does not, in the opinion of the magistrate, exceed fourteen years, or upon any female, or upon any constable on duty.”

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A person was charged on a complaint setting forth that he did, contrary to the Glasgow Police Act, 1866, *sec.* 135 (article 5) thereof, conduct himself in a riotous and disorderly manner, by using threatening language towards two police-constables named ; further, the said accused did, time and place aforesaid, assault the said constables contrary to said Act and section (article 6) thereof, whereby the accused was liable to a penalty not exceeding £10, or to imprisonment for a period not exceeding sixty days. The complaint prayed the magistrates to convict the accused “of the aforesaid contravention.”

The accused was convicted “of the contravention charged.”

Conviction suspended, in respect that it was a singular conviction upon a complaint charging two separate and distinct offences.

Gemmell v. Weir, Jan. 28, 1897, *supra*, p. 23, *distinguished*.

ON 23d February 1897 Thomas Aitchison, Kemp’s Land, Bishop-briggs, near Glasgow, was charged in the Police Court at Glasgow on a complaint setting forth that the accused “did, contrary to the Glasgow Police Act, 1866, *sec.* 135 (article 5) thereof, on 14th February 1897, in Springburn Road, Glasgow, conduct himself in a riotous and disorderly manner by cursing, swearing, and using threatening language to William M’Kay and Neil M’Lean, constables in the Glasgow Police, on duty, whereby the lieges were annoyed and disturbed : Further, the said Thomas Aitchison did, time and place aforesaid, assault the said William M’Kay and Neil M’Lean by kicking them and beating them with his fists, contrary to said Act and section above specified (article 6) thereof. Whereby the said accused is liable to a penalty not exceeding £10, and in default of payment to imprisonment for a period not exceeding two months, or alternatively without penalty to imprisonment for a period not exceeding sixty days,” with certain liabilities as to caution.*

HIGH COURT.
Lord Justice-
Clerk.
Lord Trayner.
Ld. Moncreiff.

* The Glasgow Police Act, 1866 (29 and 30 Vict. *cap.* cclxxiii.), under the general heading, “IX. Offences against the rules of good conduct,” sets forth, *inter alia*, *sec.* 135, which enacts,—“Every person who is guilty of any of the following acts or omissions within the city shall, in respect thereof, be liable to a penalty not exceeding the respective amounts, or to imprisonment for a period not exceeding the respective periods hereinafter mentioned, *videlicet* :—

“To imprisonment for sixty days.

“(1) Every person who commits or attempts to commit theft. . . .”

Then came (2), which specified the unlawful appropriation of property and reset ; and (3), which specified chain-dropping and swindling.

“To a penalty of ten pounds, or alternatively, without penalty, to imprisonment for sixty days.

“(4)”

“(5) Every person who is riotous, disorderly, or indecent in his behaviour.

“(6) Every person who commits an assault upon any male child whose

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The prayer of the complaint craved the magistrates to convict the accused "of the aforesaid contravention, and to adjudge him to suffer the penalties provided by the said Act."

Aitchison pleaded not guilty, but was convicted "of the contravention charged," and fined £5, with the alternative of thirty days' imprisonment.

Aitchison brought a suspension, pleading,—(1) The said warrant or sentence ought to be suspended, with expenses, in respect that while the complaint charges two separate offences, the prayer of the complaint prays for conviction of one only, without specifying which. (2) The said warrant or sentence ought to be suspended, with expenses, in respect that it convicts of only one contravention when two are charged, and does not specify to which contravention the conviction applies.

The respondent—the Procurator-fiscal—was called on to support the conviction. He argued that, on the authority of the undernoted cases,¹ both the complaint and the conviction were unobjectionable.

LORD TRAYNER.—I think that this conviction cannot be sustained. In the complaint two charges are made of two offences under different subsections of section 135 of the Glasgow Police Act, 1866. These are not only different subsections, but they deal with different offences, the *species facti* of which are distinct. That being the state of the complaint, the prayer is to convict the accused "of the aforesaid contravention." Such a prayer gives no indication as to which of the offences is the offence of which the magistrate is asked to convict; and I more than doubt if any conviction whatever could follow on such a prayer if not amended or the complaint restricted.

The conviction is just as faulty as the complaint. It convicts the complainer "of the contravention charged." But which contravention? for there are two. I think that conviction cannot stand, because from it it cannot be ascertained what offence the complainer was convicted of.

LORD MONCREIFF.—I am of the same opinion. I think that both the complaint and the conviction are out of shape. If the 135th section of the Glasgow Police Act of 1866 is examined, it will be found to contain under the general heading of "Offences against the rules of good conduct," twenty-one subsections or articles containing a number of specified crimes and offences, to the commission of which certain graduated penalties are attached. Each group of offences is distinct and separate. The various articles are

age does not in the opinion of the magistrate exceed fourteen years, or upon any female, or upon any constable on duty, or who commits an assault to the effusion of blood, or causing serious injury upon any male person exceeding the age of fourteen years, or who aids or incites any person to commit such assault.

"(7) . . .

"To a penalty of five pounds, or alternatively, without penalty, to imprisonment for thirty days.

"(8) Every person who alters or defaces the name or address . . . on any box or barrel . . . without the authority of the owner."

Then follow other articles, making 21 in all, classified as above, according to the penalties attached.

¹ Prentice v. Linton, Feb. 7, 1883, 5 Couper, 210; Gemmell v. Weir, Jan. 28, 1897, *supra*, p. 23.

not alternative modes of committing a statutory offence. For example, No. 13. the 1st article applies to theft or attempts to commit theft or other crimes of dishonesty; the 2d article to unlawful appropriation of property and resetting; the 3d to chain-dropping and swindling; the 5th to riotous, disorderly, or indecent behaviour; the 6th to certain assaults, and so forth.

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What is charged in this complaint is (1) a contravention of article 5, and (2) (as a distinct and substantive charge) a contravention of article 6. For each offence a penalty of £10 or sixty days' imprisonment is awarded by the statute; but in the complaint the two offences are treated as one, and in the prayer the prosecutor asks the magistrates to convict the accused "of the aforesaid contravention." The conviction echoes the prayer, and convicts the accused "of the contravention charged." Now, as two distinct crimes were charged, the conviction should have stated whether the accused was convicted of both or of only one, and if so, of which.

The recent case of *Gemmell v. Weir*¹ is clearly distinguishable. The charge was one of breach of a publican's certificate. The certificate, framed in the statutory form, contained a series of cardinal prohibitions, the particular prohibition alleged to have been contravened being that striking at trading during prohibited hours. The charge was that the accused "did permit and suffer drinking in said public-house by John Muir, and did sell and give out to him excisable liquors" during prohibited hours. This was not a charge of two separate offences, but of two acts, by both or either of which that part of the certificate may be contravened. It was therefore no abuse of language to term the commission of both acts a "contravention." Here two distinct crimes are charged; and although no doubt the assault was closely connected with the riotous conduct, the question, as the complaint is framed, is the same as if the accused had, under a complaint charging him with theft under article 1, and assault under article 6, been convicted "of the contravention charged."

LORD JUSTICE-CLERK.—I entirely agree with your Lordships. The two subsections relate to separate offences, not even of the same nature. It is suggested that because a number of offences are put into one section a general conviction on a charge alleging the contravention of two or more of them would be good. But it is plain that the only object for placing them together is that the penalty is the same, and that they are in reality separate sections. Suppose the question arose with any other two subsections. Take the one in question here (5) dealing with riotous, disorderly, or indecent behaviour, and subsection (8), dealing with the offence of altering or defacing the name or address on any barrel, box, bag, &c., not belonging to him, and without the authority of the owner, could it be suggested that if the complaint alleged a breach of these subsections, and a conviction "of the contravention charged" followed, that conviction would be good?

THE COURT suspended the conviction.

WYLIE & ROBERTSON, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

¹ *Supra*, p. 23.

No. 14.

THE CALEDONIAN RAILWAY COMPANY, Appellants.—*Deas*.
ALEXANDER RAMSAY, Respondent.

Mar. 12, 1897.
Caledonian
Railway Co.
v. Ramsay.

Railway—Trespass—Level Crossing—Caledonian Railway Act, 1893 (56 and 57 Vict. cap. clxxix.), sec. 37.—The Caledonian Railway Act, 1893, sec. 37, enacts certain penalties for trespass on the company's railways, lands, and property, subject to the proviso that no person should be subject to any penalty under this enactment unless the company proved, to the satisfaction of the Sheriff or Justices, that a public notice warning persons not to trespass had been affixed, *inter alia*, "at the level crossing (if any) nearest to the spot where such trespass is alleged to have been committed." Held that the term "level crossing" included private level crossings, and therefore that the company were barred from exacting a penalty for trespass under sec. 37, where the level crossing nearest to the spot where the trespass was alleged to have been committed was a private level crossing, and no notice had been affixed at that crossing.

Administration of Justice—Judge—Declinature—Waiver—Court of Justiciary.—A railway company appealed to the High Court of Justiciary against a judgment of a Sheriff acquitting a person of a contravention of one of the company's statutes. Two of the Judges proposed a declinature on the ground that they were shareholders in the company. *Question*, whether it was competent for the parties to waive the declinature by joint minute.

HIGH COURT.
Lord Justice-
Clerk.
Lord Trayner.
Ld. Moncreiff.

ON 7th October 1893 Alexander Ramsay, clothier, Lintrathen Gardens, West Clepington Road, Dundee, was charged, in the Sheriff Court at Dundee, on a complaint at the instance of the Caledonian Railway Company, setting forth that the accused "did trespass upon the railway belonging to the complainers, in the parish of Liff and Benvie and county of Forfar, at a point 1110 yards or thereby northwards from Lochee station, by being or passing upon the said railway, and not for the purpose of lawfully crossing the same at a level crossing thereof, contrary to the 37th section of the Caledonian Railway Act, 1893."

The Sheriff-substitute (Campbell Smith) found the complaint not proven.

The Railway Company obtained a case. It appeared from the case that the alleged trespass consisted in walking along a clear beaten footpath by the side of the company's railway, and questions were stated in the case as to whether, in so walking, Ramsay had committed a trespass; but the question now reported was as to whether the company had complied with the proviso in section 37 of their Act of 1893, quoted below,* by having a notice affixed at the level crossing nearest to the *locus* of the alleged trespass. Upon that question the case stated,—“The witnesses for the railway company were

* The Caledonian Railway Company Act, 1893 (56 and 57 Vict. cap. clxxix.), sec. 37, after enacting penalties for trespass on the company's railways, lands, and properties, contains this proviso,—“Provided that no person shall be subject to any penalty under this enactment unless the company shall prove to the Sheriff or Justices before whom complaint is laid that they have painted or fixed upon boards, or printed, painted, or enamelled on iron or any other material, public notice warning persons not to trespass upon their railways, stations, works, lands, and property, and that one or more of such notices has been affixed at the station on their railway, and at the level crossing (if any) nearest to the spot where such trespass is alleged to have been committed.”

No. 14.

Mar. 12, 1897.
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two railway porters from Lochee station and a railway inspector residing in Perth. . . . The porters proved that two copies of a printed paper placard, copy of which was produced,* were regularly exposed to view at Lochee station (being the station nearest to the spot where the trespass was alleged to have been committed), and were always replaced whenever it was observed that they had been destroyed.

. . . It was further proved that there was a copy of said placard exhibited at Baldovon level crossing, about 1300 yards off, which is the level crossing second in nearness to the *locus* of the alleged trespass, but that at the actually nearest level crossing there was no placard exhibited. It was the opinion of the railway officials who gave evidence that a placard at the latter crossing is not required by the statute libelled, because this level crossing is for the exclusive use of the contiguous farm, and the farmer is said to be bound to keep the gates of the crossing locked except when they are open for the purposes of his farm. It was not proved, however, that they were locked regularly or on the afternoon of the alleged trespass."

The following was the question in law on the point now reported :—
"3. Whether the failure to publish the placard or other statutory notice at the nearest level crossing, however limited the use of that crossing, does not bar the prosecutors from pleading that they have fulfilled every condition necessary to entitle them to exact the penalty imposed by the statute?"

The appeal was first called on 26th January 1897 before the Lord Justice-General, Lord Adam, and Lord Kinnear, when Lord Adam and Lord Kinnear proposed a declinature on the ground that they were shareholders in the Caledonian Railway Company. Ramsay was not represented, and the case was continued for hearing by a differently constituted Bench, the Lord Justice-General observing that it was doubtful whether it would have been competent for the parties to waive the declinature by joint minute, according to the practice generally competent in the civil Courts.

The appeal was subsequently heard on 12th March before the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff, Ramsay again being unrepresented.

After hearing the appellants,—

LORD JUSTICE-CLERK.—I am not inclined, in a case where only one side is represented, to decide the abstract question as to what constitutes a trespass; and as I think the case can be determined upon another ground, I prefer so to dispose of it. Section 37 of the Caledonian Railway Act, 1893 (56 and 57 Vict. cap. clxxiv.), provides—(His Lordship quoted the proviso). Now, here at a level crossing nearest to the place in question no notice was affixed. It is said in answer that this was a private level crossing leading to and from a particular farm. Nevertheless, it was a level crossing. It is plain that certain people—those connected with the farm—were entitled to use it, and it is not certain that anybody might not use it. It therefore appears to me that the company has not fulfilled the statutory requirements.

LORD TRAYNER.—I agree on the ground proposed by your Lordship.

LORD MONCREIFF.—I also agree with your Lordship. If the question

* The placard produced was a notice, "pursuant to the Caledonian Railway Act, 1893," warning persons not to trespass on the company's railways, &c.

No. 14. had arisen with the farmer or any of his servants, I think that the Railway Company would have had no answer, and I think that it cannot make any difference that the question arises with one of the public.

Mar. 12, 1897.
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THE COURT answered the third question in the affirmative, found it unnecessary to answer the other questions, and dismissed the appeal.

HOPE, TODD, & KIRK, W.S., Agents.

No. 15.

Mar. 12, 1897.
Frew v.
Morris.

JOHN FREW, Appellant.—*Constable.*
JOHN MORRIS, Respondent.—*John Wilson.*

Complaint—Service—Time—Sale of Food and Drugs Act Amendment Act, 1879 (42 and 43 Vict. cap. 30), sec. 10.—The Sale of Food and Drugs Act Amendment Act, 1879, section 10, enacts, that in prosecutions on account of the sale of a perishable article in contravention of the principal Act of 1875, the summons to appear should be served on the person charged within a period not exceeding twenty-eight days “from the time of the purchase” of the article.

Certain milk was purchased by a sanitary inspector at about nine o'clock in the forenoon of 4th November. A complaint, alleging a contravention of the Act of 1875, in respect of such sale, was served on the seller at about half-past seven in the evening of 2d December, the twenty-eighth day from the day of the purchase.

Held that the day on which the purchase took place was not to be taken into computation in calculating the statutory period, and therefore that the complaint had been served timeously.

HIGH COURT.
Lord Justice-
Clerk.
Lord Trayner.
Ld. Moncreiff.

ON 11th December 1896 John Morris, dairyman, Whitequarries, Abercorn, Linlithgowshire, was charged in the Sheriff Court at Linlithgow, on a complaint at the instance of John Frew, sanitary inspector of the county, setting forth that the accused had contravened section 6 of the Sale of Food and Drugs Act, 1875, by selling milk to the complainant with 5 per cent of water added.

The accused objected to the complaint, on the ground that it had not been served within twenty-eight days from the time of the alleged offence, as required by section 10 of the Sale of Food and Drugs Act, 1879.*

The Sheriff-substitute (Melville) sustained the objection, and dismissed the complaint.

The prosecutor obtained a case. It appeared from the complaint that the prosecutor had, at about nine o'clock on the morning of 4th November 1896, on the public road opposite the shop in Philpstoun occupied by John Hog, grocer, purchased from the accused two

* The Sale of Food and Drugs Act Amendment Act, 1879 (42 and 43 Vict. cap. 30), section 10, enacts,—“In all prosecutions under the principal Act [The Sale of Food and Drugs Act, 1875 (38 and 39 Vict. c. 63)], and notwithstanding the provisions of section 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the statute within a reasonable time, and in the case of a perishable article, not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug for the sale of which in contravention of the provisions of the principal Act the seller is rendered liable to prosecution, and particulars of the offence or offences against the said Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons. . . .”

pennies' worth of sweet milk, and that the complaint was served upon the accused at about half-past seven o'clock on the evening of 2d December 1896. No. 15.
Mar. 12, 1897.
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Morris.

The question in law was,—“ Whether the complaint in question had been served in terms of the Act 42 and 43 Victoria, chapter 30, section 10, within twenty-eight days from 4th November 1896, the date of the alleged offence or contravention.”

Argued for the appellant;—The question was, whether the statutory period was to be computed *de momento in momentum* or *de die in diem*. If the latter method of computation applied the service of the complaint had been timeous, for the milk would be regarded as having been sold at the last moment of the 4th November. That was the general method of computation, and ought to be applied here.¹

Argued for the respondent;—The general rule might be as stated by the appellant, but exceptions were recognised.² The present case ought to be treated as an exception, in the first place, because a penal statute ought to be construed in favour of the accused; and secondly, because the *terminus a quo* was described in the statute as the “time of the purchase,” not the “date” of the purchase. “Time” meant the actual time, and not a presumed or constructive time.

LORD JUSTICE-CLERK.—The case we have to consider is this,—On a certain day in November last the appellant purchased a sample of milk from the respondent, and on the twenty-eighth day thereafter this complaint was served. The question before us is, was that sufficient compliance with the terms of the statute founded on, which enacts that proceedings shall be taken “within twenty-eight days from the time” when the sample is bought. Now, it was conceded by the respondent's counsel, that if the word “time” had been “date” he would not have been able to maintain that the period allowed for instituting proceedings must be calculated *de momento in momentum*; but he contended that the use of the word “time” by the statute demanded the more exact calculation of the period allowed, and that the service must be made within twenty-eight days from the moment of the purchase of the sample. I cannot concur in that view. I think that in the ordinary sense of our criminal law the word “time” means the day on which the fact or offence occurred, and the rule of law applies, that in computing a period from the time or day of the occurrence of any event, the day of that occurrence is not to be counted. The running of the time is to be counted as from midnight of that day, and therefore any proceedings raised before midnight of the day when the statutory period expires are timeously instituted. Thus, in the *Rothsay*³ case, it was matter of decision that, where the statute specified two months from the date of the offence as the period within which proceedings might be taken, a case which was raised on the

¹ *Lindsay v. Giles*, Feb. 27, 1844, 6 D. 771, *per* Lord Cockburn at p. 818, 16 Scot. Jur. 357; *Ashley v. Magistrates of Rothsay*, June 20, 1873, 11 Macph. 708, 45 Scot. Jur. 440; *M'Vean v. Jamieson*, Jan. 8, 1896, 23 R. 25, 2 Adam, 69; *In re Railway Sleepers Supply Co.*, 1885, L. R., 29 Chan. Div. 204; Bell Comm. (M'L. edn.) i. 759.

² *Scott v. Rutherford*, Dec. 7, 1839, 2 D. 206; *Goudy on Bankruptcy* (2d edn.), p. 82.

³ 11 Macph. 708.

No. 15. last day of the two months following the day of the occurrence was timeously instituted under that statute.
 Mar. 12, 1897.
 Frew v.
 Morris.

The same reasoning applies forcibly to the present case. The words of the statute are distinct—"within twenty-eight days." The complaint was served on the twenty-eighth day,—that is, within a period not exceeding twenty-eight days from the date of the purchase of the sample. I am therefore of opinion that, both on the principle laid down in previous decisions, and also giving effect to the wording of the statute, the Sheriff was wrong, and ought to have repelled the objection to the timeousness of the service.

LORD TRAYNER and LORD MONCREIFF concurred.

THE following interlocutor was pronounced:—"Answer the question in the case in the affirmative: Sustain the appeal: Reverse the determination of the inferior Judge: Remit to him to proceed, and decern: Find the appellant entitled to expenses," &c.

THOMAS LIDDLE, S.S.C.—JAMES F. MACDONALD, S.S.C.—Agents.

No. 16. JAMES COLLISON, Complainer.—*Crabb Watt—J. A. T. Robertson.*
 Mar. 12, 1897.
 Collison v.
 Mitchell. ALEXANDER MITCHELL (Interim Burgh Prosecutor, Musselburgh),
 Respondent.—*Sym.*

Procedure—Separation of trials—Oppression.—A father and daughter were charged, on a single complaint, with selling beer without a certificate. They moved for a separation of the trials. The magistrates refused the motion. The father, having been convicted, brought a suspension on the ground that the magistrates had acted oppressively in refusing to separate the trials. Suspension refused.

Procedure—Conduct of trial—Recall of witness.—After the evidence for the prosecution and for the defence in a Police Court prosecution had been concluded, and before parties had addressed the Court, the magistrates recalled one of the witnesses and put certain questions to him. Suspension on the ground that the magistrates had acted incompetently in thus examining the witness refused.

Procedure—Record of proceedings—Productions—Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. cap. 53), sec. 16.—At the trial on a summary complaint the accused produced a bottle of beer, with a printed label on it, and put questions regarding the contents of the bottle to certain of the witnesses adduced by him. No mention of the bottle with label was made in the record of the proceedings. The accused having been convicted brought a suspension on the ground that a "production, namely, a bottle of beer," was omitted from the record. Suspension refused in respect that the bottle was not "documentary evidence" within the meaning of section 16 of the Summary Procedure (Scotland) Act, 1864.

At the trial on a summary complaint, charging the keeping of beer for the purpose of illegally trafficking in it, one of the witnesses for the defence deposed that the beer labelled was his property, and took out of his pocket an invoice for beer in his favour from the brewers. He retained possession of the invoice, and no mention of it was made in the record of the proceedings. The accused was convicted. In a suspension on the ground that the invoice had not been noted on the record, held that, as the invoice had not been made a production, it was not necessary to note it on the record.

ON 11th December 1896, James Collison, labourer, 143 High Street, Fisherrow, Musselburgh, and his daughter Elizabeth Collison, were charged before the Magistrates of Musselburgh on two complaints, at the instance of the burgh prosecutor.

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The first complaint set forth two charges, each applicable to both the accused, of having trafficked in excisable liquors without a certificate, in the house 143 High Street, Fisherrow, by selling beer to persons named on Sundays, the 15th and the 22d November 1896 respectively, contrary to the Public-Houses Acts Amendment (Scotland) Act, 1862, sec. 17.

HIGH COURT.
Lord Justice-
Clerk.
Lord Trayner.
Ed. Moncreiff.

The second complaint set forth a charge, applicable to both the accused, of having on 22d November 1896, in the house 143 High Street, Fisherrow, said house not being licensed for the sale of excisable liquors, kept excisable liquors exceeding one gallon, viz., a barrel containing eight and a half gallons of beer, for the purpose of being illegally trafficked in, contrary to the Public-Houses Acts Amendment (Scotland) Act, 1862, sec. 20.

The diets were on the motion of the agent for the accused adjourned to 15th December, when the accused pleaded not guilty.

At the adjourned diet the accused were represented by counsel, who moved the Magistrates to separate the trials of the accused under the first complaint, on the ground that justice could not be done unless the evidence of the one could be adduced in favour of the other. The Magistrates, after hearing counsel for the accused and the burgh prosecutor for the prosecution, refused the motion.

James Collison was convicted under both complaints and was fined £2, 10s. in respect of the convictions of each of the charges under the first complaint, and dismissed with an admonition in respect of the conviction under the second. The complaints against Elizabeth Collison were found not proven.

James Collison brought a suspension, in which he maintained that the conviction under the first complaint ought to be suspended on the ground that the Magistrates, in refusing the motion for the separation of the trials, had acted oppressively, and also on the ground of the following circumstances as appearing from the bill of suspension and answers thereto by the burgh prosecutor:—

After the case for the prosecution under the first complaint had been closed, and in the course of the defence, a bottle containing liquid, labelled with a label bearing the words "Excelsior Beer," and a name and address, was produced by Collison, and two of his witnesses deposed that it was the same beer which was drunk by them on 22d November. There was no mention of this bottle on the record of the proceedings, and in respect of this omission, Collison pleaded that the conviction ought to be suspended on the ground "that a material production, namely, a bottle of beer, labelled as aforesaid, was omitted from the record."*

At the conclusion of the evidence for the accused, and before the

* The Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. cap. 53), section 16, enacts, that "it shall not be necessary in any proceeding under the authority of this Act to record or preserve a note of the evidence adduced, but the record shall set forth, in the form of the schedule (I) to this Act annexed, the respondent's plea, if any, the names of the witnesses, if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in."

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prosecutor or counsel for the defence had addressed the Court, the Magistrates recalled two of the witnesses for the prosecution, and asked them to taste the beer in the bottle above mentioned, and to state whether it was the same beer as that spoken to by them in their evidence as having been bought by them on 15th November libelled. Collison maintained that the conviction ought to be suspended, in respect that it was incompetent for the Court to lead evidence after the case for the prosecution and for the accused had been closed.

Collison also maintained that the conviction under the second complaint ought to be suspended on the following ground as stated by him:—When the trial on that complaint was proceeding he adduced a witness who deponed to the firkin of beer libelled being his (witness) property, and witness “produced and deponed to the invoice in his name for said beer from the brewers. . . . Said invoice is not noted in the record.” Collison pleaded that the second conviction ought to be suspended, in respect “a material production spoken to by a witness for the defence was omitted from the record.”

The respondent made the following averment with respect to the last mentioned ground of suspension:—“Admitted that” the witness in question “took out of his pocket an invoice for beer which he alleged had been sent by” a beer-dealer named, “and that that invoice is not mentioned in the minute of procedure. It was not . . . put in evidence, but was returned by the said” witness “to his pocket. The Magistrates were never asked to look at it.”

At the hearing the complainer cited the undernoted authorities.¹
The respondent was not called on.

LORD JUSTICE-CLERK.—In this case it does not appear to me that a reply is necessary.

The first ground on which suspension is asked for is that there was legal oppression on the part of the Magistrates in refusing to separate the trials of the two accused. Now, separation of trials is always a matter peculiarly for the discretion of the Judge trying the case. I do not say that there may not be cases in which the Court would interfere—cases, for example, in which the prosecutor, for the sole purpose of depriving the accused of the only evidence which would be available to them in their defence, has included a number of onlookers it may be in the complaint. In such a case the Court might, and should, interfere to prevent oppression. But in ordinary circumstances this Court will not interfere with the discretion of the Judge trying a case in which two persons are charged, where he has applied his mind to the question and has refused to separate the trials.

The next point founded on for the suspender is, that after the evidence for the defence was closed, the Magistrates on their own motion recalled certain witnesses for the prosecution. As stated in the case and answers, it appears that in the course of the evidence for the defence a certain bottle was produced by accused's agent, and two witnesses for the defence were asked

¹ *Kerr v. Phyn*, March 21, 1893, 20 R. (Just. Cases) 60, 3 White, 480; *H. M. Advocate v. Wilkie*, Oct. 25, 1886, 1 White, 242; *M'Giveran v. Auld*, July 20, 1894, 21 Lt. (Just. Cases) 69, 1 Adam, 448.

to taste the liquid contained in it, and to state whether the liquid was similar to what they had purchased from the accused on a particular date. This having been done, and the proof for the defence closed, certain witnesses who had spoken to the purchase of the liquor libelled in the complaint were recalled by the Magistrates and asked by them to taste the liquid contained in this bottle and say if it was the same as the liquid spoken to by them in their evidence as having been bought by them on the occasion libelled. Now, all this was quite proper. The Judge was quite entitled to recall a witness and to ask him whatever questions might seem necessary to ascertain the facts of the case.

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The last objection taken to this conviction is that a material production in evidence is not noted in the record of the proceedings at the trial. Now, the Summary Procedure Act does not make it necessary to note any "article" produced in evidence, but only any "documentary evidence." It might be that the label on the bottle partakes of the nature of documentary evidence, and should have been mentioned on record if what was to be put in was the label, but the objection is not so stated. The plea is that the bottle itself should have been noted, and this is not necessary under the statute.

That disposes of all the objections taken to the first conviction.

The second conviction is challenged on the ground that a material production spoken to by one of the witnesses for the defence is not noted on record. As I understand this objection, it is that a witness for the defence in the course of his evidence took out of his pocket an invoice or receipt which he said was a receipt for beer which he had bought, he being brought to prove that he was the owner of the beer found in the suspender's shop. This receipt was not put into process, and I understand that the witness retained it in his own possession. It was not necessary, and it was not proposed by anyone, to make the receipt a production in the case, and there was therefore no necessity to note it in the record. It is quite recognised that a witness may take something out of his pocket to explain his evidence and return it to his pocket without its being made a production in the case or being required to be noted. It cannot be made a production in the case without some action on the part of the party desiring to have it produced.

I am, therefore, of opinion that all the reasons stated for suspension fall to be repelled.

LORD TRAYNER and LORD MONCREIFF concurred.

THE COURT refused the bill.

WILLIAM GEDDES, Solicitor—MACFARLANE & RICHARDSON, Solicitors—Agents.

ROBERT WHYTE (Procurator-Fiscal, Forfar), Appellant.—

Sol.-Gen. Dickson—C. K. Mackenzie, A.-D.

JAMES THOMSON AND ANOTHER, Respondents.

No. 17.

June 8, 1897.
Whyte v.
Thomson.

Fishing—Beam-Trawling—High and Low-water Marks—Herring Fishery (Scotland) Act, 1889 (52 and 53 Vict. cap. 23), sec. 6.—The Herring Fishery (Scotland) Act, 1889, prohibits beam-trawling "within three miles

No. 17. of low-water mark of any part of the coast of Scotland" (except within areas to be defined by the Fishery Board). *Held* that the prohibited area includes the space between high-water mark and low-water mark.

June 8, 1897.
Whyte v.
Thomson.

Appeal against Judgment acquitting accused—Reversal of Judgment.—In an appeal against a judgment of a Sheriff acquitting the accused on a complaint charging a contravention of the Herring Fishery (Scotland) Act, 1889, the Court sustained the appeal and reversed the determination of the Sheriff, but *refused* to remit the case to him with their opinion.

HIGH COURT.
Lord Justice-
Clerk.
Lord Trayner.
Ld. Moncreiff.

ON 27th March 1897 James Thomson, labourer, 17 Shore Wynd, Montrose, and John Thomson, labourer, 5 Shore Wynd, Montrose, were charged in the Sheriff Court at Forfar, on a complaint at the instance of the procurator-fiscal, setting forth that the accused "did, on 20th January 1897, within Montrose Bay, at a part thereof in the estuary of the River Southesk distant 200 yards or thereby in a westerly direction from the suspension bridge, Montrose, use the method of fishing known as beam-trawling or otter-trawling, contrary to section 6 of the Herring Fishery (Scotland) Act, 1889."*

The Sheriff-substitute (Dudley Stuart) pronounced this judgment,—
"In respect of the evidence adduced, finds the complaint against the respondents James Thomson and John Thomson not proved: Therefore assoilzies and dismisses them *simpliciter* from the bar."

The procurator-fiscal obtained a case. The case set forth,—
"It was proved that between 9 o'clock and 11 o'clock P.M. on the date labelled the respondents fished in the said estuary from a small oar-boat by the method known as beam-trawling or otter-trawling, the nets and apparatus used being similar to those employed by large steam trawlers, but of a smaller size. The point at which the respondents were trawling is in the estuary of the river Southesk, about 60 or 70 yards above and to the west of the suspension bridge which unites Rossie Island and the town of Montrose. Before reaching this point the river flows through Montrose tidal basin, an area which is at high tide covered by sea water, and at low tide left uncovered save where the stream itself flows. From the suspension bridge it pursues its course through the harbour, and thereafter in a comparatively narrow channel, for a distance of nearly a mile till it reaches the sea.

"The appellant produced copy of a bye-law made by the Fishery Board for Scotland, dated 18th December 1888, confirmed by Her Majesty's Secretary for Scotland on 27th February 1889, and published in the *Edinburgh Gazette* on 1st March 1889, fixing limits on the east coast of Scotland *ex adverso* of Montrose Bay, within

* The Herring Fishery (Scotland) Act, 1889 (52 and 53 Vict. cap. 23), sec. 6, enacts,—"(1) It shall not be lawful to use the method of fishing known as beam-trawling or otter-trawling within three miles of low-water mark of any part of the coast of Scotland, nor within the waters specified in the schedule hereto annexed, save only between such points on the coast or within such other defined areas as may from time to time be permitted by bye-laws of the Fishery Board for Scotland, and subject to any conditions or regulations made by those bye-laws. . . .

"(2) The Fishery Board may from time to time make, alter, and revoke bye-laws for the purposes of this section, but a bye-law shall not be of any validity until it is confirmed by the Secretary for Scotland.

"(3) Any person who uses any method of fishing in contravention of this enactment, or of any bye-law of the Fishery Board, shall be liable on conviction " to certain penalties.

which limits no person shall use any beam-trawl for taking sea No. 17.
fish.*

"The Sheriff-substitute found that the statute founded on in the complaint, and the bye-law produced, did not apply to beam-trawling in the estuary of the river Southesk where the respondents had used such method of fishing; and found the complaint not proved, and assoilzied the respondents."

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The question of law was,—“Whether, on a sound construction of the said Herring Fishery Acts and the schedules annexed, and the bye-law of the Fishery Board above mentioned, the respondents were guilty of the contravention charged?”

The appellant was heard, but no appearance was made for the respondents.

LORD JUSTICE-CLERK.—This is a very clear case. The bye-law which is founded on for the prosecution is a bye-law which prohibits beam-trawling within that part of the sea which is within a particular line described in the bye-law. Now, that line is to be ascertained in a particular way. A series of straight lines, each three miles long, are to be drawn from the low-water mark out into the sea, and a line along the seaward end of these lines forms the boundary line within which the bye-law is to apply. This line will thus follow the contour of the low-water mark, and it is for this reason alone that that mark is mentioned in the bye-law, but the bye-law itself applies to all parts of the sea within the line so ascertained. The suggestion that the bye-law should only apply to parts of the sea between the low-water mark and the three mile limit is not only contrary to common sense but also to the grammatical construction of the clause, which merely refers to the low-water mark for the purpose of ascertaining the points from which to measure outwards to the three mile limit. The line of the latter being so ascertained, the prohibition applies to every part of the sea within it.

LORD TRAYNER and **LORD MONCREIFF** concurred.

Counsel for the appellant moved the Court to remit the case to the Sheriff with their opinion, and referred to the interlocutor in *Black v. Bradshaw*.¹

The Court refused the motion.

THE COURT pronounced the following interlocutor:—“The Lords having heard counsel for the appellant, and in respect of no appearance for the respondents, answer the question in the case in the affirmative: Reverse the determination of the inferior Judge, and decern.”

CROWN AGENT, Agent.

* The bye-law provided,—“I. This bye-law shall extend and apply to that part of the sea inside of a line beginning at a point three miles east (magnetic) of Red Head, in Forfarshire, and extending along the coast at a distance of three miles from low-water mark to a point three miles north (magnetic) of Kinnairdhead Lighthouse.

“II. Within the foresaid limits no person, unless in the service or by the orders of the Fishery Board for Scotland, shall at any time, from the date when this bye-law comes into force, use any beam-trawl for taking sea fish.”

¹ Dec. 16, 1875, 3 R. (Just. Cases) 18, 3 Couper, 209.

No. 18.

June 8, 1897.
Burns v.
Williamson.

WILLIAM BURNS, Appellant.—*A. S. D. Thomson.*

DAVID WILLIAMSON (Burgh Prosecutor, Kirkcaldy), Respondent.—
Sol.-Gen. Dickson—J. B. Young.

Procedure—Citation—Name of Prosecutor—Sale of Food and Drugs Act Amendment Act, 1879 (42 and 43 Vict. cap. 30), sec. 10.—The Sale of Food and Drugs Act, 1879, enacts that in all prosecutions under the principal Act of 1875 “the name of the prosecutor shall be stated in the summons” served on the accused to appear before the magistrate.

A summons cited a person to answer to a complaint “at the instance of the burgh prosecutor,” charging the person summoned with a contravention of the Sale of Food and Drugs Act, 1875. The name of the prosecutor was not mentioned in the summons, which was in the form provided by Schedule vii. of the Burgh Police (Scotland) Act, 1892, but did not bear to proceed under that Act.

Held that the summons was ineffectual in respect that it did not state the name of the prosecutor.

Opinion (per the Lord Justice-Clerk) reserved on the question whether if the summons had borne to proceed under the Burgh Police (Scotland) Act, 1892, that would have been sufficient to override the express provision of the Sale of Food and Drugs Act, 1879, sec. 10, requiring the name of the prosecutor to be stated in the summons.

Record—Noting of documents—Observations (per the Lord Justice-Clerk) on the necessity, in summary prosecutions, of noting in the record of the proceedings all documents which are made productions.

HIGH COURT.
Lord Justice-
Clerk.
Lord Trayner.
Ld. Moncreiff.

ON 19th March 1897 William Burns, grocer, 42 Dunnikier Road, Kirkcaldy, was charged in the Police Court, Kirkcaldy, on a complaint at the instance of “David Williamson, Burgh Prosecutor,” setting forth that the accused, “on 17th February 1897, within the grocer’s shop occupied by him at 42 Dunnikier Road, in the burgh of Kirkcaldy, did, to the prejudice of Francis Braid, inspector of nuisances for the said burgh, the purchaser thereof, sell to him, at the price of tenpence, one pound weight of butter which was not of the nature, substance, and quality of the article demanded by said purchaser, namely, butter, the article so sold being a material containing fat other than butter fat to an extent not under 85 per cent by weight of the total fat present, contrary to 38 and 39 Victoria, chapter 63, section 6 (the Sale of Food and Drugs Act, 1875), and 42 and 43 Victoria, chapter 30, section 2 (the Sale of Food and Drugs Act Amendment Act, 1879), whereby, under section 6 of the said Act first libelled, the said William Burns is liable to a penalty not exceeding twenty pounds, or otherwise to be adjudicated upon under sections 487, 488, 489, and 501 of the Burgh Police (Scotland) Act, 1892.”

Before pleading to the complaint Burns objected to the summons to appear which had been served on him, in respect that it did not state the name of the prosecutor as required by the Sale of Food and Drugs Act Amendment Act, 1879, section 10.*

The summons served on Burns was in the form contained in Schedule vii. of the Burgh Police (Scotland) Act, 1892 (according to which the name of the prosecutor does not require to be set forth), and did not anywhere state the name of the prosecutor. It was in the following terms:—

“To William Burns, grocer, Dunnikier Road, Kirkcaldy. You are hereby summoned to appear personally before the magistrate offici-

* The section is quoted in the report of *Frew v. Morris*, *supra*, at p. 50, note.

ating in the Police Court of the burgh of Kirkcaldy, upon the nineteenth day of March 1897, at half-past ten o'clock forenoon, to answer to a complaint at the instance of the Burgh Prosecutor, charging you with the following, viz.:—That on 17th February 1897, within the grocer's shop occupied by you at 42 Dunnikier Road, in the burgh of Kirkcaldy, you did," &c. (as in the complaint) "whereby, under said section 6 of the said Act first libelled, you are liable to a penalty not exceeding twenty pounds, or otherwise to be adjudicated upon under sections 487, 488, 489, and 501 of the Burgh Police (Scotland) Act, 1892. This summons served by me on the 10th day of March 1897. David Chrystal, constable."

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Williamson.

Neither the complaint, which was according to the form of complaint in Schedule vii. of the Burgh Police (Scotland) Act, 1892, nor the summons, bore (either by way of heading or otherwise) to proceed under the Burgh Police (Scotland) Act, 1892, nor did either document make any reference to that Act other than the reference to sections 487, 488, 489, and 501. These sections deal with penalties only.

The Magistrate repelled the objection. Burns then pleaded not guilty, but was convicted and fined £2, 2s., with the alternative of seven days' imprisonment.

He obtained a case. The case stated questions regarding the validity of the conviction on the merits, which it is unnecessary here to detail. The case bore, *inter alia*, that "the margarine kit, margarine ticket, and margarine label of the appellant and other traders . . . and the report by the analyst, were made productions in the case." These documents were not referred to in the record of the proceedings in the inferior Court.

The following question of law was stated on the point now reported:—"3. Should the appellant's objection have been sustained that the summons served upon him did not state, or sufficiently state, the name of the prosecutor?"

The Burgh Police (Scotland) Act, 1892, sec. 432, was referred to at the hearing.

LORD JUSTICE-CLERK.—This is a prosecution under the Sale of Food and Drugs Acts brought in the Burgh Court of Kirkcaldy. I may state that there is at the end of the complaint a reference to certain sections of the Burgh Police Act of 1892. Now, I have read over those sections and find that they have nothing to do with procedure, but deal solely with the powers of the magistrate as regards the punishment which may be inflicted. In the ordinary case we should have had a note at the head of the complaint informing the accused of the statutes which were to regulate the procedure in the case against him. I say in the ordinary case, but it becomes much more important that there should be such a note when we come to deal with a prosecution for an offence under a statute in which it is expressly provided that the prosecutor shall be named, if the prosecutor intends to avail himself of another statutory form of procedure in which it is not essential that such name be given. In that case I am of opinion that the failure to give the accused due notice of that statute is fatal to the proceedings. If there had been such a reference to the Burgh Police Act of 1892 there would be the further question of how far the form of complaint given in the schedule to that Act would suffice to override the express provisions of the Food and Drugs Acts as to naming the prosecutor. As to that I express no opinion,

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but I have grave doubts whether, when an Act prescribes a particular solemnity in procedure for the prosecution of offences constituted by it, this may be disregarded because forms given in a general procedure statute seem to dispense with it. On the facts of this case it is not necessary to decide that question. Nor is it necessary to go into the merits, although at first glance they appear to disclose a very weak case for the prosecution.

There is, however, another point which has come up, and to which I should like to advert, as it is one to which we are constantly referring, and I do hope those responsible in the Courts below will in future pay attention to it. In summary cases it is prescribed by the Summary Procedure Act that where documents are produced in evidence these documents shall be noted on the record of the proceedings. That is a matter of the most elementary justice, in order that, where the case has afterwards to be dealt with either by a Court of review, or it may be by Her Majesty's minister, these documents shall be certified by the record as having formed part of the proceedings before the Court which tried the case. In the present case we learn from the statement of the Magistrate that certain items of documentary evidence were cited in the case, but on turning to the record itself we find that these are not noted, and that in itself would suffice for the overturning of this conviction. It has often been argued before us that such an omission is a mere matter of form, and not of substance, but we have always decided against this argument. It may be said that the proceedings here were not under the Summary Jurisdiction Acts, which prescribe that such a note shall be kept. But I would point out that these statutes are relaxing statutes, and therefore prescribe the minimum of formality which is necessary in summary cases. No procedure in summary trials can legally be less formal than that prescribed by these statutes, because they are statutes for the purpose of dispensing with formalities, and they do prescribe that certain formalities must on this ground be fulfilled, thus indicating that justice requires their continuance. The principle of criminal procedure is written record of the proceedings. Any relaxation of that principle must be based on statute, or customary law established so as to be equivalent to statute. There is no such law dispensing with the documents produced being set forth in the record of the proceedings in summary cases.

On this ground, as well as on account of the omission of the prosecutor's name, I think we must sustain this appeal.

LORD TRAYNER concurred.

LORD MONCREIFF.—I agree with your Lordships, and would just add, on the first point, that if it is intended to use forms of procedure different from those prescribed in the special statute creating the offence, notice of such intention should be given to the accused in the form of a note at the head of the complaint. In the present case we have no notice of the intention of the prosecutor to avail himself of the forms prescribed by the Burgh Police Act, 1892, the only mention of that statute in the complaint being a reference to certain clauses affecting the penalty to be inflicted.

THE COURT answered the third question in the case in the affirmative, and sustained the appeal.

W. & J. L. OFFICER, W.S.—J. A. STUART, S.S.C.—Agents.

JAMES BLACK MORISON, Appellant.—*Salvesen*.
ARTHUR WHITE STUBBS, Respondent.—*A. J. Young*.

No. 19.

June 8, 1897.
Morison v. Stubbs.

Complaint—Relevancy—Statute—Repeal—Statute Law Revision Act, 1892 (55 and 56 Vict. c. 19).—A complaint libelled a contravention of section 26 of the Excise Licences Act of 1825, "as altered or amended by the 8th and 9th sections of the Licensing (Scotland) Act, 1853." The 8th and 9th sections of the Act of 1853 were repealed by the Statute Law Revision Act, 1892.

Held that the complaint was irrelevant, in respect that it was founded on sections of a statute which had been repealed.

ON 11th March 1897 James Black Morison, grocer, 13 Finnart Street, Greenock, was charged in the Justice of Peace Court, Greenock, on a complaint at the instance of Arthur White Stubbs, officer of Inland Revenue, setting forth that the accused had "contravened the 26th section of the Excise Licences Act, 1825, as altered or amended by the 8th and 9th sections of the Licensing (Scotland) Act, 1853," in so far as, being a retailer of spirits within the meaning of the said Acts, he had retailed spirits in his premises in Finnart Street without having a licence for these premises.

HIGH COURT.
Lord Justice-Clerk.
Lord Trayner.
Ld. Moncreiff.

Morison had other premises in Greenock, at No. 29 West Blackhall Street, for which he held a licence, and the question on the merits was whether he had contravened the Acts libelled by receiving orders for excisable liquors in his unlicensed premises which were executed from his licensed premises; but before pleading to the complaint, Morison objected to its relevancy, in respect the 8th and 9th sections of the Licensing (Scotland) Act, 1853, had been repealed by the Statute Law Revision Act, 1892.

The Justices repelled the objection. The accused then pleaded not guilty, but was convicted and fined two guineas.

He obtained a case. The case set forth facts and a question in law on the merits, and also this question "(1) Was the complaint relevant?"

Argued for the appellant;—The complaint charged a contravention of the 26th section of the Excise Licences Act, 1825, as amended by the 8th and 9th sections of the Licensing (Scotland) Act, 1853; but as sections 8 and 9 of the latter Act had been repealed by the Statute Law Revision Act, 1892, the complaint charged a statutory offence which had been repealed, and was therefore irrelevant.

Argued for the respondent;—Repeal by the Statute Law Revision Act, 1892, was not an absolute repeal; where a repealed enactment was referred to in an enactment which was not repealed, the latter kept the former alive for the purpose of the reference. Here section 2 of the Act of 1853, which section was not itself repealed, referred to sections 8 and 9 of the same Act, which sections consequently were to some extent still in force.* In any view, sections 8 and 9

* The respondent founded on the following:—

The Statute Law Revision Act, 1892 (55 and 56 Vict. cap. 19), sec. 1, *inter alia*, provides that "the repeal by this Act of any enactment or schedule shall not affect any enactment in which such enactment or schedule has been applied, incorporated, or referred to."

The Licensing (Scotland) Act, 1853 (16 and 17 Vict. cap. 67), sec. 2, provides that grocers may obtain certificates at the same rates as are chargeable for a certificate for a public-house.

Secs. 8 and 9, which are repealed by the Statute Law Revision Act, 1892,

No. 19. merely dealt with the rate of duty ; the substantive enactment founded on in the complaint—section 26 of the Act of 1825—was unrepealed.

June 8, 1897.
Morrison v.
Stubbs.

LORD JUSTICE-CLERK.—I think that this is a plain case. The Act here founded upon is the Excise Licences Act, 1825, as altered or amended by sections 8 and 9 of the Licensing (Scotland) Act, 1853. These sections are repealed by the Statute Law Revision Act, 1892, and therefore the Act as amended, which is founded on, is no longer in existence. We are told that there is something in section 2 of the Act of 1853 which will save sections 8 and 9, because it is said that section 2 refers to sections 8 and 9, and so preserves them in force. I fail to see that sections 8 and 9 are referred to in section 2, and in any case section 2 is not referred to in the complaint. I am of opinion that the first question must be answered in the negative, and the determination of the Justices reversed.

LORD TRAYNER.—I agree. The complaint libels a contravention of a specified section of the Excise Licences Act, 1825, as altered or amended by sections 8 and 9 of the Licensing (Scotland) Act, 1853. But sections 8 and 9 of the Act of 1853 have been repealed, and consequently the Excise Licences Act, 1825, as amended by these sections, no longer exists. There can be no contravention of a non-existing statute.

LORD MONCREIFF concurred.

THE COURT answered the first question in the negative, and reversed the determination of the Justices.

J. SMITH CLARK, S.S.C.—SOLICITOR OF INLAND REVENUE—Agents.

No. 20.

June 8, 1897.
Cockett v.
Beattie.

EDWARD COCKETT, Appellant.—*Cullen*.

PETER BEATTIE (Inspector of Poor of Barony Parish, Glasgow),
Respondent.—*Deas*.

Public Health—Vaccination—Refusal to allow child to be vaccinated—Proof—Husband and Wife—Vaccination (Scotland) Act, 1863 (26 and 27 Vict. cap. 108), sec. 18.—A father was convicted of a contravention of the Vaccination (Scotland) Act, 1863, sec. 18, by having refused to allow his child to be vaccinated. He appealed. The case stated that the Parish Council having issued an order to their vaccinator to vaccinate the child, notice of the order was sent to the accused, with an intimation that the Act directed the vaccination to take place within a period specified ; that on a day within the period the vaccinator called at the house of the accused ; and that he was then told by the wife of the accused "that she was expecting him, but that her husband, who was not at home, had instructed her on no account to allow the child to be vaccinated."

The Court *sustained* the appeal, holding that it had not been proved that the accused had refused to allow his child to be vaccinated.

respectively set forth the rate of duty chargeable for licences for public-houses, and make provision for the collection of such duty by the Commissioners of Inland Revenue.

Notwithstanding their repeal, secs. 8 and 9 are printed in "The Statutes : Second Revised Edition," published (1895) by authority, the following note to each of sections 8 and 9 being added in the authorised publication :—

"Ss. 8 and 9 are rep. 55 & 56 Vict. c. 19 (Statute Law Revision Act 1892) ; but the rates of duty are applicable to grocers' licences under a. 2."

On 17th March 1897, Edward Cockett, officer of Inland Revenue, No. 20.
60 New Cambridge Drive, Glasgow, was charged in the Sheriff Court
at Glasgow, on a complaint at the instance of Peter Beattie, Inspector June 8, 1897.
of Poor of Barony Parish, Glasgow, setting forth that the accused had
contravened the Vaccination (Scotland) Act, 1863, sec. 18,* in so far
as, after the statutory procedure libelled, he had "refused" to allow
his child Constance Elaine Cockett to be vaccinated. Cockett v. Beattie.

HIGH COURT.
Lord Justice-
Clerk.
Lord Trayner.
Ld. Moncreiff.

The accused pleaded not guilty, but was convicted and fined 15s.

He obtained a case.

The case stated that the Sheriff-substitute (Strachan) found it proved (2) that on 26th January 1897 the Parish Council of Barony Parish issued an order to the vaccinator, Dr Hay, directing him to vaccinate Cockett's child; (3) that on the same day a notice of such order was sent to Cockett, "which notice contained a memorandum to the effect, *inter alia*, that the Act directs the vaccinator to vaccinate every child named in the order at some time, not less than ten nor more than twenty days after the date of the said notice; (4) that Dr Hay having, on 6th February 1897, called at the house of the said Edward Cockett for the purpose of vaccinating the said child, Constance Elaine, he was told by Mrs Cockett, the wife of the said Edward Cockett, that she was expecting him, but that her husband, who was not at home, had instructed her on no account to allow the child to be vaccinated, and at the same time she admitted that the child was in perfect health."

It further appeared from the case that Cockett maintained that there was not legal evidence to warrant a conviction, *inter alia*, on the ground "that the refusal by the appellant's wife, during his absence, of liberty to vaccinate said child was not the refusal of the appellant."

The question of law stated by the Sheriff-substitute was,—“Whether I was warranted in the circumstances stated in convicting the said Edward Cockett of the said contravention.”

LORD TRAYNER.—It appears that what the appellant is charged with in the complaint before us is a refusal to allow his child to be vaccinated. The only thing in the case which appears to shew that he did refuse is in the fourth finding, in which it is set forth that the public vaccinator called and saw the appellant's wife, and that she stated that she had been instructed by her husband to refuse to allow vaccination. Now, I cannot take the statement of the appellant's wife, made outwith the presence of the appellant, as equivalent to the statement of the appellant himself. I do not

* The Vaccination (Scotland) Act, 1863 (26 and 27 Vict. cap. 108), sec. 18, enacts that on receipt from the registrar of a list of persons who have failed to transmit a certificate of vaccination in terms of the Act, the parochial board should issue an order to their vaccinator to vaccinate the persons named in the list, "and notice in writing of such order shall be given to such persons, or if children to their father or mother, or the persons having care of them; and in pursuance of such order the vaccinator shall vaccinate the persons named therein, or any of them, at any time not less than ten and not more than twenty days after the date of such notice . . . and if any such person, or the parent or person having the care of any such child shall refuse to allow such operation to be performed, he shall for every such offence be liable to a penalty not exceeding twenty shillings, and failing payment," &c.

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know whether the appellant authorised or instructed his wife to make the statement which she made. I cannot sustain the conviction in the case unless it is proved that the appellant refused to allow his child to be vaccinated, and of that there is no proof. It is said that there may be a practical difficulty in the working of the Vaccination Act if we refuse to regard a statement by a wife as equivalent to a statement made by her husband. I am not greatly impressed by that. The answer of the husband, as the guardian of the child, is the answer which the statute requires, and though, if it were proved that he gave his wife instructions to give a positive refusal, that might be sufficient, yet the mere statement by her of what she says he said is not enough. I decide the case on the ground that it is not proved that Mr Cockett refused to allow his child to be vaccinated.

LORD MONCREIFF.—On the facts proved it is only too probable that the statement made by the appellant's wife as to the instructions given by her husband was true. But what we have to consider is whether there was legal evidence on which the Sheriff was entitled to convict. Now, the section alleged to be contravened is section 18 of the Vaccination Act; and looking to that section it is plain that in the circumstances of this case the person called upon to allow the vaccination of the child was the father. So the authorities seem to have thought, because it was the father to whom a statutory notice was sent. He was therefore the only person whose refusal would infer a contravention of the section. Now, the only evidence before us of his alleged refusal is the evidence of the vaccinator as to orders which the appellant's wife said her husband gave her. She was not, and could not competently be, adduced as a witness. I think that such evidence is not sufficient to warrant conviction to be followed by penal consequences. If the appellant had been asked if it was true that he had ordered his wife to refuse, and either admitted it or declined to answer, or even if notice had been given to him that the vaccinator would call on a certain day and hour, and asking that arrangements should then be made for vaccination, it might have been sufficient. But as the case stands the evidence fails.

I arrive at this conclusion with reluctance, because there is strong probability that the appellant instructed his wife not to permit vaccination; and, as far as we know, the child is still unvaccinated. But I agree with your Lordships that the conviction cannot stand.

LORD JUSTICE-CLERK.—I entirely agree that there was not evidence here to warrant a conviction. The only thing I wish to add is, that I have a strong impression that the only evidence we have is not competent evidence at all. For what does it consist of? Solely of a statement of what the wife of the accused said, and I think that a statement of what the wife of the accused said is not competent, more particularly in a case in which she would not be a competent witness. Even if competent, it could never be sufficient to prove as matter of fact that the accused did refuse to have his child vaccinated.

THE COURT answered the question in the case in the negative, and sustained the appeal.

DAVID DOUGAL, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

JOHN TAYLOR, Complainer.—*Comrie Thomson—Findlay.*
HER MAJESTY'S ADVOCATE, Respondent.—*Sol.-Gen. Dickson—*
James Ferguson, A.-D.

No. 21.

June 8, 1897.*
Taylor v.
H. M. Advocate.

Fraudulent Bankruptcy—“Intent to defraud”—Debtors (Scotland) Act, 1880 (43 and 44 Vict. c. 34), sec. 13—Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), sec. 8.—It is unnecessary to set forth intent to defraud in an indictment charging a sequestered bankrupt with a contravention of the 13th section of the Debtors (Scotland) Act, 1880, by concealing his property.

Fraudulent Bankruptcy—Concealment of property—Indictment—Relevancy—Debtors (Scotland) Act, 1880 (43 and 44 Vict. c. 34), sec. 13.—An indictment under the Debtors (Scotland) Act, 1880, after setting forth that the accused had been sequestered, and that within four months next before the presentation of his petition for sequestration he had concealed his property, proceeded,—“and thus he did not, to the best of his knowledge and belief, fully and truly disclose the state of his affairs, in terms of the Bankruptcy (Scotland) Act, 1856, and did not deliver up to his said trustee all his property, which he was required by law to deliver up, contrary to the Debtors (Scotland) Act, 1880, section 13, subsection (a) 1, 2, and 3 thereof.”

It was objected that the statement that the bankrupt had concealed his property was not libelled as a substantive charge, but was introduced merely as explaining the mode in which he committed the offences of failing to disclose and failing to deliver his property to the trustee.

Held that this was a good charge of concealment of his property by the bankrupt under subsection 3 of section 13 of the Act.

Fraudulent Bankruptcy—Property and all documents in control of the bankrupt—Relevancy—Debtors (Scotland) Act, 1880 (43 and 44 Vict. c. 34), sec. 13, subsec. 2.—*Held* that in an indictment under subsections 1, 2, and 3 of section 13 of the Debtors (Scotland) Act, 1880, it is unnecessary, in order to the relevancy of a charge under subsection 2, to set forth that the property which the bankrupt is alleged to have failed to deliver to the trustee in his sequestration was “in his custody or under his control.”

Question, whether the words “in his custody or under his control” refer only to “books, documents, papers, and writings relating to” the bankrupt's affairs, and not to “his property.”

Fraudulent Bankruptcy—Indictment—Specification—Locus—Debtors (Scotland) Act, 1880 (43 and 44 Vict. c. 34), sec. 13, subsecs. 1, 2, and 3.—A bankrupt was charged under the Debtors (Scotland) Act, 1880, with having concealed “in the stable in Charles Street Lane, Edinburgh, and in the dwelling-house at No. 5 Bristo Street, Edinburgh, then both occupied by Robert Forrest, cattle-dealer,” certain specified property, including a large number of articles.

Objection that the *locus* was indefinite and wanting in specification repelled.

ON 22d February 1897, John Taylor, auctioneer, Montague Street, Edinburgh, was charged at the instance of Her Majesty's Advocate upon an indictment charging him with “having carried on business in Lothian Street, Edinburgh, as an auctioneer and dealer in goods of various kinds, including clothing, furniture, pianos, plated goods and miscellaneous articles, which he was in the habit of purchasing from manufacturers and wholesale agents, and selling by auction and otherwise, and his estates having, on 24th July 1896, been sequestered,

HIGH COURT.
Lord Justice-
Clerk.
Lord Adam.
Lord Low.

No. 21. under 'the Bankruptcy (Scotland) Act, 1856,' on his own petition, by the Sheriff of the Lothians and Peebles, at Edinburgh, and Robert Greenwood Morton, accountant, Edinburgh, having been elected trustee on his sequestrated estates on 3d August 1896, and the trustee's election having been duly confirmed by act and warrant of the said Sheriff of the Lothians and Peebles, on 5th August 1896, he did, on various occasions, between the 1st day of April 1896 and the said 24th day of July 1896, being within four months next before the presentation of his said petition for sequestration, conceal in the stable in Charles Street Lane, Edinburgh, and in the dwelling-house at No. 5 Bristo Street, Edinburgh, then both occupied by Robert Forrest, cattle-dealer, the various goods described in the first column of the schedule annexed to the said indictment, which had been purchased by him from the respective persons or firms named in the second column of said schedule, and which had been received by him from the said persons or firms respectively on or about the respective dates set forth in the third column of said schedule, and a quantity of other goods, consisting of chairs, chests of drawers, over-mantles, rolls of floorcloth and linoleum, carpets, shawls, dress stuffs, underclothing, portmanteaus, plated goods, jewellery, cutlery, and other articles, the quantities of each of which are to the prosecutor unknown, the whole goods above libelled being his property, or part of his stock in trade, and amounting in all to the value of £800 or thereby, and thus he did not, to the best of his knowledge and belief, fully and truly disclose the state of his affairs, in terms of 'The Bankruptcy (Scotland) Act, 1856,' and did not deliver up to his said trustee all his property, which he was required by law to deliver up, contrary to 'The Debtors (Scotland) Act, 1880,' section 13, subsection (a) 1, 2, and 3 thereof."*

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The Sheriff (Rutherford) repelled objections to relevancy.

The accused then pleaded not guilty. After a trial the jury returned the following verdict as recorded:—"The jury unanimously found the panel guilty as libelled."

* The Debtors (Scotland) Act, 1880 (43 and 44 Vict. c. 34), sec. 13, enacts:—"The debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, and on conviction before the Court of Justiciary, or before the Sheriff and a jury, shall be liable to be imprisoned for any time not exceeding two years, or by the Sheriff without a jury, for any time not exceeding sixty days, with or without hard labour

"(a) In each of the cases following, unless he proves to the satisfaction of the Court that he had no intent to defraud; that is to say—

"1. If he does not, to the best of his knowledge and belief, fully and truly disclose the state of his affairs in terms of The Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), or the Cessio Acts, as the case may be.

"2. If he does not deliver up to the trustee all his property, and all books, documents, papers, and writings relating to his property or affairs which are in his custody or under his control, and which he is required by law to deliver up, or if he does not deal with and dispose of the same according to the directions of the trustee.

"3. If, after the presentation of the petition for sequestration or cessio, or within four months next before such presentation, he conceals any part of his property, or conceals, destroys, or mutilates, or is privy to the concealment, destruction, or mutilation of any book, document, paper, or writing relating to his property or affairs."

The accused was sentenced to nine months' imprisonment.

No. 21.

Taylor brought a bill of suspension, in which he pleaded;—1. The indictment against the complainer is irrelevant, in respect—(1) There is no allegation contained therein of any intention to defraud on the part of the accused. (2) The complainer was charged with offences under subsections 1 and 2, and was found guilty of concealment under subsection 3. (3) There is no allegation that the said property was in his custody or under his control. (4) That the *locus* is indefinite and wanting in specification. June 8, 1897.
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Argued for the complainer;—(1) Intent to defraud was of the essence of the crime charged, and the prosecutor should have set it forth.¹ (2) The accused had been charged only with a contravention of the 1st and 2d subsections of the 13th section of the Debtors (Scotland) Act, 1880, and yet he had been convicted of concealment of his property under the 3d subsection. (3) The charge under subsection 2 was irrelevant. There was no averment that the property not delivered up was under the bankrupt's control or in his custody. This was essential, otherwise a man might be tried on a charge of failing to deliver up property over which he had no control. (4) The *locus* was wanting in specification. The accused was entitled to know whether he was charged with concealing the property in the stable or in the dwelling-house. He could not conceal the same goods in the two places.

Argued for the respondent;—(1) *Small v. Hart*¹ was no longer of authority. Since the passing of the Criminal Procedure Act, 1887,² the words "with intent to defraud" were to be implied.³ (2) The indictment distinctly charged the accused with concealment, and then by the words "and thus" imported that concealment as the *modus* of the two further contraventions. (3) It was unnecessary to libel that the property in question was "in the control" of the accused. It must have been in his control if he concealed it. Further, the words in subsection 2, "which are in his custody or control," applied only to books and documents, and not to property. (4) The objection to the *locus* as being wanting in specification came too late, as it was not stated at the first diet.

LORD JUSTICE-CLERK.—The first objection in this case is that there is no allegation of any intent to defraud on the part of the accused. Now, I should have no doubt or difficulty in holding that under the section in question it is not necessary to aver an intent to defraud, it not being necessary to prove any such intent, because the section says that if the accused does certain things he shall be held guilty of an offence unless he proves that he had no intent to defraud. But even if I were wrong on that point, all doubt is removed by section 8 of the Criminal Procedure Act, 1887, whereby it is provided that words like falsely and fraudulently shall be implied in every case where under the former practice their insertion would have been necessary.

The second objection is that while the accused was found guilty of concealment under subsection 3, the form of the indictment excludes conceal-

¹ *Small v. Hart*, March 12, 1886, 13 R. (Just. Cases) 45, 1 White, 80.

² Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), sec. 8.

³ *Howman v. Mackie*, Feb. 2, 1891, 18 R. (Just. Cases) 30, 2 White, 617.

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ment as a substantive accusation, and alleges it only as a narrative from which the other two charges may be inferred, i.e., failing to disclose the state of his affairs, and not delivering up his property. I think this objection also is bad, and that the accused is charged quite distinctly with concealment of his property. I should, however, remark that I think prosecutors would do well in cases of this kind where concealment is charged, not to go into the offences covered by the first two subsections, as, if a man is found guilty of concealing his property, it is clear that he must have failed to disclose the state of his affairs, and not delivered up his property to the trustee.

Again, it is said that it is not averred that the property concealed was in the custody or under the control of the bankrupt. On this I have two observations to make. First, I think that such an averment is implied in a charge of concealment of property, and further, that I am satisfied that the words "in his custody or under his control" in subsection 2 of section 13 of the Debtors (Scotland) Act, 1880, refer to the latter part of the clause, and not to the former,—that is, they refer to documents or papers, and not to property. A man has presumably the control of his own property, but there may be many papers relating to his property or affairs which are not under his own control, and the Act therefore limits the call to those which are in his custody or under his control.

The fourth objection is that the *locus* is indefinite and wanting in specification. Now, the averment is one of concealment of property in two places, and I do not think it is essential that the particular things concealed in each place should be specified. The objection is not that there is no statement of *locus*, or that the statement of *locus* is misleading, but merely to want of specification. If the accused suffered any prejudice from this want, objection should have been taken at the first diet. It is no doubt competent in this Court to set aside a conviction on the ground of an objection to the statement of the *locus*, but the objection must be of a substantial character. I am of opinion that this objection, relating only to sufficiency of specification, not having been taken in the Court below, cannot now be sustained.

LORD ADAM.—The first objection to the conviction here is that there was no averment of intent to defraud in the indictment, and it is supported on the authority of the case of *Small v. Hart*.¹ If matters had remained in the same condition as they were when that case was decided, I should have had some difficulty in refusing to give effect to the argument. But in the meanwhile the Criminal Procedure Act, 1887, was passed, and accordingly the case of *Howman v. Mackie*² was decided, in which Lord M'Laren, who was one of the Judges who were in the majority in the case of *Small*,¹ points out that the arguments formerly of avail were no longer applicable, because under section 8 of the Act the missing averment was to be inferred from the statement of facts. I think, therefore, that we must follow the case of *Howman*² and repel this objection.

¹ 13 R. (Just. Cases) 45, 1 White, 80.

² 18 R. (Just. Cases) 30, 2 White, 617.

The next objection urges that whereas the conviction is of concealment of property there is no relevant charge of that crime. I think that is not so; and that it is distinctly charged. Mr Thomson urged that the concluding clause of the indictment, beginning "and thus," excluded the charge contained in the prior part, but that is too stringent a view to take of these words.

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June 8, 1897.
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H. M. Advocate.

With regard to the objection to the statement of the *locus*, I agree that when this indictment sets forth in a cumulative manner the articles that were alleged to have been concealed in these two places, it was not necessary to specify in which place each article was concealed.

The remaining objection is that it is not averred that the property in question was "in the custody or under the control" of the bankrupt. I do not think it was necessary to use these words where from the whole facts stated it appeared as a necessary inference that the property was under his control. But I am also disposed to agree with your Lordship that these words in subsection 2 refer to the documents and papers which the bankrupt is called upon to deliver up, and not to his property, but I reserve my opinion on that point.

LORD LOW.—Upon the first point, as to whether it was necessary in the indictment to allege that the concealment was with intent to defraud, I agree with Lord Adam that it is sufficient to say that these words are necessarily implied under the Criminal Procedure Act of 1887, and that it is unnecessary to express any opinion on the case of *Small v. Hart*,¹ which occurred prior to the passing of that Act.

In regard to the objection to the relevancy of the indictment, that there is no good charge of a contravention of all the three subsections of section 13 of the Debtors (Scotland) Act, 1880, I agree entirely with what has been said.

It is distinctly and specifically averred that the bankrupt concealed his goods, and by doing so committed an infringement of the first, second, and third subsections of section 13. It is a good indictment, although I agree with the Lord Justice-Clerk that it might have been simpler and sufficient if the prosecutor had libelled an infringement only of the 3d subsection. It is clear that there may be cases of offences under the first two subsections without there being any offence under the third, because a bankrupt might fail to disclose the state of his affairs and to deliver up his property to the trustee without concealing his property—the concealment referred to in the third subsection obviously meaning a positive act—the actual hiding away of property. But then, on the other hand, it follows that if a man has been guilty of concealing his property he must also have failed to disclose the state of his affairs and to deliver up his property to his trustee.

With regard to the question of *locus*, I have nothing to add. With regard to the objection that it should have been stated that the goods in question were under the bankrupt's control or in his custody, I agree that even assuming that it is necessary they should be under his control it is not

¹ 13 R. (Just. Cases) 45, 1 White, 80.

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H. M. Advocate.

necessary to use the precise words if on the narrative of the indictment it is clear that the goods were under his control; and here it is clear, because it is narrated how he got the goods and concealed them in certain places. I should prefer not to express any opinion as to whether the words "in his custody or under his control," as used in subsection 2 of section 13, apply to "property" or not. The bankrupt may have property which is not in his custody or under his control, and I do not see how it would be an offence not to deliver such property to the trustee. The question, however, does not arise sharply, and it is safer not to express an opinion upon it. On the whole matter, I agree that the objections to this conviction have all failed.

THE COURT refused the bill.

PATRICK & JAMES, S.S.C.—CROWN AGENT—AGENTS.

No. 22.

June 8, 1897.*
Sime v.
Linton.

DAVID SIME, Complainer.—Cook.

GEORGE LINTON, Respondent.—Baxter—Boyd.

Suspension—Process—Irregularity in procedure—Visit by Magistrate to locus—Remit to Sheriff.—A person was charged in the Police Court with having wilfully and maliciously scratched and defaced a door of a dwelling-house in a particular street. After evidence had been led and counsel for the parties heard, the magistrate adjourned the diet. The accused having been subsequently convicted brought a bill of suspension, averring that, between the adjournment and the conviction, the magistrate had made an independent examination of the door in question. The Court having remitted to the Sheriff to inquire into the facts, the Sheriff reported that the magistrate had at the close of the trial made up his mind to convict, but had not determined upon the sentence, and that the alleged examination by him of the door was accidental and casual.

Held that there was no sufficient irregularity to justify a suspension of the conviction.

Suspension—Sentence—Oppression.—A person having been convicted in the Police Court of having wilfully and maliciously scratched and defaced a door of a dwelling-house in a street, was sentenced by the magistrate to pay a fine of £10, with an alternative of sixty days' imprisonment.

In a suspension the Court *refused* to set aside the sentence as oppressive.

HIGH COURT.
Lord Justice-
Clerk.
Lord Adam.
Lord Low.

ON 16th October 1896 David Sime, dairyman, Haymarket Terrace, Edinburgh, was charged in the Police Court, Edinburgh, at the instance of the Police Court Prosecutor, upon a complaint which set forth that he had wilfully and maliciously scratched and defaced doors in dwelling-houses in nine streets in the city, the ninth charge relating to the door of the dwelling-house, No. 14 Manor Place, occupied by James Boyd Fleming.

On 27th October the Magistrate (Bailie Gulland) found the charge last libelled proved, and sentenced the accused to a fine of £10, with the alternative of sixty days' imprisonment.

Sime brought a bill of suspension, in which, after averments of irregularities in the procedure of the trial which are not now reported, he averred as follows:—(Stat. 5) "Further, between the close of the trial and Tuesday, 27th October, upon which date the panel was convicted by the sentence now brought under suspension, the said presiding Magistrate paid a visit to some or all of the doors referred to in the charge, and in particular to the door of the house No. 14 Manor

Place, referred to in the last charge, for the purpose of satisfying himself, in view of the conflicting evidence, by an examination of the door, as to the number, position, and character of the marks in question. This he did outwith the presence of the accused, and without the sanction of anyone representing him. Influenced by what he then saw, he, upon 27th October 1896, pronounced the sentence now brought under suspension.”

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He pleaded ;—The proceedings of the Magistrate condescended on being incompetent, irregular, illegal, and oppressive, the complainer is entitled to suspension of the conviction and sentence libelled.

On 27th January 1897 the High Court remitted to the Sheriff of the Lothians and Peebles to inquire into the facts and to report, with power to the Sheriff to take evidence thereanent.

The report of the Sheriff (Rutherford) was as follows :—“ I have to report, as the result of the inquiry, that on Friday, the 23d of October 1896, the case *Linton v. Sime* was tried in the Edinburgh City Police Court before Bailie Gulland.

“ After witnesses had been examined upon both sides, and after hearing the prosecutor and counsel for the accused (*Sime*), the Magistrate held a short consultation with Mr Weston, the clerk of the Police Court, to whom he stated that he had made up his mind, in respect of the evidence adduced, to convict *Sime* upon the last (ninth) charge in the complaint, and that he proposed to sentence him to imprisonment without giving him the option of a fine. To this Mr Weston demurred, on the ground that it was unusual to sentence persons who had not been previously convicted to imprisonment without the option of a fine, and he suggested that the Bailie should take time to consider the sentence to be pronounced. This conversation does not appear to have been overheard by anyone present, and there can be no doubt that it was carried on in an undertone.

“ Bailie Gulland then announced to the parties that he would continue the diet until Monday, the 26th of October, a date which was, however, altered to the 27th in order to suit the convenience of *Sime's* counsel. As this was the last case upon the charge sheet, most of those who were present immediately afterwards left the Court. . . .

“ On the afternoon of the same day Bailie Gulland had occasion to make a call in Torphichen Street, and after transacting his business there he walked along Maitland Street to the corner of Manor Place looking for a tram-car. As he did not see a car when he got to the corner of Manor Place, he walked up to Nos. 14 and 22 and took a cursory glance at the doors of these houses, being two of the doors mentioned in the complaint *Linton v. Sime*. He did not, however, make any minute examination of these doors or of the marks upon them, and in two or three minutes returned to the corner of the street, where he caught a car.

“ On the 27th of October 1896 the conviction and sentence was pronounced which is now under review of your Lordships.”

Argued for the complainer ;—In making an independent investigation into the marks upon the door in question, the Magistrate had committed a gross irregularity. He was bound, like a juryman, to decide the case upon the evidence given upon oath at the trial.¹ The

¹ *Sutherland v. Prestongrange Coal and Firebrick Co., Limited*, March 2, 1888, 15 R. 494; *Hattie v. Leitch*, July 3, 1889, 16 R. 1128.

No. 22. delay in pronouncing sentence shewed that he had not made up his mind prior to the independent visit.

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Argued for the respondent ;—The present case was entirely different from those relied on by the complainer. The Sheriff had reported that the visit was entirely accidental and casual, and that the delay in pronouncing sentence was due to the Magistrate not having made up his mind what the sentence was to be.

LORD JUSTICE-CLERK.—It is most essential that the procedure in all criminal cases should be conducted with regularity, and, indeed, punctilious regularity, and if any irregularity is disclosed in the conduct of such proceedings it must necessarily have the strongest effect against any conviction which may have been pronounced in such a case. But still all such questions are necessarily to some extent questions of degree. There are cases in the books in which it was perfectly clear that a magistrate had had his mind influenced, or had placed himself in circumstances in which his mind might be influenced, by evidence extraneous to the evidence legally before him in the case. In such cases it is the duty of this Court, acting as a Court of review or as the Supreme Court of justice with the power of setting aside convictions improperly pronounced, to set aside the conviction pronounced. If I were of opinion that the circumstances of this case amounted to what I have just indicated, I should certainly be for quashing this conviction, and it was upon the ground that such a matter, when distinctly averred, must be inquired into and dealt with as a matter of fact before its legal effect could be considered, that an inquiry was ordered by this Court. Now, we must take the report we have received from the Sheriff, whom we appointed to inquire, as conclusive upon the matters of fact.

The point taken by the suspender is, that the Magistrate, after the case was closed, went and looked at the doors which the accused is said to have injured. That visit of Bailie Gulland to these doors in Manor Place, according to the Sheriff's report, was of the most accidental and casual description. I do not think that it differs in any practical way from what would have happened if Bailie Gulland had been making a call in Manor Place that afternoon, and had when passing, in a moment of curiosity, gone up the steps and taken a look at the door he had heard so much about. He was, in point of fact, at the corner of Manor Place waiting for a tram-car, and not seeing a car coming he went up Manor Place and looked at the two doors. The Sheriff does not report that that had any influence on the Bailie's mind. On the contrary, the report of the Sheriff shews that that was not so. The Sheriff reports that it was proved as a fact before him that the Bailie had already made up his mind that there must be a conviction, and that the only question he thought it necessary to take time to consider was one raised after consultation with the Clerk of Court as to whether he should pronounce a sentence of imprisonment without the option of a fine. The effect of the Bailie's subsequent deliberation was that he pronounced what we must hold as the very much lighter sentence, particularly to a man in the suspender's position, because necessarily it would have been a much more serious matter for the accused, both as regards his business and his reputation, that he should be treated before the Police Court as a man so

offending that, although the offence was one for which the option of a fine was competent, his case was so bad that he must be sentenced to imprisonment without giving him that option. In the event here he got that option, and so got what was in reality the lighter sentence as the result of the Bailie's deliberation on the question. No. 22.
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It was further said that the sentence pronounced was oppressive because it was the highest sentence of fine and alternative imprisonment that could have been pronounced. No doubt the sentence was severe, but that is a matter into which we cannot enter. The accused was not a common labourer. He was a dairyman in Haymarket Terrace, carrying on a business of his own, and the Magistrate may have thought that an offence of the character charged committed by a man in that position ought to be severely dealt with, both as a proper punishment and as a deterrent to others. On the whole case I am of opinion that no sufficient grounds have been presented to us to justify our quashing this conviction, and that it therefore must be sustained.

LORD ADAM and LORD LOW concurred.

THE COURT refused the bill.

DAVID MURRAY, Solicitor—THOMAS HUNTER, W.S.—Agents.

CHARLES DUNSMORE, Complainer.—*Steele.* No. 23.
JOHN MORTON THRESHIE (Procurator-Fiscal of Justice of Peace Court, Glasgow), Respondent.—*Clyde—Horne.* June 8, 1897.*
Dunsmore v. Threshie.

Citation—Error in service copy of complaint—Timeous Objection.—On 8th October 1896 a person was charged on a summary complaint setting forth that he had committed an offence on 23d September 1896. The copy of the complaint which had been served on the accused set forth that the offence had been committed on 23d October 1896. After he had pleaded not guilty, and part of the evidence for the prosecution had been led, the accused objected to the competency of the proceedings, in respect of the error in the service copy. The accused was convicted. He brought a suspension.

The Court *refused* the suspension, holding that after the accused had pleaded to the charge, and the leading of the evidence had been commenced, it was too late to object to the service copy of the complaint.

Procedure—Adjournment.—On 8th October, after part of the evidence for the prosecution on a summary complaint had been led, the presiding Justices adjourned the diet till 12th October in order to consider an objection by the accused to the competency of the proceedings. At the adjourned diet the accused was convicted. He brought a suspension, pleading that it was incompetent for the Justices to adjourn the diet. Suspension *refused*.

ON 8th October 1896 Charles Dunsmore junior, spirit-merchant, Graham Street, Airdrie, was charged in the Justice of Peace Court at Glasgow on a summary complaint setting forth that he had committed an assault on 23d September 1896. HIGH COURT.
Lord Justice-Clerk.
Ld. Moncreiff.
Lord Kin-
cairney.

Dunsmore pleaded not guilty. After part of the evidence for the prosecution had been led Dunsmore objected to the validity of the proceedings, on the ground that (as was the fact) in the service copy

No. 23. of the complaint, the date of the assault charged was set forth as "23d October 1896" instead of 23d September 1896. The Justices adjourned the diet to 12th October in order to consider the objection. On 12th October further evidence was led, and thereafter the Justices found Dunsmore guilty, and fined him three guineas.

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Dunsmore brought a suspension, pleading,—The sentence complained of should be suspended, as craved, in respect that (a) the pretended copy of said complaint served upon the complainer was not a copy thereof, but differed therefrom in material particulars; (b) that the Justices failed to dispose of said objection at once, but adjourned the diet, to the complainer's hurt and prejudice.

The facts above narrated were admitted by the parties at the hearing.

The authorities given below were cited for Dunsmore.¹

The respondent, the Procurator-fiscal, was not called on.

LORD JUSTICE-CLERK.—The objection to the procedure here is that while there was a copy of the complaint served upon the accused, there was a discrepancy between the copy and the principal complaint. That discrepancy arose from the fact that a clerk had, *per incuriam*, entered the date of the alleged offence in the copy as October 23d instead of September 23d, an error which could not prejudice the accused in any respect. Now, it is said that this clerical error being discovered by the accused after the trial had been begun without objection, he is entitled to an acquittal, for it comes to this, that if the objection is to be held good after the trial has commenced, he must be acquitted finally, having tholed an assize. There is nothing more certain than this, that if such an objection were taken in the High Court or in the Sheriff Court after the jury has been sworn, it would not be listened to, and I see no ground for holding that it would be more competent in a summary Court after evidence had been led. There are only two views on which such an objection can be looked at—either the accused never noticed the discrepancy, and so could have suffered no damage from it, not having been misled, or if he did discover it, he had purposely concealed it in order to secure an acquittal by stating it after the trial had commenced. Taking either view, it would be entirely contrary to public justice to hold that a suspension should be granted because, through the fault of a clerk, there was an accidental discrepancy between the complaint and the service copy. It is laid down by Hume that such an objection must be pleaded before trial. He says (ii. 249)—“Now, with regard to all those matters which must be set forth *in gremio* of the libel, such as the instance, the panel's name, the denomination of the crime, the several articles of the charge, the particular things stolen, the date and tenour of the forged writing, and the like, it seems to be sufficiently plain that the panel must not let pass the opportunity which is given him, *eo intuitu*, to object *in limine* of the process when the libel is read to him at the bar. If on this occasion, when called upon by the Court to listen and to plead to the charge,

¹ On the first question—Stewart v. Lang, Nov. 22, 1894, 22 R. (Just. Cases) 9, 1 Adam, 493; Cook v. Vaughan, 1838, 7 L. J. Ex. 219; Spice v. Bacon, 1877, L. R., 2 Ex. Div. 463. On the second question—Laird v. Anderson, Nov. 2, 1895, 23 R. (Just. Cases) 14, 2 Adam, 18.

he takes no notice of any variation of his copy of the libel from the record, he virtually acknowledges it as an accurate, at least a sufficient copy, and such a one on which he has no objection to be tried." I think these short sentences very clearly express the justice of the matter. If the accused discovers the error in time, he can state it, and obtain a remedy for any prejudice which he has suffered by delay being granted and the correct procedure followed. I am clearly of opinion that such an objection must be stated as a preliminary objection to the trial proceeding, and cannot be brought forward after the prosecutor and the accused have joined issue by evidence being led.

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In this case there is no record of the objection having been taken at all. But it appears that on such a matter being mooted during the trial, the Justices adjourned the trial in order to have time for consideration. I think they acted quite properly in doing so. It is absurd to say that they had no power to adjourn—to say that a party may raise a new plea in law in the middle of a case, and that the Court may not adjourn to consider it. I am certain that Lord Trayner meant nothing of that kind in the passage quoted from his opinion in *Laird v. Anderson*.¹ That was a case where an Act required a citation on six days' *induciae*, and a citation of only three was given, and Lord Trayner held that that defect could not be cured by an adjournment of the Court for three days. Nothing that I have said at all militates against the soundness of his Lordship's judgment, to which, I think, I gave my concurrence at the time.

I was rather staggered at the hearing of the statement, which I find to be correct, that section 33 of the Criminal Procedure Act, 1887,* is not made applicable to summary procedure. But I now see the reason is that section 33 of the Act of 1887 was not intended to make any new law as to objection to the citation. It was only intended that on a new procedure being instituted by which every case, both in the Supreme and in the Sheriff Court, should come before the Sheriff at the first diet, it should not be competent to state an objection to the citation for the first time at the second diet, and to make it imperative that it should be stated before the Sheriff at the first diet. It is therefore quite proper that section 33 should not be made applicable to summary procedure, because such cases stand in the same position as all criminal cases did before the passing of the Act, and that was, as I hold, that an objection such as is stated in this case must be made before the charge goes to proof.

LORD MONCREIFF.—I agree with your Lordship on both points. The first point is of most importance. The established practice in the High

¹ 23 R. (Just. Cases) 14.

* 50 and 51 Vict. c. 35, sec. 33.—“No objection by a person accused to the validity of the citation against him on the ground of any discrepancy between the record copy of the indictment and the copy served on him, or on account of any error or deficiency in such service copy or in the notice of citation, shall be competent unless the same be stated to the Sheriff at the first diet before the accused person is called upon to plead, and no such discrepancy, error, or deficiency shall entitle such accused person to object to plead to such indictment unless the Sheriff shall be satisfied that the same tended substantially to mislead and prejudice such accused person.”

No. 23. Court of Justiciary is that all objections to citation, and in particular to the copy of the libel served on the accused, must be stated before the case goes to trial on the merits. The reasons for this are clearly stated by Hume (ii. 249-250). The same rule is recognised and enacted in regard to procedure by double diets in High Court cases by the Act of 1887. By the 33d section of the Criminal Procedure Act, 1887, it is provided that no objection by a person accused to the validity of the citation against him on the ground of any discrepancy between the record copy of the indictment and the copy served upon him shall be competent unless the same be stated to the Sheriff at the first diet before the accused is called upon to plead, and no such discrepancy shall entitle the accused person to object to plead to the indictment, unless the Sheriff shall be satisfied that the same tended substantially to mislead or prejudice him. The rule in the Police Courts is the same. I have no reason to think that there is any difference in summary cases in the Sheriff Court. In such cases it is not even necessary that there should be citation and service of a copy of the complaint. Though when the Sheriff orders citation a copy must be served, in other cases the accused is apprehended and tried without receiving a copy of the complaint. I do not wish to say anything to encourage the view that when a copy is served it should not be a correct one, but any objection to it must be stated *in limine*.

Apart from this, we cannot grant relief on account of a technical error, unless we are satisfied that substantial prejudice has been caused to the accused. In this case I do not see any possibility that the accused could have suffered prejudice by the discrepancy. So far from that, it appears that he did not even discover it until the trial was well advanced. On those grounds I am of opinion that the bill of suspension should be refused.

LORD KINCAIRNEY.—I concur, and agree with the observations which your Lordships have made. The only substantial objection is the first, that in the service copy of the complaint the date of the offence was stated by a clerical error as 23d October instead of 23d September. Now, I have heard no authority for the proposition that a conviction should be set aside as bad because of a discrepancy between the principal and service copies of the complaint, in a case where it is not said that the discrepancy did mislead the accused or cause him any injustice. Indeed, it seems to me that the case of *Armstrong v. Stevenson*¹ is an authority to the contrary, because there was in that case an omission in the service copy; it was not an exact copy of the complaint; yet the Court held that as the accused had answered the citation, and had suffered no prejudice, the omission was no reason for setting aside the conviction. Here it is clear that the accused suffered no prejudice, as he did not even notice the discrepancy until the trial had begun.

Further, by section 5 of the Summary Procedure Act, 1864, it is made competent at any stage of the proceedings to amend the principal copy of the complaint in any way not involving a variation in the character of the

¹ Dec. 12, 1892, 20 R. (Just. Cases) 21, 3 White, 373.

offence. And I cannot comprehend how a mistake which would not have been fatal had it appeared in the principal, can be fatal when it appears in the copy. But in any view I agree with your Lordships that this objection came too late, and that the conviction must be sustained.

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THE COURT refused the bill.

T. C. SMITH, S.S.C.—J. & A. HASTIE, Solicitors—Agents.

ALEXANDER EMSLIE, Appellant.—*T. B. Morison.*

No. 24.

WILLIAM BROMFIELD PATERSON, Respondent.—*Jameson—Dewar.*

June 12, 1897.

Statutory Offence—Dentists Act, 1878 (41 and 42 Vict. cap. 33), sec. 3—Unregistered Person—“American Dentistry”—“Dental Office.”—The Dentists Act, 1878, sec. 3, enacts that after 1st August 1879 “a person shall not be entitled to take or use the name or title of ‘dentist,’ either alone or in combination with any other word or words, or of ‘dental practitioner,’ or any other name, title, addition, or description implying that he is registered under this Act, or that he is a person specially qualified to practise dentistry, unless he is registered under this Act,” and renders the person so using any such name, title, &c. liable to a penalty on summary conviction.

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A. Emslie, a person who was not registered under the Act, placed on his door a brass plate with the inscription “American Dentistry. A. Emslie”; also another plate, with the inscription “Dental Office.”

Held (quashing a conviction) that in putting the plates on his door Emslie had not committed an offence under the Act, in respect that the inscriptions did not imply that he was registered under the Act, or that he was a person specially qualified to practise dentistry.

Complaint—Instance—Private Prosecutor—Statutory title to prosecute.—Where a private person has by public statute a title to prosecute summary complaints for statutory offences it is not necessary to set forth in the complaint the statute giving the person his title to prosecute.

ON 4th March 1897 Alexander Emslie was charged in the Sheriff Court at Edinburgh on a complaint at the instance of “William Bromfield Paterson, of No. 64 Brook Street, London, F.R.C.S.E. and L.D.S., Honorary Secretary of the British Dental Association, with concurrence of Robert Laidlaw Stuart, Procurator-fiscal of Court, for the public interest,” which complaint set forth “that Alexander Emslie, residing or carrying on business at No. 1 Rankeillor Street, Edinburgh, has contravened the 3d section of ‘The Dentists Act, 1878,’* in so far as not being a person registered under

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Lord Justice-
Clerk.
Lord Trayner.
Ld. Moncreiff.

* The Dentists Act, 1878 (41 and 42 Vict. cap. 33), proceeds on the preamble,—“Whereas it is expedient that provision be made for the registration of persons specially qualified to practise as dentists in the United Kingdom, and that the law relating to persons practising as dentists be otherwise amended.”

Sec. 3 enacts,—“From and after the first day of August 1879 a person shall not be entitled to take or use the name or title of ‘dentist,’ either alone or in combination with any other word or words, or of ‘dental practitioner,’ or any other name, title, addition, or description implying that he is registered under this Act, or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.

“Any person who, after the first day of August 1879, not being registered under this Act, takes or uses any such name, and the addition or description as aforesaid, shall be liable, on summary conviction, to a fine

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the said Act, and not being a legally qualified medical practitioner, he has taken or used a name, title, addition, or description implying that he is a person specially qualified to practise dentistry, by one or more or all of the following methods, viz. :—(First) by displaying, or causing to be displayed, since the month of October 1896, a signboard and brass plate on the outside of the premises occupied by him at No. 1 Rankeillor Street aforesaid, with the words ‘American Dentistry. A. Emslie’ thereon; (second) by having, during said period, a brass plate affixed to the door of said premises with the words ‘Dental Office’ thereon; (third) by using, on or about the 5th day of November last, a business card or advertisement having the words ‘American Dentistry. Persons desirous of having dental work done will do well to call at our office, and save at least 50 per cent. A. Emslie, Manager,’ printed thereon; and (fourth) by exhibiting, or causing to be exhibited, on or about the said date, a diploma, purporting to be granted by ‘The Dental Society of New York, authorised by the State Legislature, and to confer on Alexander Emslie the degree of “Master in Dental Surgery,” whereby the said Alexander Emslie is liable,” &c.

The accused objected (1) to the competency of the complaint in respect that the prosecutor had not set forth a sufficient title to prosecute, and also (2) to the relevancy of all the charges in the complaint.

The Sheriff-substitute (Orphoot) repelled the objection to title, sustained the objection to the relevancy of the third and fourth charges, and *quoad ultra* repelled the objections to the relevancy.

The ground on which the Sheriff-substitute proceeded in sustaining the objection to the relevancy of the third and fourth charges was that the *locus* of these charges was not sufficiently specified.

The accused then pleaded not guilty, but was convicted of the contravention charged by the methods first and second specified, and was fined three guineas.

He obtained a case. In the case the facts averred under the first and second charges were set forth as proved.

The following questions of law were, *inter alia*, stated :—“(1) Whether the respondent has set forth a sufficient title to prosecute? (2) Whether the complaint is relevant?”

Argued for the appellant;—(1) The complaint was bad in respect that it did not set forth the complainer’s title to prosecute. Under the Dentists Act, 1878, sec. 4, no private person was entitled to prosecute unless with the consent of the General Medical Council. The Medical Act, 1886 (49 and 50 Vict. cap. 48), sec. 26, repealed that part of the Dentists Act, and gave private persons a title to prosecute; but the Medical Act was not set forth in the complaint, and consequently the instance was bad. [*Jameson*, for the respondent.—The point is settled by the Summary Procedure Act, 1864, sec. 4.] Private persons were *prima facie* not entitled to prosecute, and consequently their title, if they had one, ought to be set forth in the complaint. The concurrence of the procurator-fiscal did not remedy the instance, if it was *per*

not exceeding £20; provided that nothing in this section shall apply to legally qualified medical practitioners.”

Sec. 5 enacts that after 1st August 1879 “a person shall not be entitled to recover any fee or charge, in any Court, for the performance of any dental operation, or for any dental attendance or advice, unless he is registered under this Act or is a legally qualified medical practitioner.”

as null. (2) The complaint, in so far as concerned the first and second charges, which alone were now in question, was irrelevant. The Dentists Act, 1878, did not prohibit unregistered persons from practising dentistry; it only prohibited them from using a title implying that they were registered or specially qualified, and from charging fees. Cases under the Pharmacy Act, 1868, such as *Bremridge v. Hume*,¹ were thus in marked contrast, for the purpose of that Act was to prohibit the retail sale of poisons by unqualified persons absolutely. Similarly, in the Veterinary Surgeons Act, 1881, which was under consideration in *The Royal College of Veterinary Surgeons v. Robinson*,² the statutory prohibition was against an unregistered person using a title implying that he was "a practitioner of veterinary surgery," or that he was specially qualified; here the corresponding statutory words were that he was "registered under this Act," or that he was specially qualified. In short, the purpose of the Dentists Act, as shewn by its preamble, was to make provision for the registration of persons specially qualified in dentistry, not to prohibit the practice of dentistry by other persons. Now, the brass plates here with the inscriptions "American Dentistry. A. Emslie," and "Dental Office," did not in the slightest degree suggest registration under the Dental Act, therefore that branch of the Act was out of the case. Then did these inscriptions imply special qualifications to practise dentistry? They did not. At the utmost they merely intimated that the house was a place where dental operations were carried on. They said nothing about the personal qualifications of "A. Emslie,"—not even that he was a dental practitioner.

Argued for the respondent;—The first question was as to the title. [LORD JUSTICE-CLERK.—You need not go into that.] Then as to the relevancy of the complaint. The Dentists Act, 1878, was one of those Acts which had been passed for the purpose of enabling the public to distinguish between qualified and unqualified practitioners in particular professions or trades, and the principles of construction applied in *Bremridge v. Hume*¹ and the case of the *Veterinary College*² to such Acts ought to be applied here. The question was whether the appellant had by his acting held himself out as qualified to practise dentistry. The descriptions here libelled were special descriptions of persons professing to practise dentistry. It was true that "Dental Office," and perhaps also "American Dentistry," were descriptions applicable to places rather than to persons; but the *Veterinary College*² case was a complete answer to the argument founded by the appellant on that circumstance, for there the words used by the accused were "Veterinary Forge," and that description was held to be struck at by the Veterinary Surgeons Act, 1881, the language of which was, *mutatis mutandis*, practically identical with the present Act. "American" dentistry certainly implied special qualifications—the qualifications of an American dentist.

At advising,—

LORD MONCREIFF.—The Sheriff-substitute held that the complaint was irrelevant as regards the third and fourth methods therein described, but sustained the relevancy *quoad ultra*, and convicted the appellant of the con-

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¹ *Bremridge v. Hume*, Nov. 2, 1895, 23 R. (Just. Cases), 9, 2 Adam, 24.

² *The Royal College of Veterinary Surgeons v. Robinson*, L. R. [1892], 1 Q. B. 557.

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travention charged by the methods first and second specified. In my opinion the complaint is also irrelevant in regard to the first and second methods as well as the third and fourth.

The charge is based on the 3d section of the Dentists Act of 1878. The Act does not prohibit the practice of dentistry or recovery of fees in respect thereof if the patient will pay, but it imposes penalties upon any person who, without being registered under the Act assumes the title of dentist or any other title, addition, or description implying that he is registered under the Act, or that he is specially qualified to practise dentistry.

The question in this case is whether the method first and second mentioned in the complaint are, in the sense of the 3d section, a description implying that the appellant is a person specially qualified to practise dentistry.

I agree that the description contemplated by the statute is a description personal to the individual *ejusdem generis* with the preceding words, and indicating his special qualifications for the work by training and practice. The terms of the statute are not satisfied by notices exhibited outside a building, which simply state that dentistry is practised therein. The sign-board and plate mentioned in the complaint bear the inscriptions, "American Dentistry, A. Emslie," and "Dental Office." They do no more than notify that dentistry is carried on within; they contain no profession of the qualifications of the practitioner, and the plate does not even assert that the appellant is the operator. I think the case would have been precisely the same if the notice had been "Teeth drawn here," which I fancy would not have inspired much confidence in sufferers coming to the place.

I therefore think that, although possibly a relevant case might have been made against the appellant if the complaint had been carefully framed and based on the diploma, the remnant of the complaint upon which the Sheriff convicted is irrelevant, and that the appeal should be sustained.

LORD TRAYNER.—In the complaint (out of which this appeal arises) the appellant is charged with a contravention of the Dentists Act, 1878, in so far as not being a person registered under said Act, and not being a legally qualified medical practitioner, he has, by one or more of the four methods specified by the complainer, taken or used a name, title, addition, or description implying that he is a person specially qualified to practise dentistry. The Sheriff-substitute has held that with regard to the third and fourth of the methods specified there are no relevant averments, and on a consideration of the evidence led before him has convicted the appellant of the offence charged as having been committed in the methods first and second specified. No objection is stated by the complainer to the decision of the Sheriff-substitute on the relevancy of the methods third and fourth; we are therefore only now concerned with the complaint and conviction in so far as they proceed upon the first and second methods. I am of opinion with regard to them that they are not relevant to infer a contravention of the statute libelled, and that the conviction should be set aside.

It is to be observed that the statute in question nowhere provides that it shall be unlawful for anyone to practise dentistry unless he be a medical practitioner or specially qualified for such practice. It may fairly enough

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be said that the statute contemplates that such persons will practise dentistry, for in their discouragement it provides that they shall not be entitled to exact fees for any dental operation performed by them. What the statute does prohibit is any person taking or using the name of "dentist" or "dental practitioner," or "any name, title, addition, or description" implying that he is registered under the Act or specially qualified to practise dentistry. Now, the appellant does not call himself a "dentist" or "dental practitioner." So far it is clear there has been no contravention of the statute on his part. He has exhibited a signboard or brass plate on his premises with the words thereon, "American Dentistry, A. Emslie," and another on the door of his premises bearing the words "Dental Office." These words (I take the two inscriptions together) may no doubt be read as meaning that dental operations are performed in these premises, and performed by the appellant, but they contain nothing to imply that the appellant is registered under the Act or that he is specially qualified to perform these operations. What the statute provided against is anyone using a name or designation which is descriptive of a registered or qualified practitioner, who is not in fact entitled to the designation which the assumed name or description implies. Here the appellant has assumed no title whatever. He does not call himself a dentist, dental practitioner, dental surgeon, or licentiate in dental surgery. If he did so he would contravene the statute. But he has added nothing to his own name (which I think is the thing the statute prohibits) by way of title, addition, or description implying that he is registered as a dentist, or that he possesses or claims to have any special qualification for the performance of dental operations. Neither "American Dentistry" nor "Dental Office" can be said to be a name which the appellant has assumed, and neither is a title, addition, or description added to his name implying special qualification for dentistry.

LORD JUSTICE-CLERK.—I agree in the opinions of your Lordships. I will confess that at first I was inclined to take a different view, and if this Act had been broadly directed against the legality of any person not registered practising or professing to practise dentistry I should have had no hesitation in holding that what was alleged and proved here was a contravention. But that is not what the Act bears. As regards that part of the Act on which the prosecutor founds in this case, it strikes only at the holding forth of himself by any person as "specially qualified" to practise dentistry. It does not strike at the practice of dentistry. It recognises that others than persons "specially qualified" may be in the practice of dentistry, and it affects them only to the extent of depriving them of any legal right to sue for remuneration for work done. The question therefore is, whether what is set forth in the two charges which were sent to trial constituted the taking or using of a name, title, addition, or description implying that the appellant was a person specially qualified to practise dentistry. What he did was to place the words "American Dentistry" on his premises, to place his name in juxtaposition to these words, and further that on the premises occupied by him he had the words "Dental Office."

I cannot find in these words anything which implies "special" qualification. If the appellant can without any breach of the criminal law extract

No. 24. teeth and put in false teeth, or the like, I can see nothing in the statute forbidding him from announcing that he does so, which is just announcing that he practises dentistry. The Act strikes at his asserting that he has "special" qualification for doing so, and whatever that may mean, I am unable to hold that the use of the words "American Dentistry" in connection with his name, or calling his place of business a "Dental Office," can be held to be taking or using a name or title, addition, or description implying that he has a "special" qualification, as distinguished from an assertion that he is qualified.

June 12, 1897.
Emslie v.
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THE COURT answered the second question in the negative, and sustained the appeal.

DOUGLAS & MILLER, W.S.—STUART & STUART, W.S.—Agents.

No. 25. WILLIAM DICKIE, Complainer.—*Munro*.
HER MAJESTY'S ADVOCATE AND ANOTHER, Respondents.—
Sol.-Gen. Dickson—Chisholm, A.-D.

July 15, 1897.
Dickie v.
H. M. Advocate.

Rape—Proof—Evidence of woman's unchastity.—In a trial for rape or assault with intent to ravish, while it is competent on due notice being given, to attack the woman's character for chastity by putting questions to herself, or to prove her general bad repute at the time of the alleged offence, or to prove that she had recently yielded her person voluntarily to the accused, it is not in general competent to prove individual acts of unchastity on her part with other men.

Question, whether it is competent to prove individual acts of unchastity on the part of the woman with other men when such acts are so closely connected with the crime charged as to form part of the *res gestæ*.

H. M. Advocate v. Allan, 1 Broun, 500; *H. M. Advocate v. Reid*, 4 Irv. 124, *followed*.

H. M. Advocate v. Blair, 2 Broun, 167, *considered*.

HIGH COURT.
Lord Justice-
Clerk.
Lord Adam.
Lord Low.

WILLIAM DICKIE, brickworker, St Leonard Street, Lanark, was charged in the Sheriff Court at Lanark, on an indictment setting forth that on 27th March 1897, at a place libelled, he did attempt to ravish A B, a woman named and designed, or otherwise, time and place libelled, did indecently assault the said A B.

Prior to the trial the accused gave notice in the following terms:—"The accused hereby gives notice that it is his intention on the trial of the said indictment . . . to impeach the chastity of the said" A B, "and to prove that she is a person of loose and immoral character, and that she has been on terms of improper familiarity with various men; that in particular in the months of June, July, or August 1895," C D, a man named and designed, "had connection with her at" a place specified; "that in the summer and autumn of 1896 the said" A B "was on terms of undue intimacy with" E F, another man named and designed, "and that the said" E F "had carnal connection with her during said period in a field" specified; "that during the years 1896 and 1897 the said" A B "was improperly familiar in her father's house" with G H, another man named and designed.

At the trial, on 7th May 1897, the agent for the accused asked a witness adduced by the accused the following question:—"Did you see" A B "in the act of connection with" C D "at the back of her house in June, July, or August 1895?"

The Procurator-fiscal objected to the question, and the Sheriff-substitute (Fyfe) sustained the objection. No. 25.

The Sheriff-substitute also refused to permit the agent for the accused to examine another witness, adduced by the accused, as to any particular act of connection between A B and E F. July 15, 1897.
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The jury by a majority found the accused guilty of indecent assault, and the Sheriff-substitute sentenced him to thirty days' imprisonment.

He brought a suspension against the Lord Advocate and the Procurator-fiscal, pleading;—The sentence complained of should be suspended and liberation granted, with expenses, as craved, in respect that (1) The Sheriff-substitute rejected competent evidence on behalf of the complainer—(a) by refusing to permit the first mentioned witness to answer the question whether she had seen the said A B in the act of connection with C D; (b) by preventing the second mentioned witness from answering any questions regarding the improper intimacy of the said A B with E F. (2) The said evidence being competent and valuable, in respect that it affected (a) the character, and (b) the credibility of the principal witness for the Crown, the said A B, the Sheriff-substitute refused to admit it. (3) The refusal of the Sheriff to admit the said evidence was oppressive.¹

At advising,—

LORD JUSTICE-CLERK.—The right to attack the character of a witness, and to bring evidence in support of the attack, is one which has always been carefully kept within very limited bounds. There are two reasons why this should be so. First, it is the duty of a Court to protect witnesses from attacks which they cannot be prepared to meet, and which they can claim no right to meet, by leading evidence to rebut them. And second, such inquiries, if entered upon, would necessarily interfere with the conduct of judicial proceedings by introducing collateral issues, which would be most inconvenient and embarrassing, and might often protract proceedings and obscure the true issue which was being tried. Accordingly, in the ordinary case, while it is competent to ask a witness whether he has been convicted of a crime,—if he denies it the fact cannot be vouched except by an extract conviction,—it is not competent to enter upon an inquiry into his general antecedents and to try to prove that he has committed a crime. It is only competent to inquire into matters directly connected with the subject of the trial then proceeding.

In the case of injuries to women, some specialties have been introduced for obvious reasons. Where a woman maintains that she has been indecently attacked, it is competent, upon notice being given, to attack her character for chastity, and to put questions to her involving the accusation of unchastity. And in such cases it has been held competent for the accused to prove

¹ *Authorities cited by the parties.*—H. M. Advocate v. Swords, May 1769, cited in Burnet's Criminal Law, p. 592; H. M. Advocate v. Wilson, July 15, 1813, cited in Hume on Crimes, notes, p. 304; H. M. Advocate v. Macfarlane, April 26, 1834, 6 Scot. Jur. 321; H. M. Advocate v. Stephens, April 20, 1839, 2 Swin. 348; H. M. Advocate v. Allan, Dec. 27, 1842, 1 Broun, 500; H. M. Advocate v. Blair, May 4, 1844, 2 Broun, 167; H. M. Advocate v. Dignan, Jan. 23, 1854, 1 Irv. 357; H. M. Advocate v. Reid, Dec. 9, 1861, 4 Irv. 124; H. M. Advocate v. Forsyth, April 27, 1866, 5 Irv. 249; Alison, Criminal Law, i. 215, 216, ii. 530, 630; Dickson on Evidence, 2d edit. sec. 29.

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that the witness voluntarily yielded to his embraces a short time before the alleged criminal attack. That such proof should be allowed is only consistent with the clearest grounds of justice, for in considering the question whether an attempt at intercourse be criminal, and to what extent criminal, it is plainly a relevant matter of inquiry on what terms the parties were immediately before the time of the alleged crime. Further, it seems a relevant subject of inquiry whether the woman was at the time a person of reputed bad moral character, as bearing upon her credibility when alleging that she has been subjected to criminal violence by one desiring to have intercourse with her. Such evidence may seriously affect the inferences to be drawn from her conduct at the time. But such evidence is something very different from evidence of individual acts of unchastity with other men at varying intervals of time. I am not aware that such evidence has ever been allowed, and indeed it could only be allowed upon the footing that a female who yields her person to one man will presumably do so to any man—a proposition which is quite untenable. A woman may not be virtuous, but it would be a most unwarrantable assumption that she could not therefore resist, and resist to the uttermost, an attempt to have connection with her by any man who might choose to endeavour to obtain possession of her person, and to whom she might have no intention to yield. Every woman is entitled to protection from attack upon her person. Even a prostitute may be held to be ravished if the proof establishes a rape, although she may admit that she is a prostitute.

Accordingly, it does not seem to me that the relaxation of the ordinary rules of evidence in such cases should be carried any further than it has been in former cases, and that while it is competent to prove a general bad repute at the time of the offence, or to prove that the woman said to have been attacked had yielded her person recently to the same man, it is not competent to prove individual acts of unchastity with other men at other times. Whether proof of such unchastity might be allowed if it occurred just before and practically on the same occasion I do not say. Such a case might be held as falling within the doctrine of the competency of proof of all matters forming parts of the *res gestæ*. Such facts might have an important bearing on that branch of evidence in such cases which relates to the appearance of the private parts when examined. But where the time is entirely different I am of opinion that the sound and safe rule is that applied to all other cases, viz, that the credibility of witnesses may not be attacked by raising proof on collateral issues as to their previous history, except where they are tainted with crime, conviction of which can be proved by extract record of a Court of justice, or where there is evidence of general repute immediately before the time of the alleged offence which may affect credibility.

I refrain from entering into any examination of the cases, as one of your Lordships is, I understand, prepared to do so, and content myself with saying that according to my reading of the decisions their trend is in the direction of the opinion I have indicated.

LORD ADAM.—There is no doubt that it is not a relevant defence to a charge of rape that the person alleged to be injured was unchaste, however

bad her character may be in that respect. Neither, as I understand, is it competent to lead evidence to impeach her general character as regards credibility. But cases such as this are exceptional in this respect, that although unchastity is not a relevant defence to the charge, yet nevertheless it is competent, upon due notice given to the prosecutor, to lead evidence to impeach the chastity of the person alleged to be injured.

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The difficulty is to determine the limits within which such evidence must be confined.

There is not much authority on the subject, but the first case to which I think it necessary to refer is that of *Allan*,¹ which was a case on Circuit. In that case the injured party had denied in the course of her examination that she had had connection with a man Campbell about a year previously. In defence Campbell was called as a witness, and it was proposed to ask him whether he had had connection with her. The question was objected to, and the objection sustained. Lord Moncreiff in giving judgment said,—“No doubt the character of the woman said to have been injured is most material in a case of rape. It is competent, I have not the least doubt, to impeach her character generally, but here it is proposed to prove a specific act, and that is not competent”; and Lord Meadowbank said,—“I myself entertain no doubt that in refusing to receive the evidence tendered we pronounce a decision in conformity with the law.”

That appears to be a decision directly in point on the present case, but its authority is somewhat shaken by the subsequent case of *Blair*.²

In that case, which was also on Circuit, Blair was charged with the crime of rape. He gave in special defences impeaching the chastity of the girl alleged to have been injured, and stating that she was a common prostitute, and had shortly before surrendered her person to him for money. It was proposed to prove this in defence, which was objected to. In giving judgment the Lord Justice-Clerk (Hope) said,—“Looking to the terms of the special defences which have been lodged, I have no doubt that the proof objected to is competent. The alleged connection was with the panel himself, which makes this case entirely different from that referred to (*Allan*¹). I may state, however, that after a careful consideration of the authorities I would be prepared, if necessary, to admit proof of particular acts of carnal connection between the injured party and other men as bearing most materially upon the guilt or innocence of the accused on a charge of rape, provided special notice had been given to the public prosecutor that such proof was proposed.”

Lord Wood, on the ground that the alleged connection was with the panel himself, concurred in repelling the objection, but gave no opinion on the more general point.

The matter came up again for consideration in the case of *Reid and Others*,³ which was a High Court case.

In that case it was proposed, in defence, to establish the unchaste character of the injured party at a past period, the exact date of which could not be precisely stated. This was objected to, and the objection sustained. In

¹ Dec. 27, 1842, 1 Broun, 500. ² May 4, 1844, 2 Broun, 167

³ Dec. 9, 1861, 4 Irvine, 124.

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giving judgment Lord Neaves said,—“ I think, in the first place, that it is clearly competent to impeach the character of the principal witness in a rape, to allege and to prove her bad character at the time when the injury results. If it is alleged that this character was acquired at an earlier period, still it is necessary that it be established by something like continuous evidence up to the time of the alleged offence. This is of great importance to the witness, because it may be easy for her to contradict proof of bad conduct at a particular time and place. She may prove, for example, that she was not there, but in another part of the country at the time. But the proof here offered seems to me to be inadmissible. I think there is no real pertinency in it, and that it would be most dangerous. To attempt to lead evidence as to a course of conduct many years back—perhaps in another country—would be quite irrelevant—at least unless under very special circumstances, and with the most distinct and special notice as to the party, the place, and the time. Now, here it is attempted to prove not bad reputation but latent acts of individual unchastity, at a great distance of time. I can imagine nothing more unfair, nothing more dangerous. Here the inquiry is, whether these panels had forcible connection with the witness. If in the trial of such a case the woman may be made to answer twenty different questions as to whether on twenty different occasions she had connections with as many different men, we might sit to the end of our lives investigating such cases. I conceive that such a course would be contrary to the principles of justice and of judicial inquiry. In the present case no specific notice has been given of such an inquiry, and even if there had, I should regard such an inquiry into the whole latent life of a witness as a cruel and grievous evil.

“ As to the other point which has been raised, I think the question irrelevant, and the line of inquiry proposed incompetent. I adhere generally to the views of Lord Moncreiff, expressed in one of the cases that have been quoted to us. The only instances I can imagine where such a proof would be admissible would be where the alleged occurrences were so closely connected with the crime charged as to form in fact part of the *res gestæ*, as where, for example, as happened in one case, the woman alleged to have been ravished had connection with another man on the night of the alleged occurrence.”

The Lord Justice-Clerk (the late Lord President), in his opinion, p. 129, says,—“ I am entirely of the same opinion, and were it not that the questions are of considerable importance I should have contented myself with expressing my concurrence in general terms. It seems to me that under the first branch we have to consider two questions. Is the panel in such a case to be allowed, without notice, or even with notice, to prove specific acts of unchastity, and are we to admit evidence of general bad repute without any limit as to time? I have always entertained a strong opinion in conformity with that of Lord Moncreiff. It is for the panels to shew that at the time when the offence is said to have been committed the woman was of loose and immoral character, not as matter of defence, but as bearing very materially on the effect of the evidence on the minds of the jury. The law has done wisely in making an exception in the case of rape from the general rule, that you cannot raise up a collateral issue and allow a proof of a wit-

ness's character and repute. But to extend this to particular instances of unchaste conduct would be most unfair to the witness, especially without very pointed and distinct notice, and even with such notice.

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"But, second, what is here sought to be proved is general evidence of reputation or character, not more recent than many years ago, which is all we could gather from the statement of the prisoner's counsel. The Court are not in possession of any more specific information as to date. Now, I object to this line of examination, very much on the same grounds as I object to proof of individual acts, because if a woman is in possession of a fair and honourable reputation at the time of the alleged offence, it would be in the highest degree unjust and inexpedient to inquire into her character at some former time. She may have been indiscreet, or even unchaste, in her conduct at some period of her life, but if she is not so now, I do not think the inquiry relevant. I hold it to be indispensable that the character sought to be proved should be the character existing at the time when the rape is said to have been committed.

"Another point has been raised, not indeed of the same importance, and as to it I have no difficulty. The proof attempted of particular circumstances and incidents in this woman's life, merely for the purpose of contradicting the statements made by her on cross-examination, seems to me to have no pertinency or relevancy at all. I hold it to be established law that such proof is inadmissible, and the laws of all countries agree in disallowing it."

I concur entirely in the opinions of the Lord Justice-Clerk and Lord Neaves there expressed.

The result then appears to me to be that it is competent to lead evidence to impeach the chastity of the party alleged to be injured, provided always that due notice thereof be given, but that such evidence must be confined to evidence of general character and repute in that respect existing at the time of the alleged crime. That it is not competent to prove specific acts of connection with other men, unless such acts are so closely connected with the crime charged as to form, as Lord Neaves puts it, part of the *res gestæ*, by which I understand him to mean that they would or might furnish evidence tending to account for the physical condition and appearance of the woman. That it is competent to prove previous connection with the panel himself. In that case, however, it appears to me that the evidence is relevant to the question of consent or non-consent, because it is more or less probable that a woman who had been already intimate with a man would not offer a very strenuous resistance to his having again connection with her, while there is no presumption or probability that a woman who may have allowed a particular man to have connection with her, would allow another man, it may be a perfect stranger, to have connection with her.

I am of opinion therefore that the evidence tendered in this case was rightly rejected.

Had I been of a different opinion on the general question, I should still have been of opinion that the decision was right both in respect of the remoteness of the alleged acts and of the latitude of time proposed to be taken.

I am therefore of opinion that the suspension should be refused.

No. 25. giving judgment Lord Neaves said,—“ I think, in the first place, that it is clearly competent to impeach the character of the principal witness in a rape, to allege and to prove her bad character at the time when the injury results. If it is alleged that this character was acquired at an earlier period, still it is necessary that it be established by something like continuous evidence up to the time of the alleged offence. This is of great importance to the witness, because it may be easy for her to contradict proof of bad conduct at a particular time and place. She may prove, for example, that she was not there, but in another part of the country at the time. But the proof here offered seems to me to be inadmissible. I think there is no real pertinency in it, and that it would be most dangerous. To attempt to lead evidence as to a course of conduct many years back—perhaps in another country—would be quite irrelevant—at least unless under very special circumstances, and with the most distinct and special notice as to the party, the place, and the time. Now, here it is attempted to prove not bad reputation but latent acts of individual unchastity, at a great distance of time. I can imagine nothing more unfair, nothing more dangerous. Here the inquiry is, whether these panels had forcible connection with the witness. If in the trial of such a case the woman may be made to answer twenty different questions as to whether on twenty different occasions she had connections with as many different men, we might sit to the end of our lives investigating such cases. I conceive that such a course would be contrary to the principles of justice and of judicial inquiry. In the present case no specific notice has been given of such an inquiry, and even if there had, I should regard such an inquiry into the whole latent life of a witness as a cruel and grievous evil.

“ As to the other point which has been raised, I think the question irrelevant, and the line of inquiry proposed incompetent. I adhere generally to the views of Lord Moncreiff, expressed in one of the cases that have been quoted to us. The only instances I can imagine where such a proof would be admissible would be where the alleged occurrences were so closely connected with the crime charged as to form in fact part of the *res gestæ*, as where, for example, as happened in one case, the woman alleged to have been ravished had connection with another man on the night of the alleged occurrence.”

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"But, second, what is here sought to be proved is general evidence of reputation or character, not more recent than many years ago, which is all we could gather from the statement of the prisoner's counsel. The Court are not in possession of any more specific information as to date. Now, I object to this line of examination, very much on the same grounds as I object to proof of individual acts, because if a woman is in possession of a fair and honourable reputation at the time of the alleged offence, it would be in the highest degree unjust and inexpedient to inquire into her character at some former time. She may have been indiscreet, or even unchaste, in her conduct at some period of her life, but if she is not so now, I do not think the inquiry relevant. I hold it to be indispensable that the character sought to be proved should be the character existing at the time when the rape is said to have been committed.

"Another point has been raised, not indeed of the same importance, and as to it I have no difficulty. The proof attempted of particular circumstances and incidents in this woman's life, merely for the purpose of contradicting the statements made by her on cross-examination, seems to me to have no pertinency or relevancy at all. I hold it to be established law that such proof is inadmissible, and the laws of all countries agree in disallowing it."

I concur entirely in the opinions of the Lord Justice-Clerk and Lord Neaves there expressed.

The result then appears to me to be that it is competent to lead evidence to impeach the chastity of the party alleged to be injured, provided always that due notice thereof be given, but that such evidence must be confined to evidence of general character and repute in that respect existing at the time of the alleged crime. That it is not competent to prove specific acts of connection with other men, unless such acts are so closely connected with the crime charged as to form, as Lord Neaves puts it, part of the *res gestæ*, by which I understand him to mean that they would or might furnish evidence tending to account for the physical condition and appearance of the woman. That it is competent to prove previous connection with the panel himself. In that case, however, it appears to me that the evidence is relevant to the question of consent or non-consent, because it is more or less probable that a woman who had been already intimate with a man would not offer a very strenuous resistance to his having again connection with her, while there is no presumption or probability that a woman who may have allowed a particular man to have connection with her, would allow another man, it may be a perfect stranger, to have connection with her.

I am of opinion therefore that the evidence tendered in this case was rightly rejected.

Had I been of a different opinion on the general question, I should still have been of opinion that the decision was right both in respect of the remoteness of the alleged acts and of the latitude of time proposed to be taken.

I am therefore of opinion that the suspension should be refused.

No. 25. LORD LOW.—Having had the advantage of reading over the opinion delivered by your Lordship in the chair, it is only necessary to state that I concur not only in the result arrived at by your Lordships, but also on the grounds on which that decision is founded. I also concur with Lord Adam in his summary of the result of the authorities on this branch of law and the conclusion they lead to.

THE COURT refused the bill.

J. D. HAY STEWART, W.S.—CROWN AGENT—Agents.

No. 26. WILLIAM CRAIG, Complainer.—*Abel.*
 ANDREW TARRAS (Burgh Prosecutor, Fraserburgh), Respondent.—
A. S. D. Thomson.

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 H. M. Advocate.
 Craig v.
 Tarras.

Suspension—Statutory exclusion of review—No written record of adjournment—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 495.—The hearing of a complaint under the Burgh Police (Scotland) Act, 1892, was, on the motion of the accused, adjourned to 28th June 1897, but there was no written record of the adjournment. On 28th June the accused pleaded not guilty without stating any objection to the absence of a written record of the adjournment. The accused having been convicted brought a suspension pleading that the whole proceedings subsequent to the original diet were vitiated in respect that there was no written record of the adjournment.

Held that the absence of a written record of the adjournment was a fundamental nullity which vitiated the whole proceedings, and that the conviction was not protected from review by section 495 of the Burgh Police (Scotland) Act, 1892.

HIGH COURT.
 Lord Justice-
 Clerk.
 Lord Kin-
 cairney.
 Lord Stormonth-
 Darling.

ON 28th June 1897 William Craig senior, holder of a grocer's certificate for the sale of exciseable liquors at his premises in Broad Street, Fraserburgh, was convicted in the Police Court there on a complaint under the Burgh Police (Scotland) Act, 1892, charging him with a contravention of the Public-Houses Acts.

He brought a bill of suspension, in which he stated :—(Stat. 2) The complaint was served upon the complainer on 10th June 1897, and he was summoned to appear on the 18th June following. (Stat. 3) "An adjournment of said diet to the 28th June was granted on the application of the complainer's law-agent; but no minute adjourning the diet was written out or signed." (Stat. 4) "The complainer was unable, by reason of illness, personally to attend the said adjourned diet on 28th June 1897. His law-agent, who appeared on his behalf, and tendered a medical certificate as to the complainer's absence, took objection to the relevancy of the complaint, but the objection was repelled. The complainer's law-agent thereafter tendered a plea of not guilty, and the case accordingly proceeded to trial," and the complainer was convicted.

The complainer pleaded, *inter alia* ;—(2) The whole proceedings subsequent to the date of the original diet being in any event vitiated, in respect that there is no written minute of adjournment of said diet, the conviction should be set aside.

Argued for the complainer ;—The want of a written record of the adjournment was fatal to the conviction.¹

Argued for the respondent ;—The Burgh Police (Scotland) Act, 1892,

¹ *Macarthur v. Campbell*, March 18, 1896, 23 R. (Just. Cases) 81, 2 Adam, 151.

ness's character and repute. But to extend this to particular instances of unchaste conduct would be most unfair to the witness, especially without very pointed and distinct notice, and even with such notice.

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H. M. Advocate.

"But, second, what is here sought to be proved is general evidence of reputation or character, not more recent than many years ago, which is all we could gather from the statement of the prisoner's counsel. The Court are not in possession of any more specific information as to date. Now, I object to this line of examination, very much on the same grounds as I object to proof of individual acts, because if a woman is in possession of a fair and honourable reputation at the time of the alleged offence, it would be in the highest degree unjust and inexpedient to inquire into her character at some former time. She may have been indiscreet, or even unchaste, in her conduct at some period of her life, but if she is not so now, I do not think the inquiry relevant. I hold it to be indispensable that the character sought to be proved should be the character existing at the time when the rape is said to have been committed.

"Another point has been raised, not indeed of the same importance, and as to it I have no difficulty. The proof attempted of particular circumstances and incidents in this woman's life, merely for the purpose of contradicting the statements made by her on cross-examination, seems to me to have no pertinency or relevancy at all. I hold it to be established law that such proof is inadmissible, and the laws of all countries agree in disallowing it."

I concur entirely in the opinions of the Lord Justice-Clerk and Lord Neaves there expressed.

The result then appears to me to be that it is competent to lead evidence to impeach the chastity of the party alleged to be injured, provided always that due notice thereof be given, but that such evidence must be confined to evidence of general character and repute in that respect existing at the time of the alleged crime. That it is not competent to prove specific acts of connection with other men, unless such acts are so closely connected with the crime charged as to form, as Lord Neaves puts it, part of the *res gestæ*, by which I understand him to mean that they would or might furnish evidence tending to account for the physical condition and appearance of the woman. That it is competent to prove previous connection with the panel himself. In that case, however, it appears to me that the evidence is relevant to the question of consent or non-consent, because it is more or less probable that a woman who had been already intimate with a man would not offer a very strenuous resistance to his having again connection with her, while there is no presumption or probability that a woman who may have allowed a particular man to have connection with her, would allow another man, it may be a perfect stranger, to have connection with her.

I am of opinion therefore that the evidence tendered in this case was rightly rejected.

Had I been of a different opinion on the general question, I should still have been of opinion that the decision was right both in respect of the remoteness of the alleged acts and of the latitude of time proposed to be taken.

I am therefore of opinion that the suspension should be refused.

No. 26. LORD KINCAIRNEY.—I agree. I think the case of *Macarthur v. Campbell*¹ is quite conclusive.

July 16, 1897.
Craig v.
Tarras.

LORD STORMONTH-DARLING concurred.

THE COURT passed the bill, and suspended the conviction and sentence complained of.

WM. CROFT GRAY, Solicitor—W. & J. L. OFFICER, W.S.—Agents.

No. 27.

JAMES WHITE, Appellant.—*Abel*.

ROBERT MAXWELL MAIN, Respondent.—*Cook*.

July 16, 1897.
White v.
Main.

Complaint—Civil or Criminal—Dogs Act, 1871 (34 and 35 Vict. c. 56), sec. 2.—The Dogs Act, 1871, sec. 2, enacts,—“Any Court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous and not kept under proper control, and if it appears to the Court having cognisance of such complaint that such dog is dangerous, the Court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed, and any person failing to comply with such order shall be liable to a penalty not exceeding twenty shillings for every day during which he fails to comply with such order.”

A person was charged with “an offence” under the Dogs Act, 1871, as being the owner of a dog which was dangerous and not kept under proper control, and an order was craved directing him to keep it under proper control. The magistrate convicted the owner of the offence charged, and pronounced the order craved, “under a penalty not exceeding 20s. for every day during which he fails to comply with this order.”

Conviction *quashed*, on the ground that the procedure for obtaining an order was civil and not criminal, and that no offence could be committed until the order had been disobeyed.

HIGH COURT.
Lord Justice-
Clerk.
Lord Kin-
cairney.
LdStormonth-
Darling.

ON 6th March 1897 James White senior, market-gardener, East Linton, was served with a complaint at the instance of the Procurator-fiscal of the Justice of Peace Court, Haddington, and was cited “to appear personally to answer thereto in the Justice of Peace Court-room in the county buildings at Haddington, upon the 16th day of March 1897, at eleven o'clock forenoon, with certification.”

The complaint was in the following terms:—

“Under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and Criminal Procedure (Scotland) Act, 1887.

“Unto the Honourable Her Majesty's Justices of the Peace for the county of Haddington

“The complaint of Robert Maxwell Main, solicitor in Haddington, Procurator-fiscal of Court,

“Humbly sheweth

“That James White senior, market-gardener, East Linton, has been guilty of an offence within the meaning of the Dogs Act, 1871, section 2,* in so far as he is the owner of a dog (a cross-bred Bedlington) which is dangerous and not kept under proper control. That the said dog, on the 11th day of February 1897, did, on the road or street leading through the village of East Linton, and at a part thereof near to the house occupied by William Cowe, butcher there, attack Helen Hope, niece of and residing with Margaret Hope, spinster, East Linton, by springing upon her and knocking her to the ground, and while on the ground by again springing upon her and biting her on the right

¹ 23 R. (Just. Cases) 81, 2 Adam, 151.

* Quoted in rubric.

hand, and did drag from her arms a Dandie Dinmont terrier which she was then carrying, and severely bite and worry said terrier, whereby the said James White senior is liable, as the owner of said dog, to have an order made by Court of summary jurisdiction directing that said dog be kept under proper control or destroyed, under a penalty not exceeding 20s. for every day during which such order is not complied with.

"May it therefore please your Honours to grant warrant to cite said James White senior, to appear before you to answer to this complaint, and thereafter, if it shall appear to your Honours that said dog is dangerous, to make an order directing the dog to be kept by the owner under proper control or destroyed, under the penalty provided in said Act.

"According to Justice."

The record of procedure bore that on 16th March 1897 in presence of six Justices of the county of Haddington "appeared James White senior, complained against, and the complaint being read over to him he answers that he is not guilty."

The record further bore that four witnesses named were examined "in support of the complaint" and two "in exculpation."

The Justices pronounced the following deliverance:—"Haddington, 16th March 1897.—The Justices, in respect of the evidence adduced, convict the said James White senior of the offence charged, in respect the dog libelled, on the date libelled, at the place libelled, did bite the woman Helen Hope libelled, once on the hand, and direct the dog libelled to be kept by the owner under proper control, and that under a penalty not exceeding twenty shillings for every day during which he fails to comply with this order—all in terms of the Dogs Act, 1871."

White obtained a case.

The case set forth the complaint and the procedure, and also that the facts averred were held to be proved, and further stated that no objection had been taken to the competency or relevancy of the complaint.

The following question of law was, *inter alia*, stated,—“1. Whether the appellant was, in the circumstances stated, guilty of a contravention of, or of an offence within the meaning of, the Dogs Act, 1871, section 2?”

Argued for the appellant;—The statute did not authorise a conviction in the first instance; it was only after an order had been pronounced and had been disobeyed that proceedings of a criminal character for the recovery of a penalty became competent.

Argued for the respondent;—It was not incompetent under the statute to pronounce a conviction.¹ Even if it was, the mistake was a purely technical one, and the appellant had suffered no prejudice. As therefore he had taken no objection to the complaint in the Court below it was too late to raise the question now.²

LORD JUSTICE-CLERK.—In this case, although the fact that the appellant was found guilty of an offence may not be a very serious one, looking to the character of the alleged offence, yet the question is a general one, and we must deal with it as such. Where a statute provides that a person may be summoned before a Court of summary jurisdiction to say why that Court should not pronounce a judgment requiring him to do something prescribed by the statute, are the proceedings under such a statute criminal in their

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¹ Henderson v. Mackenzie, March 18, 1876, 3 R. 623.

² Macdougall v. MacLulich, Feb. 18, 1887, 14 R. (Just. Cases), 17, 1 White, 328.

No. 27. character, at least at that stage, and is a criminal complaint the appropriate method of initiating such proceedings?
 July 16, 1897. *White v. Main.*

Now, here we are asked the question, "Whether the appellant was . . . guilty of a contravention of, or of an offence within the meaning of the Dogs Act, 1871, section 2?" Now, section 2 there referred to consists of two parts. The first part relates to a complaint to be brought before a Judge of summary jurisdiction, averring that a dog is dangerous, and asking that its owner be ordered to keep the dog under proper control or destroy it. Then the second part of the section provides a penalty which may be pronounced against the owner should he fail to implement the order pronounced under the first part of the section. The first part does not involve any offence at all. The statute proceeds upon the footing that if a dog has been proved to the satisfaction of a magistrate to be dangerous, the magistrate may pronounce an order requiring the owner of that dog to keep it under proper control or destroy it. So far there is nothing of the nature of an offence at all. It is merely a matter of civil administration. I do not appreciate the difficulty suggested about the form of proceedings to be adopted. The complainer has merely to say that A B has a dog which is dangerous, and which is not kept under proper control, and end with a prayer that an order may be pronounced that A B should either keep that dog under proper control or destroy it. Until such an order had been pronounced and had been disregarded, the appellant was not in a position to be dealt with under the penalty clause of the statute. He had committed no offence at all. If that be so, we are in a position to answer the first question put to us in this case in the negative. The circumstances set forth are, that the dog belonging to the appellant did certain things, and from that it was evident that the dog was dangerous and was not kept under proper control. That being so, the complainer was no doubt entitled to ask that an order be pronounced requiring the appellant to keep his dog under control or destroy it, but there is so far no offence committed, and to convict him of an offence was to do what was outside the prayer, and was therefore incompetent.

LORD KINCAIRNEY concurred.

LORD STORMONTH-DARLING.—I agree. I think the Act is purely preventive, and is intended to ensure that the owner of a dog which is or becomes dangerous shall take due precautions against its doing any injury. If the Court finds that a dog is dangerous an order may be pronounced requiring its owner to keep it under proper control. The prayer of the complaint is right enough, but I suppose the narrative, which recites that an offence had been committed, misled the magistrates. If the narrative of the complaint had been confined to the facts, and if the magistrates had confined their judgment to affirming these facts and pronouncing an order on the owner, they would have acted quite competently under the statute, but they have convicted the appellant of an offence when there was no offence at all. The offence does not arise till the order is disobeyed.

THE COURT answered the first question in the negative, and sustained the appeal.

ALEX. MORISON, S.S.C.—PURVES & AITKEN, W.S.—Agents.

CASES

DECIDED IN

THE COURT OF SESSION, &c.

1896-97.

WINTER SESSION.

ALEXANDER DRYBURGH, Pursuer (Respondent).—*Balfour—Macfarlane.*

No. 1.

A. & A. S. GORDON, Defenders (Reclaimers).—*W. Campbell—Clyde.* Oct. 15, 1896.
Dryburgh v. Gordon.

Sale—Sale of heritage—Objection to title—Inhibitions—Obligation to clear record.—In an action by a purchaser of heritage for implement of an obligation by the seller's agents to produce searches shewing a clear record, the defenders tendered searches which disclosed two inhibitions used against the seller prior to the date of the disposition by him. The defenders alleged that the inhibitions were invalid.

Held (aff. judgment of Lord Kincairney) that whether the inhibitions were or were not valid, the defenders were bound to implement their obligation to clear the record by having them discharged.

Opinion (by Lord Kincairney, Ordinary) that an inhibition may affect a heritable right in the person of one who does not hold it by feudalised title.

ON 26th September 1895 Alexander Dryburgh, grocer, Edinburgh, made an offer to William Shaw to purchase certain premises in Edinburgh belonging to him. The offer was accepted. 2D DIVISION.
Lord Kin-
cairney.

By disposition, dated 6th and 7th December, and recorded 10th December 1895, the subjects were conveyed to the purchaser. The disposition bore:—"I, William Shaw, . . . proprietor of the several subjects hereinafter disposed, with consent and concurrence of Alexander Gordon, S.S.C., Edinburgh, and I, the said Alexander Gordon, for all right, title, and interest, competent to me in the said subjects, in virtue of (first) disposition by the said William Shaw in my favour, dated and recorded . . . 28th February 1895, and (second) disposition by the said William Shaw in my favour, dated and recorded . . . 25th July 1895, and we, the said William Shaw and Alexander Gordon, both, with joint consent and assent, in consideration of the sum of £979, 13s. 9d. sterling, instantly paid to me, the said William Shaw, by Alexander Dryburgh . . . as the price thereof, of which sum I, the said William Shaw, hereby acknowledge the receipt, and discharge the said Alexander Dryburgh, do hereby . . . sell and dispose to the said Alexander Dryburgh and his heirs and assignees whomsoever, heritably and irredeemably" the subjects.

The deed contained the following clause of warrandice:—"And I, the said William Shaw, grant warrandice; and I, the said Alexander Gordon, grant warrandice from my own facts and deeds only."

ON 7th December 1895 Messrs A. & A. S. Gordon granted to the purchaser the following letter:—"Dear Sir,—With reference to the

No. 1. settlement of the purchase of the above, the price whereof has been received to-day, we undertake— . . . 6. To produce searches shewing a clear record as at 10th December 1895.”

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Founding on this letter, Dryburgh raised the present action against Messrs Gordon, concluding to have the defenders ordained to exhibit to the pursuer searches for incumbrances shewing that the subjects sold were free from all inhibitions and all other burdens.

The pursuer averred that the defenders had failed to implement their obligation,—“the searches they have exhibited having disclosed two inhibitions against the said William Shaw, raised on 13th and executed on 15th, and both recorded in the General Register of Inhibitions on 22d May 1895, discharges whereof the defenders refuse or delay to procure, whereby the present action has become necessary.”

The defenders stated that Mr Alexander Gordon, one of the partners of their firm, had made advances to Shaw to enable him to complete his buildings, and had obtained from him an absolute disposition, which was recorded on 28th February 1895, and that this disposition was not qualified by any back-letter. The disposition, which was produced, bore to be granted “for certain good and onerous causes and considerations not exceeding in all the sum of £600.”

The defenders admitted “that the searches referred to disclose two inhibitions, both recorded on 22d May 1895, long after the date of recording the first disposition in favour of said Alexander Gordon. Denied that the defenders have failed to implement their obligation.”

On 10th June 1896 the Lord Ordinary (Kincairney) pronounced the following interlocutor:—“Finds (1) that by letter addressed by the defenders to the pursuer, dated 7th December 1895, the defenders undertook to deliver to the pursuer searches shewing a clear record in reference to the subjects conveyed by the disposition in favour of the pursuer, dated 6th and 7th December 1895, No. 8 of process; (2) that the searches furnished by the defenders disclosed the inhibitions against William Shaw, granter of said disposition, set forth on the record; (3) that, in respect of said inhibitions, the said obligation contained in said letter has not been implemented; (4) that the defenders are bound to disencumber the title to the said subjects of said inhibitions.” *

* “OPINION.— . . . The question is, whether the obligation expressed in the letter to produce searches shewing a clear record has been implemented; or whether the two inhibitions shewed that the record was not clear, and were incumbrances which the defenders were bound to remove.

“On considering the case, I formed an opinion in favour of the pursuer; but it appeared to me that the letter was not sufficiently stamped. That defect has been rectified, and, having reconsidered the cause, I retain the opinion that the pursuer is in the right, and that the defenders' obligation has not been fully implemented.

“The letters of inhibition are in the form of the Schedule QQ in the Titles to Land Consolidation Act, 1868, and they purport to prohibit Shaw, *inter alia*, from ‘disposing his lands or heritages.’ Of course the prohibition is in general terms, and mentions no lands. Before 1868 letters of inhibition affected not only lands belonging to the person inhibited at the date of recording the letters, but also lands subsequently acquired by him (Stair, iv. 50, 17; Ersk. ii. 11, 10). But it is provided by the 157th section of the Act of 1868 that no inhibition shall affect *acquirenda* except in the cases mentioned in the section.

“By the disposition to the pursuer, Shaw does the precise thing which the letters prohibit. *Prima facie*, the disposition is in breach of the letters

The defenders reclaimed, and argued;—The inhibitions were not effectual. At their date there were no lands and heritages left belonging to Shaw. If the record was clear at the date of his divestiture it could not after that date be burdened *quoad* him. A clear record at this date fulfilled the obligation of the defenders. The disposition of 28th February 1895 conveyed to Gordon the feudal right to the lands and only left in Shaw a personal right to the reversion of the subjects when he had settled Gordon's claims against him. But an inhibition could not affect a personal right.¹ Inhibition could only cover feudalised subjects.² Perhaps Stair's general rule had been qualified,³ still three requirements remained as essential (1) the right affected must be real; (2) it must be capable of infestment; and (3) infestment must have followed.

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and reducible *ex capite inhibitionis*. Section 157 does not affect the question, and need not be considered, because there is no suggestion that the subjects have been acquired by Shaw since the inhibitions were recorded. He had the same right to the lands then as at the date of the disposition.

"The defenders' answer is that the inhibitions do not affect the lands, because at both dates Gordon, and not Shaw, was proprietor in virtue of the disposition to Gordon, dated 28th February, and so prior to the inhibitions recorded on 22d May. I am, however, of opinion that it is competently ascertained that at these dates Shaw, and not Gordon, was the true proprietor. It is true that the disposition of 28th February by Shaw to Gordon is *ex facie* absolute. It bears to be granted 'for certain good and onerous causes and considerations not exceeding in all the sum of £600.' It does not bear expressly that any sum was paid; but yet it is *ex facie* absolute.

"But the disposition in favour of the pursuer granted by Shaw as well as by Gordon proves, I think, incontestibly that the disposition by Shaw to Gordon was only in security, and left the radical right in Shaw. The disposition to the pursuer has the effect of a registered back-letter on the previous disposition by Shaw to Gordon. It bears that the price was paid to Shaw, that it was Shaw who undertook absolute warrandice, and (which appears conclusive) it expressly describes Shaw as the proprietor, and that I take to be the language of Gordon as well as of Shaw. But the defenders say that at all events the feudal title was in Gordon, and that what was left in Shaw was only a personal right to have the subjects reconveyed. That is no doubt true, and is fully borne out by the case of the *Union Bank of Scotland, Limited, v. National Bank of Scotland, Limited*, 10th December 1886, 14 R. (H. L.) 1, quoted by the defenders. I do not doubt that Gordon could have given a good title, and I do not say whether a disposition by Gordon could have been objected to on account of letters of inhibition against Shaw. But I am not concerned with a disposition by Gordon, but with a disposition by Shaw, as principal granter, he having the radical right but not the feudal title. The defenders quoted no authority to the effect that the operation of an inhibition depends on sasine or registration; or that an inhibition does not affect such a radical right in lands as was in the person of Shaw. It has, it is true, been doubted whether an inhibition will affect a heritable bond which has never been feudalised.—Dirleton's Doubts, p. 100, and, Stewart's Answers, p. 163. But it has been decided that if a heritable bond has been feudalised, and then assigned, further transferences of it will be struck at by an inhibition, although the right of the inhibited disponent be only personal.—*Low*, 6th December 1814, F. C. That is to say, that an inhibition may affect an heritable right in the person of one who does not

¹ *Union Bank of Scotland, Limited, v. National Bank of Scotland, Limited*, Dec. 10, 1886, 14 R. (H. L.) 1; 2 Bell's Comm. (7th ed.) 135.

² Stair, iv. 50, 2.

³ *Low v. Wedgwood*, 6 Dec. 1814, F. C.

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Argued for the pursuer;—Shaw, who granted the disposition, described himself as proprietor of the subjects, and he received and discharged the price. He was truly the owner, and the Lord Ordinary had taken the correct view of his position. The obligation of the defenders was to shew a clear record to 10th December 1895. The inhibitions of May 1895 precluded fulfilment of their obligation, and must be removed. While they stood they offered a practical basis for declining to accept the title. The Lord Ordinary was right in regarding the inhibitions as valid, but whether they were or not, it was the duty of the defenders to clear them off, and to deliver to him a marketable title.

LORD JUSTICE-CLERK.—The defenders, by letter dated 7th December 1895, which had reference to a purchase of property from Mr Shaw, a client, gave an undertaking to the pursuer to produce searches shewing a clear record as at 10th December. That undertaking was given in regard to a disposition to the pursuer by Mr Shaw, who is described in the deed as owner of the property, and to whom the price was to be paid.

In these circumstances, when the search was made it was found that there were on the record two undischarged inhibitions applying to the property, and dated prior to the disposition. Whether these inhibitions are ineffectual is a question which cannot be decided in this action. The only question before us is whether a search shewing a clear record has or has not been made. All I say is, that standing the disposition by Mr Shaw and the undertaking by the defenders, and standing these undischarged inhibitions, the defenders' obligation has not been carried out.

LORD YOUNG.—I am of the same opinion. When I first read the papers in the case I was of opinion that we could not decide anything on the validity of the inhibitions, the inhibitors not being here, and it not being incumbent on the pursuers to call them. The action is founded on a letter hold it by feudalised title. I do not think that I require to decide whether, assuming the radical right to be in Shaw, that right is affected by the letters of inhibition. I lean to the opinion that it is. But it is enough if the point be fairly open to serious question. I think that it is; and on that account I am of opinion that the pursuer is entitled to object that a search which discloses such inhibitions does not shew a clear record.

“Further, I regard the defenders' letter as corroborative of the obligation of Shaw as seller. It adds the obligation of the defenders to his; and it appears to me that the obligation of the defenders may be measured by Shaw's obligation. Now, that was the ordinary obligation of a seller to disencumber the subjects. On that point Professor Menzies observes,—‘If there are inhibitions undischarged, discharges must be insisted for, unless the party inhibited has been afterwards sequestrated; the sequestration terminates the effect of inhibition in relation to third parties, for it is under it that inhibition must be made effectual.’—Menzies' Lectures, 3d ed. p. 836. That, it is true, was written before 1868, but, as I have remarked, the provision in the Act of 1868 does not seem to affect the case. It can hardly be doubted that before 1868 a purchaser could not be compelled to take a title from a seller under inhibition, nor to do so now, unless it appeared that the seller had acquired the lands since the date of the inhibition, and so was in a position to plead the 157th section of the Act of 1868.

“On the whole I am of opinion that, so long as the letters of inhibition are not taken out of the way, the obligation of the defenders has not been implemented.”

of obligation by the defenders to the pursuer to produce searches shewing a clear record as at 10th December 1895 in regard to a property purchased by the pursuer from Mr Shaw. The disposition bears that Shaw is the proprietor, and that the conveyance is made in consideration of a sum paid to him. In the disposition the Messrs Gordon are made consenting parties and co-disponers. That could not do any harm, but the purchase was made from Shaw as proprietor through Messrs Gordon as his agents, and the purchase money was paid to Shaw. In these circumstances it was natural, at least quite intelligible, that a letter should be taken from the Messrs Gordon binding them to shew a clear record as at 10th December 1895. That undertaking was clearly as regards Mr Shaw, who bears on the face of the disposition to be the proprietor and disponent. The search shewed that the record was not clear, that two inhibitions existed dated in May 1895. Now it is said, and on intelligible grounds, that the inhibitions are of no use, because Mr Shaw in February divested himself from a conveyancing point of view of the property by making a disposition of it in favour of Messrs Gordon. It is said that Mr Shaw having divested himself of the property in February, the inhibitions in May were inoperative. But the purchaser has no concern with the relations between Mr Shaw and Messrs Gordon. I give no opinion as to whether the inhibitions, if they were fully investigated, would be found to be operative or not. All I decide is that it is for Messrs Gordon to clear the record. If the inhibitions are easily proved to be worthless, it will be an easy matter to clear the record; if the question as to the validity of the inhibitions is a more serious matter,—and I cannot regard it as other than serious when I find that the Lord Ordinary has decided that the inhibitions are of value,—still the obligation to clear the record exists. I am therefore very clearly of opinion that the only result we can arrive at is to affirm the judgment of the Lord Ordinary without entering into any of the questions raised in his judgment with regard to the validity of the inhibitions.

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LORD TRAYNER.—I am of the same opinion. The action is brought to enforce the obligation contained in the letter of 7th December 1895 in which the defenders undertook to produce searches showing a clear record as at 10th December 1895. That meant a clear record not merely in the property register but also in the register of personal diligence. The search produced discloses two inhibitions. I am of opinion that whether these inhibitions are valid or invalid, the pursuer is entitled to have the record cleared of them, and that the defenders are bound to clear the record of these inhibitions before their obligation can be held to be fulfilled.

LORD MONCREIFF.—I concur. I think it is unnecessary to decide as to the validity of the inhibition. My judgment proceeds on the letter of obligation. What the title requires is a clear record as to Shaw as at 10th December. By the disposition itself a personal search is required as against Shaw, who, on the face of the disposition, appears as the proprietor, and to whom the price was paid. The defenders cannot be held to have fulfilled their obligations till the record is cleared of these inhibitions.

THE COURT adhered.

MACRAE, FLETT, & BENNIE, W.S.—A. & A. S. GORDON, W.S.—Agents.

No. 2. JAMES CRAIG, Complainer (Reclaiming).—*Lees*—A. S. D. Thomson.

Oct. 17, 1896.
Craig v. Hogg.

THE REVEREND DAVID NASMYTH HOGG, Respondent.—*D.-F. Asher*—*Clyde*.

Judicial Factor—Process—Expenses—Decree against defender “as judicial factor”—*Personal liability*.—A judicial factor upon the estate of a person deceased defended an action brought against him “as judicial factor” by a creditor of the deceased. An interlocutor was subsequently pronounced ordaining the defender “as judicial factor” to make payment to the pursuer of £159, and finding the defender “as judicial factor” liable in expenses to the pursuer.

Held (by a majority of seven Judges, Lord Young, Lord Adam, Lord M'Laren, Lord Kinnear, and Lord Moncreiff, *diss.* Lord Justice-Clerk and Lord Trayner) that the interlocutor could not be construed as imposing on the defender personal liability for expenses.

Question, whether a judicial factor who litigates unsuccessfully is as a general rule personally liable for expenses to the successful party.

Opinions (affirmative) per Lord Justice-Clerk, Lord M'Laren, Lord Trayner, and Lord Moncreiff.

Opinions (negative) per Lord Young, Lord Adam, and Lord Kinnear.

Gordon v. Campbell, 1842, 1 Bell's App. 428, and *Ferguson v. Murray*, December 20, 1863, 16 D. 260, *commented on*.

2D DIVISION,
with three
consulted
Judges.
Lord Low.

ON 13th December 1892 James Craig, chartered accountant, Edinburgh, was appointed judicial factor on the estates of the deceased Archibald Rodan Hogg, solicitor, Edinburgh. The principal asset of the estates consisted of a claim for repayment of £2026, 8s. 9d. of cash advances made to a Mr John Baird, builder, Edinburgh, secured over the reversion of certain heritable subjects.

On 21st April 1893 the Reverend David Nasmyth Hogg of Auchtermuchty raised an action of accounting against Mr Craig as “judicial factor foresaid,” calling for exhibition and production of an account of the whole intromissions of Archibald Rodan Hogg as executor of his deceased brother Dr Robert Hogg, or as vititious intromitter, and craving that Mr Craig, as judicial factor foresaid, should be decreed to make payment to the pursuer as one of the next of kin of Dr Hogg of the sum of £1000, or such other sum as might appear to be the balance due to him, and in the event of Mr Craig failing to produce an account, craving for decree against him “as judicial factor foresaid,” of the sum of £1000, which should in that case be held to be the balance due as aforesaid.

Mr Craig lodged defences, and upon 1st March 1894 the Lord Ordinary (Low) pronounced an interlocutor decerning and ordaining the defender, “as judicial factor of Archibald Rodan Hogg, to make payment to the pursuer of £159, 6s. 8d., with interest: . . . Finds the defender, as judicial factor foresaid, liable in expenses to the pursuer.”*

* “OPINION.—There has been some discussion in regard to the terms in which the finding for expenses to which the pursuer is entitled should be made. The action is directed against Mr Craig only in the capacity of judicial factor upon the late Mr Rodan Hogg's estate, and it is not disputed that decree for the principal sum falls to be given against him as judicial factor. He contends, however, that the pursuer should only be found entitled to expenses ‘out of the estate’ or ‘only as an ordinary creditor.’ I do not know of any authority for so limiting a finding or decree for expenses. When the pursuer in an action against a judicial factor is found entitled to

An interlocutor was subsequently pronounced giving decree for No. 2.
£179, 6s. 11d., the taxed amount of expenses.

Mr Craig failed to pay the principal sum or the expenses.

Oct. 17, 1896.
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The pursuer thereupon extracted the interlocutors, and on 28th May 1895 charged Mr Craig "to make payment of the sum of £179, 6s. 11d., being the taxed amount of the pursuer's account of expenses, and the sum of 19s. 8d., being the dues of extract."

Mr Craig presented a note of suspension of the charge. He averred,—(Stat. 5) " . . . The deceased A. R. Hogg at his death had, among other assets, a sum of £2026, 8s. 9d. owing to him, secured, subject to prior bonds, over certain heritable properties in Edinburgh which had belonged to a Mr Baird. The judicial factor has endeavoured to realise these properties, so as to yield a surplus to the factory estate, but so far without success. It is the failure to realise this outstanding asset which prevents the creditors being settled with. The complainer never concealed the circumstances of the factory estate from the respondent, who, before he raised the said action, was well aware thereof, or at all events he could have ascertained the real position of the factory estate without the slightest difficulty."

The respondent answered,—(Ans. 5) "Explained that throughout the litigation in which the said expenses were incurred the complainer was aware (1) that the factory estate, after paying preferable debts, would not exceed in value the sum of £250; (2) that the unsecured debts of the deceased amounted to £3000 or thereby; (3) that the respondent's claim was for a ranking, and that the dividend payable to the respondent could not exceed £10 or thereby. Although fully aware of these facts, the suspender carefully concealed them from the respondent throughout the litigation. He was frequently called upon but always refused to give the respondent any information as to the estate of the deceased. . . . In the circumstances it was improper for the complainer to embark in a litigation involving expenses on both sides of nearly £400, he well knowing that the sum at stake was only about £10, and his doing so was wilfully reckless, or at least reckless."

The complainer pleaded, *inter alia* ;—(1) In respect the decree founded upon does not warrant personal diligence against the complainer, he is entitled to suspension. (2) The complainer being liable only as judicial factor, the charge, in so far as directed against him personally, ought to be suspended. (3) The complainer, as judicial factor, having been called upon to defend the estate under his administration, and litigated *in bona fide*, the respondent is not entitled to compel him to pay out of his own funds the expenses found due.

The respondent pleaded, *inter alia* ;—(2) The charge complained of being authorised by the said decree as the warrant thereof, the note should be refused. (3) The suspender, having been all along aware that the estate under his charge was insolvent and unable to pay the

expenses, the ordinary and proper decree, when it is not intended to make the factor personally liable, is simply against him in the capacity in which he is sued. Mr Craig's object is of course to avoid the risk of being compelled in any circumstances to pay the expenses, or any part of them, out of his own funds. I do not think that that is a matter which I can deal with at present beyond expressing my opinion that Mr Craig was without doubt justified in defending the action."

No. 2. pursuer anything but a nominal dividend on his claim, and having insisted in the defence of said action in the knowledge of said facts which, though frequently called on to disclose the extent and circumstances of the estate under his charge, he concealed from the respondent, was not litigating *in bona fide*, and is personally liable to the respondent for the expenses of such litigation.

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On 10th January 1896 the Lord Ordinary (Low) refused the prayer of the note of suspension.*

* "OPINION.— . . . The question is, whether a judicial factor who has no factorial funds is liable for the expenses of a litigation which have been awarded against him only as judicial factor?

"The general rule, which received its latest recognition in the case of *White v. Steel*, 21 R. 649, is, that a person put to the expense of vindicating his rights, is entitled to recover that expense from the party by whose opposition it was incurred.

"That rule has been applied in the case of testamentary trustees, of a trustee in bankruptcy, and of a liquidator appointed by the Court under the Companies Acts, and the question is, whether it also applies in the case of a judicial factor or curator bonis?

"There are, I think, only two cases in which the liability of a judicial factor or curator bonis, who has no estate in his hands, for expenses, has been considered, namely, *Forbes v. Morrison*, 7 D. 853, and *Ferguson v. Murray*, 16 D. 260.

"In the former case Peter Morrison brought an action of reduction of certain deeds which he had granted on the ground that they had been obtained from him by the fraud of the defenders. After issues had been adjusted for the trial of the cause Morrison became insane, and Forbes having been appointed his curator bonis sisted himself as a party to the action, and carried on the litigation, which ended in a verdict for the defenders. In consequence of the verdict the Court assoilzied the defenders and found 'the pursuer liable to the defenders in the expenses incurred by them in this action.'

"Forbes made payment of the expenses to the extent of the funds of his ward, but a balance remained unpaid and the defenders threatened personal diligence. Forbes accordingly brought a suspension, and the Court held that he was not liable for the balance of the expenses.

"The Lord Ordinary (Cunninghame) seems to have been of opinion that where expenses have been awarded against a curator bonis only in his curatorial capacity, he is in no case liable beyond the amount of the estate in his hands.

"The First Division affirmed Lord Cunninghame's interlocutor, but they appear to me to have proceeded entirely upon the special circumstances of the case. The action had been commenced by the ward before the curator's appointment; if the ward had not become insane, the defenders would have had no security for the expenses beyond his estate; and there was no ground for treating the appointment of a curator bonis as giving the defenders additional security, or a cautioner for the expenses.

"The learned Judges, however, recognised that there might be cases in which a curator bonis would be personally liable for expenses, Lord Mackenzie instancing the case of a curator who knew that there were no funds out of which expenses could be paid.

"In the case of *Ferguson v. Murray*, a judicial factor who had unsuccessfully defended an action brought against him in that capacity was found by the Lord Ordinary, by interlocutor dated 14th June 1853, 'liable in expenses since the date of lodging the defences.' Upon the enrolment of the case for approval of the Auditor's report and decree, the Lord Ordinary pronounced this interlocutor,—' Finds that the defender Murray has not by the defences maintained by him in this cause, or by his general conduct in

The complainer reclaimed, and after hearing parties the Court appointed the case to be argued before them and three Judges of the First Division.

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Argued for the complainer;—The general rule that the unsuccessful party must pay the expenses of an action rendered necessary by his opposition to a just claim¹ did not apply. (1) The complainer was called merely as judicial factor, and a judicial factor was not personally liable for expenses if he had no factorial estate in his hands with which to pay them.² This proposition was founded upon considerations of reason and justice. A judicial factor differed from a testamentary trustee or a trustee in bankruptcy (in which cases it was admitted there was personal liability for expenses), in this respect, that he lacked the power they possessed of consulting those who were interested in the estate either as beneficiaries or creditors. There were, moreover, special circumstances in the present case which rendered the general rule as to expenses inapplicable. The judicial factor had acted reasonably, in the opinion of the Lord Ordinary, in defending the action.³ He was a defender, not a pur-

the litigation, subjected himself personally liable in expenses: Approves the Auditor's report upon the pursuer's account of expenses; and in terms thereof decerns in his favour for the sum of £34, 4s. 8d. sterling.'

"Upon a reclaiming note, the First Division pronounced the following interlocutor:—'In respect that the Lord Ordinary's interlocutor of date the 14th June 1853, in so far as it finds the defender liable to the pursuer in expenses since the date of lodging the defences, did not subject the defender in said expenses personally or at all otherwise than as concluded for in the summons, that is to say, in his judicial capacity as judicial factor or curator bonis, and so as to have effect primarily against the curatorial estate, the defender being individually answerable only to make such estate forthcoming, or failing thereof, to supply any deficiency *prima instantia* from his own funds, he having always relief against the estate: Find that the interlocutor now submitted to review, if intended to go further than said is, was both incompetent and erroneous, and if not intended to go further was unnecessary.'

"That interlocutor is not very happily expressed, but as I read it, it means that if a decree for expenses has been pronounced against a person as judicial factor, and he has no factorial estate in his hands, he must pay the expenses out of his own pocket and take his chance of operating his relief against any estate which he may afterwards recover. If that is a sound construction of the interlocutor, then it was practically a judgment upon the question which I am now considering.

"Even if the case of *Ferguson* is not to be regarded as an authority upon the question, I do not think that there is any sufficient ground for holding that a judicial factor is in no case subject to the general rule, that a person who causes expense to another in establishing a right is liable for the expense.

"A judicial factor, although he is an officer of the Court, does not, except in cases requiring special powers, act under the direct authority of

¹ *White v. Steel*, March 10, 1894, 21 R. 649.

² *Ferguson v. Murray*, Dec. 20, 1853, 16 D. 260, 26 Scot. Jur. 116; *Forbes v. Morrison*, June 10, 1845, 7 D. 853, 17 Scot. Jur. 443; *Drummond (Carse's Factor) v. Carse's Executors*, Jan. 27, 1881, 8 R. 449; *Young v. Nith Commissioners*, July 6, 1876, 3 R. 991, and June 10, 1880, 7 R. 891.

³ *Law v. Humphrey*, July 20, 1876, 3 R. 1192, *per Lord President (Ingles)*, 1194.

No. 2. *suer.*¹ The action was raised after the death of his principal. The estate, though valueless now, might some day improve, and the whole sum ultimately be recovered. A large sum had been sought in the action, and a small one obtained. But (2) in any view, while the conclusions of the summons might have been framed against the complainer either (1) personally or (2) *qua* judicial factor, or (3) *qua* judicial factor and personally, the summons had been limited to a conclusion against him "*qua* judicial factor." The Lord Ordinary had accordingly pronounced decree against him in these terms, and must be held to have decided in the original process whether in the circumstances the complainer should or should not be held personally liable. Now, properly construed, the decree imported that the complainer's liability was limited to the amount of the factorial estate in his hands.² The words were distinct and intelligible words of limitation, restricting the decree to one against him in his representative capacity. Where it was intended that in the event of the factory estate proving insufficient the factor should be personally liable to

the Court. He can make contracts in reference to the factorial estate, and he is personally liable to perform such contracts, and in suing or defending actions he acts on his own responsibility, and it is he, and not any party whom he represents, who is the litigant.

"No doubt there may be (as in the case of *Forbes v. Morrison*) special circumstances which render the general rule as to liability for expenses inapplicable. But here I do not think that there are any such special circumstances. The respondent made a claim, which proved to be well founded, to a substantial extent, against the factorial estate, but the expense which he incurred in establishing that claim was entirely caused by the complainer's opposition. The complainer, upon the other hand, had no funds whatever to meet the claim if it was established, or to pay expenses if his defence should be unsuccessful. In these circumstances I think that the complainer must pay the expenses just as trustees or an official liquidator would be compelled to do under similar circumstances, because, to use the words of Lord M'Laren,³ 'expenses are not awarded as in the nature of penalty, but as compensation to the successful party for the cost to which he has been put in establishing a right which his opponents ought to have known to be well founded.'

"The complainer argued that to refuse the note would be to find him personally liable in expenses, and that it was incompetent to do so except in the action in which expenses were awarded. I do not regard the question raised here as properly one of personal liability. When a trustee or other person litigating in a representative capacity is found liable personally in expenses, that means that he is liable without any right of relief against the trust-estate or the person whom he represents. Here the complainer was not found personally liable in expenses, and his right of relief against any estate which he may recover remains entire. For the reasons, however, which I have stated, I do not think that the fact that there is no factorial estate is a good answer to the respondent's claim for the expenses to which he has been put, by reason of the complainer's opposition, in establishing his rights."

¹ *Lawrie v. Pearson*, Nov. 9, 1888, 16 R. 62.

² *Gordon v. Campbell*, June 13, 1842, 1 Bell's App. 428, approved in *Muir v. City of Glasgow Bank*, April 7, 1879, 6 R. (H. L.) 21, *per* Lord Chancellor (Cairns), p. 26; *Dickson v. Bonar's Trustees*, Nov. 20, 1829, 8 S. 99, 2 Scot. Jur. 40; *Kirkland v. Gibson*, Dec. 20, 1831, 10 S. 168; *Kirkland v. Crichton*, Feb. 3, 1842, 4 D. 613, 14 Scot. Jur. 239; *Forbes v. Morrison*, June 10, 1845, 7 D. 853; *M'Laren on Wills and Succession*, 3d ed. pp. 1242-3.

³ *M'Laren on Wills*, 3d ed. 1245.

make good the deficiency, it should be expressly stated in the decree.¹ **No. 2.**
*Gordon's case*² was subsequent in date to the cases of *Gibson v. Pearson*,³ and *Scott v. Patison*,⁴ relied upon by the respondent.

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Argued for the respondent;—The general rule enunciated in *White v. Steel*⁵ had been given effect to in the case of testamentary trustees⁶ sued as such, and they were bound to pay the expenses whether they held trust funds in their hands or not. It also applied to a trustee in bankruptcy⁷ in reference to an action concerning the sequestrated estate, and it had been held that it was not a relevant answer to a charge for expenses for him to say that he had no funds belonging to the estate.⁸ The rule also applied to a liquidator appointed by the Court under the Companies Acts.⁹ There was no reason why it should not be given effect to in the case of a judicial factor who had litigated unsuccessfully, and had no factorial estate in his hands. The distinction, as regarded liability for expenses, between a judicial factor and a trustee in bankruptcy, alleged to consist in the latter's power to consult the creditors interested in the estate, did not exist; for a judicial factor could equally do this, and he was moreover paid for his services. The fact that the complainer was called and defended the action as judicial factor instead of electing to pursue the action, made no difference in his liability for expenses. The case of *Ferguson v. Murray*¹⁰ relied on by the complainer was really an authority for the respondent. The judgment might be somewhat obscurely expressed, but it had been construed by Lord Low in the present case and by Lord Kincairney in the case of *White v. Steel*¹¹ as importing personal liability by the judicial factor for the expenses decerned against him as such. The case of *Forbes v. Morrison*¹² was decided to a large extent on specialties. (2) The Lord Ordinary in pronouncing the decree for expenses against the complainer "as judicial factor" could not have intended to limit the complainer's liability for them to the extent of the factorial funds in his hands, because he had expressly refused to limit his interlocutor so as to find the pursuer entitled to expenses "only out of the estate." But further, the decree as it stood did not exclude personal diligence against him. The words "*qua* judicial factor" were words descriptive of the character in which the complainer was sued, and they did not limit his obligation to pay the expenses in an action which he had chosen to defend.¹³

¹ *Kay v. Wilson's Trustees*, March 6, 1850, 12 D. 845, 22 Scot. Jur. 363; *Davidson's Trustee v. Carr*, June 21, 1850, 12 D. 1069, 22 Scot. Jur. 469.

² *Gordon v. Campbell*, June 13, 1842, 1 Bell's App. 428.

³ *Gibson v. Pearson*, May 25, 1833, 11 S. 656, 5 Scot. Jur. 387.

⁴ *Scott v. Patison*, Dec. 21, 1826, 5 S. 172.

⁵ *White v. Steel*, 21 R. 649; *Kirkpatrick v. Irvine or Douglas*, Jan. 18, 1848, 10 D. 367, *per* Lord Jeffrey, 369.

⁶ *M'Laren on Wills and Succession*, 3d ed. vol. ii. 1243; *Robertson v. Morrison*, Dec. 4, 1823, 2 S. 479.

⁷ *Torbet v. Borthwick*, Feb. 23, 1849, 11 D. 694, 21 Scot. Jur. 231.

⁸ *Cowie v. Muirden*, July 20, 1893, 20 R. (H. L.) 81.

⁹ *Liquidator of the Consolidated Copper Co. of Canada v. Peddie*, Dec. 22, 1877, 5 R. 393; *Ferrao's case*, 1874, L. R., 9 Ch. App. 355.

¹⁰ *Ferguson v. Murray*, 16 D. 260.

¹¹ *White v. Steel*, March 10, 1894, 21 R. 649, *per* Lord Kincairney, p. 650.

¹² *Forbes v. Morrison*, 7 D. 853.

¹³ *Scott v. Patison*, Dec. 21, 1826, 5 S. 172.

No. 2. At advising,—

Oct. 17, 1896. LORD JUSTICE-CLERK.—When this case came before a bench of three Judges in this Division, there was a difference of opinion, and we thought the question so important that it was desirable it should be heard before a larger Bench, and I am glad that this course was taken in view of what I understand will be the decision of a considerable majority of the Bench which has heard the case of new.

The Lord Ordinary in the action in reference to which this suspension is brought was asked by the defender to limit the finding in favour of the pursuer for expenses to expenses “out of the estate, or only as an ordinary creditor.” This the Lord Ordinary refused to do. And the finding as to expenses is,—“Finds the defender, as judicial factor foresaid, liable in expenses to the pursuer.”

It is contended on behalf of the complainer in this suspension that this finding is equivalent to a finding such as was asked from the Lord Ordinary and refused by him. He further maintains that having been called, and having appeared as judicial factor, he is not liable to do more than make the funds in his hands forthcoming, and that if these will not meet the expenses he has caused to the pursuer, the pursuer must suffer the loss.

If these contentions are to receive effect, it must be upon the ground that there is a difference between the case of a judicial factor and other litigants who engage in litigation by either suing or defending as in a fiduciary character, such as testamentary trustees, or trustees in bankruptcy, or official liquidators. If such litigants must make good to a successful opponent the expense he has incurred in litigation, and cannot plead that the fund they hold is exhausted as a ground for resisting payment, is there any ground for holding the position of a judicial factor to be different? It is only different from the case of voluntary trustees in this particular, that he is paid for his services, but in what is his position different from that of trustee voluntary or official, or liquidator, as regards his opponent in the litigation? There are cases which might be held exceptional, such as a curator bonis to one insane, who cannot obtain any aid by opinion or guarantee from his ward. It seems in one case to have been so held. I take leave to doubt whether the exception so made is sound in principle, but it is certainly not the same case as the present, where the factor was truly acting for parties quite able to advise and support him, just as those behind trustees, or behind a trustee in bankruptcy, or a liquidator, may do.

If this question were to be decided on principle, I should decide it as the Lord Ordinary has done. But I hold that there is authority for so deciding it in the case of *Ferguson v. Murray*.¹ I have not, after repeated consideration—knowing that a different view is taken—been able to come to any other conclusion than that the decision in that case established that a judicial factor found liable in expenses must make them good to his opponents by supplying any deficiency of the funds of the factory out of his own funds, he having relief against the estate, if from the condition of that estate he can obtain it.

But it is said that the Lord Ordinary by his finding the defender liable

"as judicial factor," limited his liability to the funds in his hands. This does not appear to me to be a sound reading of his interlocutor. It has been decided in express terms that a judgment finding a trustee litigant liable in expenses "*qua* trustee" is enforceable to the effect of making him pay the expenses, and I am unable to understand how the exactly corresponding words in the case of a judicial factor should not be read as applicable to the case of the factor in the same way. No cases were cited to the Court shewing that in practice such words have been so construed,—differently from what is done where similar words are used in the case of trustees.

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It is true that the Lord Ordinary, who refused to frame his interlocutor so as to limit the pursuer's claim for expenses to the funds in the factor's hands, states that the factor was "justified in defending the action," but if that had been intended as meaning anything more than that as regards the estate he represented he committed no blameworthy wrong in defending the action, then it would, I think, be a contradiction of the Lord Ordinary's judgment in the cause, which held that the defender was in the wrong in the litigation, and that decree must be given in terms of the summons.

I have stated thus shortly why, contrary, I believe, to the opinion of the large majority of your Lordships, I am in favour of affirming the Lord Ordinary's interlocutor. I have abstained from going more at length into the question, because I have had an opportunity of reading an opinion prepared by Lord Trayner, in which I desire to express my entire concurrence.

LORD YOUNG.—After this case was argued and taken to avizandum in the Second Division, the Judges thought it raised a question of general interest and importance which it was fitting should be decided by a full bench. It regards the liability of a judicial factor on the estate of a deceased owner for a sum of expenses of process for which he has been found liable "as judicial factor" in an action against him in that capacity by a creditor of the deceased.

The respondent holds decree against the complainer for a debt of £159, 6s. 8d., and also for a sum of £179, 6s. 11d., of expenses of process "as judicial factor" on the estate of the deceased debtor.

With respect to the debt, the respondent admits that the complainer is under no other obligation to him than to treat him as a just creditor and claimant to the amount of it on the factorial estate. But with respect to the expenses of process, he contends that the complainer's obligation is not thus limited, but that by force of the decree he is personally bound to him as debtor therefor, or as cautioner and surety for the sufficiency of the factorial estate to meet them in full.

The complainer disputes this contention, and maintains that as regards his obligation or duty to the respondent, there is no distinction between the debt and the expenses of process.

Proceeding on the view which he takes of his right, the respondent charged the complainer personally on the decree for expenses in order to do diligence for the attachment of his private property, and the question before us arises in a suspension of the charge.

The decree, on which alone any liability of the complainer to the respon-

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dent stands, makes no distinction between the debt and the expenses of process, declaring in terms that his liability for both and each is "as judicial factor." I am unable to regard these words as superfluous and unmeaning, or otherwise than as distinct and intelligible words of limitation, operating alike on the liability for the debt and for the expenses. Now, what is that limitation? I have characterised it as, in my opinion, distinct and intelligible, thinking it clearly imports that the complainer is not by the decree thus qualified made the respondent's debtor, or the respondent his creditor for the sums specified, but is only ordered to treat the respondent as having a good claim on the factorial estate for these sums.

It is, I think, not doubtful that a judicial factor, although sued and concluded against only as such, may competently be found liable and decerned against in such manner as to subject him personally in immediate and direct liability, at least for expenses of process, so that diligence therefor may be done against his private property, and all that I mean by what I have already said is that this is not done by finding him liable and decerning against him "as judicial factor."

It was contended on the part of the respondent that a judicial factor sued as such by a claimant on the estate committed to his charge, and defending the action, is in the same position with respect to liability for costs as a party defending an action directed against himself personally—that costs ought in both cases alike to follow the result, and with the personal liability therefor of the losing party.

I think this contention is based on a misapprehension. It is true that costs as a rule follow the result in this sense—that they are not given or withheld only according as the Court is of opinion or not that the unsuccessful action (or defence) was reasonable and therefore excusable although unsuccessful. In this, the only reasonable sense of the rule, it is applicable to an action properly brought to establish a claim against a factorial estate so that the successful pursuer of such action will, unless under exceptional circumstances, have decree against his debtor (the factorial estate) not only for the debt which he has established, but also for costs, although the Court should be of opinion that the defence by the factor officially representing the estate was "without doubt" reasonable. The rule in this sense—and I can take it in no other—was acted on in the respondent's favour when in his action he got decree for his costs in the same terms as for his debt, although the Court was of opinion that the defence "was without doubt justified." But the question regarding the factor's liability, the only question of importance here, involves quite other considerations. Irrespective of the decree, the relation of debtor and creditor does not, and never did, exist between the complainer and respondent, and by the decree the complainer is made debtor in no other sense or capacity for the costs than for the debt found to have been due by the deceased owner of the factorial estate.

The respondent had no living debtor when he raised his action, and has none now unless the decree creates one, which I think it clearly does not. His only debtor died in 1890, and no representative of his with a passive title—that is to say, liable for his debts—exists, or ever existed. A judicial

factor has no passive title to make him debtor to the creditors on the factorial estate, and when an action is brought against him as such it is to establish an alleged debt not against him but against the estate. It is not doubtful that the debtor for costs awarded to a successful claimant on the estate is the estate itself, which must accordingly be administered by the factor with a view to meet them as a proper claim upon it. It would be absurd to contend that under such a decree as we have here to deal with the estate is not liable, and that the successful pursuer can only claim the costs from the individual factor who unsuccessfully defended the action. The personal liability sought to be imposed on the factor is therefore in truth that of a cautioner or surety for the sufficiency of the estate. That such liability may be imposed must, I think, be admitted when the Court is of opinion that the factor has been guilty of some misconduct—some violation or neglect of duty which warrants it. But the idea of this Court putting such cautionary obligation on its own officer, who has only done his duty, without violating or neglecting it in any respect, is, I think, abhorrent to reason and justice.

A judicial factor on the estate of a person deceased is, as I have already said, not debtor to that person's creditors, owes them nothing, and is under no duty to them, except an honest and intelligent performance of the duties of his office. These duties he owes to all without distinction who are interested in the factorial estate. It may be, or not, according to his duty to resist individual claims on the estate, and to require that they shall be judicially established before he admits them. If he fails in this duty, violates, or falls short of it, by resisting any claim which he ought in the due discharge of his duty to have admitted, or by admitting and satisfying any claim which it was his duty to resist, he may incur personal responsibility and consequent liability to any sufferers or sufferer by his misconduct. Whether by resisting any particular claim—that is to say, defending an action brought to establish it—he has acted according to his duty or in violation of it, is a question to be determined in the action itself, and the determination of it unfavourably to the judicial factor may lead to his being subjected to personal liability for the costs thereby occasioned to the claimant. But the proposition that a judicial factor cannot in the due and proper discharge of his duty defend an action without incurring the risk of such personal liability, and being actually subjected to it if the pursuer establishes his claim, is one which I must reject.

I can pay no attention to the imputations of the respondent in his answer 5, because it is, I think, the reasonable and settled rule that any misconduct or breach of duty by a judicial factor warranting the imposition of personal liability for costs must be found by the Court in the action in which the costs are awarded, while in that action here the Court (Lord Low) not merely found nothing amiss in the factor's conduct, but distinctly expressed the opinion that "he was without doubt justified in defending the action"; and I may here remark, that if the complainer "was without doubt justified in defending the action," he was "without doubt" entitled to pay his own expenses out of the estate, though the consequence might be to leave nothing to pay the debt for which the respondent holds decree. To say that he is nevertheless personally bound as

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No. 2. cautioner for the costs given to the respondent by the same decree and in the same terms seems extravagant.

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It was suggested and urged in argument that while on the one hand justice to the successful pursuer to whom costs are awarded requires that the judicial factor shall pay them as cautioner for the estate, on the other no injustice is thereby done to the factor, because he always may, and in prudence ought to, protect himself against the consequences of such cautionary liability by consulting those who are beneficially interested in the estate, and procuring their obligation to protect him against the consequences before taking the position of defender in the action.

I am altogether adverse to this view. In the first place, the pursuer's debtor, and only debtor, is the factorial estate, which in his interest, and that of all others having claims on it, has been placed under judicial management. The judicial manager is in no sense whatever his debtor, and in the action is not called as his debtor, but only as manager and administrator of the estate which is. It is hardly worth saying that a successful pursuer thinks it hard when he finds that his debtor is unable to pay his debt and costs. The case is familiar enough, and the law certainly does not protect any pursuer against it by giving him a cautioner for his debtor's ability to pay. In the second place, I cannot countenance the notion that a judicial factor who is honestly and on reasonable grounds of opinion that it is according to his duty to resist a claim on the estate unless it shall be established to the satisfaction of the Court whose officer he is, ought, before defending an action brought to establish it, to consult those interested in the estate, and obtain their approval and also pecuniary obligations from them for his protection. I must say that I think such a proceeding is of questionable propriety, but apart from that, it is one which in many, I should think in most cases, is impracticable. Further, regarding this suggestion of the possibility of obtaining an obligation of indemnity as an answer to the argument based on the manifest injustice of putting a cautionary obligation on an unoffending judicial factor, I am not influenced by it. For why should an unoffending factor, who is honestly and intelligently doing his duty, be put to look out for and take obligations of indemnity against risk? And what is the character of the obligations which it is thought he may get, and ought for his safety to take, before acting according to what he rightly believes to be his duty? Is it a written bond of caution for expenses of process to be substituted for the liability which *ex hypothesi* the law imposes on himself, and which his opponent in the action must be content with? or a bond of relief, on receiving which he must be content to take the risks, or otherwise decline to perform what he believes to be his duty?

Small at the best, and possibly uncertain as the estate committed to the factor here was, we must assume that this Court was judicially satisfied that it was such an estate, and that the interests in it were such, as to make it proper that it should be committed to the charge of a judicial factor, with the duty of managing and administering it as should in his judgment be best in the interests of all concerned; and we must further assume that the person appointed to the office was so appointed only after the Court was satisfied of his fitness. We may now have a petty case to deal with, but in considering

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a general question we must disregard that detail. A factorial estate may be of any value, and of any degree of certainty or uncertainty of realisation, having regard to its character and investments. Further, the interests in it and the claims upon it may be of any character and of any extent. Now, the factor is charged with the care and protection of the estate in the interests of all alike, and a very conspicuous part of his duty, in the common interest, is to protect the estate against claims which are not established to his satisfaction, and the establishment of which may cause expense to the claimants or the estate. This duty involves the exercise of judgment, and I should have thought it clear, on the one hand, that he is bound to exercise his judgment honestly and intelligently, and on the other, that no more can be required of him. It is in the common interest that he shall exercise it without favour and also without fear. Now, consider the position in which he would be placed, and the risk to which the interests placed in his charge would be exposed if the law were that if he resisted any claim, although of a character which he was "without doubt warranted" in resisting, he must become personally cautioner to the claimant for the expenses of process. I think this is not a position in which anyone ought to be placed who is required to exercise a disinterested judgment, for it is a position which gives him an obvious personal interest and bias in one direction.

The case may be rare—I hope it is—when an estate which this Court has thought fit to commit to a judicial factor turns out to be so worthless as that here in question seems likely to do, but we must, as I have said, deal with the question before us and the considerations of reason, justice, and expediency bearing on it, as they may occur in any reasonably supposable case. Now, an apparently large factorial estate may be wholly lost without any fault on the part of the factor, as by sudden failure of securities, or the success of a claimant on an outside title to what had long been regarded as part of the estate. To put the judicial factor in the position of cautioner for the estate's sufficiency to pay costs, possibly of large amount, may therefore be a very serious matter indeed. A proper litigant must undoubtedly take the risk of the law's uncertainty, or rather perhaps the uncertainty of Judges and judgments. But to put such risk on a judicial factor with respect to the ultimate result in the law Courts—it may be in the Court of last resort—and with much and reasonable difference of opinion, on a question in the decision of which he has no interest whatever, but only a duty to see that it is regularly and properly tried, is a quite different thing.

If any claimant on a factorial estate who brings an action against it—for such action must, as I have said, be regarded as brought against the estate, the pursuer having certainly no other debtor—ought to be dealt with so exceptionally from other pursuers, that caution for expenses must be given as the condition of a defence being allowed, it is difficult to see why he should be bound to take the caution of the judicial factor. But why he should have any caution I cannot conceive. He gives none himself, and no other pursuer or defender does, but takes the risk of his debtor being able to pay what may be found owing and decerned for.

I have specially dealt only with the case of a judicial factor defending an action brought against him as such, and which resulted in a decree in the terms of that before us, and certainly the case is the strongest for the appli-

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cation of the views which I have expressed. At the same time I think it right to say that my opinion extends to the case of a judicial factor who in the due performance of his duty makes a claim on behalf of the estate and raises action to establish it. I see no reason why the pursuer (the estate) should find caution for expenses, or why the obligation of a cautioner should be put on the factor as a condition of his performing his duty, which is, I assume, to institute and pursue the action.

I also think it right to say that the considerations, with their result, which I have expressed and endeavoured to illustrate, apply, or may apply (for there may be exceptional cases), to trustees including executors, and generally to anyone holding an office involving duties to others whose common interests the law has placed in his charge, and involving no interest on his own part except the faithful and intelligent performance of these duties.

I stated in the outset of these observations that the qualifying and limiting words "as judicial factor" in the decree against the complainer are, in my opinion, inconsistent with the personal liability which the respondent contends for, and this opinion, if sound, is enough for the decision of the case. It was suggested in the argument for the respondent that Lord Low, who pronounced the decree, must have intended personal liability, seeing that he has refused this suspension to resist it. But I think it clear enough from his Lordship's notes that he had no intention of imputing misconduct to the complainer, and, on the contrary, was judicially satisfied that he had acted according to his duty, although he was nevertheless of opinion, in point of law, that personal liability attached to him. I have stated fully my reasons for differing from this opinion. Had there been grounds for thinking that his Lordship meant to impose personal liability because of any misconduct which would warrant it, I should not merely have regretted the inaccurate (in that view) language of the decree, but felt disposed if possible to overcome it.

It is important that there should be no doubt as to the meaning and effect of these qualifying and limiting words "as judicial factor," or "as trustee" or "as executor," or as to the grounds on which they ought to be used or avoided, and others importing personal liability employed. This must be my excuse for entering so fully into the subject, and was indeed the reason which induced the Second Division to refer the case to a full Bench.

With respect to the authorities to which we were referred, I have to say, first, that I am unable to accept the decision in *Gibson*¹ as an authority. It has never since been followed, and the practice of the Court, so far as my experience goes, has been at variance with it. Second, I think the decision and the opinions expressed in *Forbes v. Morrison*² are in accord with the views which I entertain and have expressed. Third, I think the case of *Ferguson v. Murray*³ is not in point. Fourth, the most recent case—*Laird v. Humphrey*,⁴ and the opinion of the Lord President, concurred in by all the Judges, are entirely in accord with the views which I hold. Fifth, in the English case—in *re Bolton & Company, Salisbury-Jones, and Dale's*⁵ case,

¹ 11 S. 656.⁴ 3 R. 1192.² 7 D. 853.⁵ L. R. [1895], 1 Ch. 333.³ 16 D. 260.

which was not cited to us, the Court proceeded on the same view adverse to the personal liability of a trustee who has been guilty of no misconduct or failure in duty.

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LORD ADAM.—I think it is clear that all questions of expenses as between the parties to an action must be determined in the action in which they are incurred. I think it is quite incompetent to inquire in this case whether, or in what capacity, the complainer should have been liable in expenses in the original action.

It appears to me therefore that the only question we can competently consider in this suspension is, What has the Lord Ordinary decided as to expenses in that action? And in that matter the interlocutor or decree must speak for itself. We cannot go to the Lord Ordinary's opinion to see what meaning he intended that the interlocutor should have. Third parties,—messengers-at-arms, for example, or arresters and others interested—have no access to such sources of information, and the interlocutor must have effect according to its legal meaning and construction, whatever that may be.

Now, the Lord Ordinary has in the original action ordained the complainer, as judicial factor, to make payment to the respondent of a principal sum of £159, 6s. 8d., with interest, and has found him "as judicial factor foresaid" liable in expenses to the respondent.

The question is, whether by the finding, expressed in the terms used, the complainer is bound to make payment of these expenses personally, out of his own pocket, or only out of the factory estate?

Now, as I have stated above, the complainer has been ordained to pay a principal sum of £159, 6s. 8d. as judicial factor. I have not heard the respondent or anybody else suggest that the complainer is personally liable to pay that sum, or that the words do not aptly express the intention of limiting liability to the factorial estate.

I can only say that throughout my long experience I have always understood that the words "as judicial factor" or "*qua* judicial factor" when used as here were intended to limit liability to the factorial estate, and I have always so used them. But if that is their undisputed meaning when used in this interlocutor in connection with the principal sum, how can it be maintained that they are not to have the same meaning when used in connection with the finding as to expenses? I cannot read the interlocutor as if no such words were in it, or as if it found the judicial factor personally liable. To my mind the construction of the interlocutor is clear, and it imposes on the complainer no personal liability for expenses.

I do not think that we have to consider what would be the effect as regards liability for expenses of an interlocutor finding the defender liable in expenses without qualification, or whether as regards such liability judicial factors or other officers of Court are in a different position from trustees in bankruptcy. But as the question has been argued to us, I may say that I concur with Lord Young on that matter.

I think that, if it is intended that such officers are to be personally liable in expenses to the opposing litigant, it should be expressly so found.

On the whole matter I am of opinion that the interlocutor of the Lord Ordinary is wrong.

Y. 1. The question—The question was asked at the last hearing of the case—whether the trustee is liable for expenses incurred in the action at law for the recovery of the trust property. The question is the question of the trustee's liability for expenses incurred in his representative capacity.

As to the first question I shall say very little. I hold it to be wrong to state as a general rule that a trustee is liable for expenses incurred in the action at law for the recovery of the trust property. It is a question of fact whether the trustee is liable for expenses incurred in the action at law for the recovery of the trust property. But this is not in dispute. One case has been cited in the case of *Langdon v. The Bank of England*, where the trustee is liable for the expenses incurred in the action at law for the recovery of the trust property. Now, in all cases where the trustee is a trustee in a bank, I should be disposed, in considering the trustee's liability for expenses incurred in the action at law for the recovery of the trust property, to consider the trustee's liability for expenses incurred in the action at law for the recovery of the trust property, but where the trustee is a trustee in a bank, I should be disposed, in considering the trustee's liability for expenses incurred in the action at law for the recovery of the trust property, to consider the trustee's liability for expenses incurred in the action at law for the recovery of the trust property.

I have said that the question is one of trustee liability, because it is a question of fact whether a trustee is liable for all practical purposes a trustee. It is a question of fact whether the reason for appointing a trustee is that he is a trustee under a will or a new trustee, and the trustee is liable for the expenses incurred under judicial supervision, while the trustee is a trustee under a will or a new trustee. But now that the trustee is a trustee under a will or a new trustee, the trustee is seen to be a trustee under a will or a new trustee, and the trustee has the power to appoint a trustee under a will or a new trustee, and the trustee is liable for expenses incurred in the action at law for the recovery of the trust property.

The next question I take on the second question would (if I were a judge) make it necessary to consider the first. I think that the question whether a trustee is liable for expenses incurred in the action at law for the recovery of the trust property, is a question that ought always to be decided in the original action. If the decree is simply against the "pursuer" or the "defender," I should understand this as meaning that the defendant decreed against must pay the expenses, reserving his claim to be indemnified out of the trust-estate, a claim which of course cannot be determined one way or the other in an action to which beneficiaries are not parties. In the present case the interlocutor in the original action, which is the warrant of the decree, ordains Mr Craig, "as judicial factor of Archibald Robert Hogg," to make payment to the pursuer of £159, 6s. 8d., with interest, and also finds the defender, "as judicial factor foresaid," liable in expenses to the pursuer. It is not disputed that the decerniture for principal and interest due under the account sued for is a decerniture against Mr Craig in his representative capacity; and it follows, in my opinion, that an award of expenses, qualified in identical terms, must be read subject to the same limitation.

In so reading the decree we are not, as I conceive, laying down new law. So long ago as 1842 the meaning of an obligation undertaken by obligants

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"as trustees" was determined by the House of Lords. I refer to the case of *Gordon v. Campbell*.¹ This case arose out of a charge given on letters of horning to enforce payment of principal and interest under a bond granted by the suspenders "as trustees." The chargers had intimated their intention of following out the charge by a caption, and a suspension was brought on the ground that the suspender was not in the possession of trust funds to meet the claim. The Lord Ordinary, Lord Moncreiff, found "that there was no legal warrant in the heritable bond and disposition on which the letters of horning were issued for charging the suspender as on personal diligence for payment of the debt in question as due by him personally and individually," and therefore suspended the charge. To this interlocutor the Lords of the Second Division adhered, and their judgment was affirmed on appeal. This decision has been accepted and acted on as the charter of limited liability for trustees and representative persons in all cases where the parties to a contract are free to contract on such terms. In his judgment in *Muir's*² case the case is examined by Lord Cairns and approved, and his Lordship went so far as to say that in such a case, where there is authority to accept a contract so limited, "the words used could have no meaning and could be referred to no object other than that of limiting responsibility."

I think it would be unfortunate if it should be held that an obligation constituted by decree in language which *ex facie* imports a limited responsibility has a different meaning from that which has been attached to the same words when used in a voluntary deed of obligation, and I see no reason for the suggested distinction. I think that as the chargers state their intention of using the charge so as to affect the private estate of the judicial factor, the charge ought to be suspended.

LORD KINNEAR.—I agree with the opinion of Lord Young, both (1) as to the construction and effect of such an interlocutor as that pronounced by the Lord Ordinary, and (2) on the general principle which ought to guide the Court in deciding whether a judicial factor should be liable personally or in his factorial capacity. My reasons for doing so have been stated so fully and so clearly by his Lordship that I do not think I would be justified in occupying the time of the Court by repeating them.

LORD TRAYNER.—The general rule of our practice is that an unsuccessful litigant is found liable in the expenses of the action in which he has unsuccessfully maintained a claim or a defence. I say either claim or defence, because in my opinion it makes no difference in the question of liability for expenses whether the unsuccessful party has voluntarily come into Court to pursue a claim which he has not been able to establish, or has been called into Court and stated a defence which has been repelled. If the general rule, as I have stated it, is applied in the case before us, the suspender (defender in the action in which expenses were decerned for) is bound to pay these expenses, and his suspension of the decree against him should be refused.

But the suspender maintains that the general rule is not applicable to his

¹ 1 Bell's App. 428.

² *Muir v. City of Glasgow Bank*, April 7, 1879, 6 R. (H. L.) 21.

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10 On the first point my opinion is adverse to the contention of the suspender. That he was called to the action and defended it as judicial factor does not, in my opinion, hinder in the least the application of the general rule as to liability for expenses, and I think there is neither authority nor principle for giving effect to the exception for which the suspender contends. Called to the action as judicial factor, he appears in it in his official capacity—that is, a representative capacity—he represents the factorial estate. Does that fact relieve him from liability for expenses? If it does, then a judicial factor is more favoured than other litigants who appear as representatives of interests other than their own. Testamentary trustees suing or being sued as such in matters connected with the trust-estate under their care are liable in expenses to their successful opponent, and must pay such expenses whether they have trust funds in their hands or not. So also, a trustee in bankruptcy, suing or being sued in reference to the sequestrated estate, is liable to his successful opponent in expenses, and (as has been decided in express terms) it is not a relevant answer to a charge for such expenses to say that he has no funds belonging to the sequestrated estate. There is no such difference between a judicial factor and testamentary trustees or a trustee in bankruptcy, as to make it necessary, expedient, or right that a rule should be applied in his case different from the rule applied in theirs. Indeed, a judicial factor is in very many cases, if not in all cases, practically a trustee in bankruptcy, or a testamentary trustee. He either represents beneficiaries, like a testamentary trustee, or creditors like a trustee in bankruptcy. In the present case, it appears from the statements of the parties that the suspender is acting chiefly in the interests of creditors, and he is therefore, as I have said, in the same position as a trustee in bankruptcy. It can make no difference in the question of his liability for the expenses of an unsuccessful litigation that he is called a judicial factor, and not a trustee, or that he acts under an extracted appointment made by the Court, instead of under an act and warrant by the Court confirming an appointment made by creditors. That being so, it appears to me to have been decided that it is no relevant answer for this suspender to make to the charge served upon him, that he has no trust or factorial funds in his hands to meet it. In giving this opinion, I am not forgetting that it was said in the case of *Forbes v. Morrison*¹ that the position of a trustee in bankruptcy is very different from that of a curator bonis. This difference is strongly asserted, but the only reason assigned for the difference seems to me, if I may with deference say so, quite inadequate. The reason was that a trustee in bankruptcy had always the creditors on the estate behind him to give him both advice and instructions as to whether he should *qua* trustee embark on a certain litigation; that he acted as mandatory for the creditors; whereas the curator bonis, in the case cited (he was curator to an insane ward), could

¹ 7 D. 853.

not, from the very circumstances of his position, consult with the ward whose interests were involved in the litigation. Now, I cannot help thinking that this peculiarity in the position of the curator bonis had a good deal to do with the judgment arrived at, which, it may be thought, shewed more consideration for the difficult and embarrassing position of the curator bonis than for the just claims of his opponent. The difficulty of the curator's position was his misfortune, but why should that prejudice his opponent? But while I can see no difference in principle as regards liability for the expenses of an unsuccessful litigation between a curator bonis and a trustee in bankruptcy—both litigating in a representative capacity and in interests other than their own—I am not concerned for the purposes of this case to deny that such a distinction may exist; for the distinction,—at least the reason assigned for the distinction,—cannot avail the suspender. He had behind him both creditors and beneficiaries with whom he might have consulted before litigating with the respondent, and in that respect was not different from a trustee in bankruptcy. But as a trustee in bankruptcy would undoubtedly have been personally liable *prima instantia* for the expenses of an unsuccessful litigation, so should the suspender be liable, between whose case and the trustee's no real distinction can be drawn.

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It is not, however, necessary to determine the question before us upon principle, for, in my opinion, it is already determined by authority. I refer to the decision in the case of *Ferguson v. Murray*.¹ Some observations have been made upon the interlocutor in that case, to the effect that it is complex and involved, if not unintelligible. I have not experienced any difficulty in understanding that interlocutor, the language and meaning of which seems plain enough; and it is just worth noticing in passing, that that interlocutor was pronounced by the First Division of the Court at a time when that Court was composed of Judges whose opinions have always been regarded by the profession as entitled to more than ordinary respect. In that case the Lord Ordinary found "the defender" (who was a judicial factor, and called as such) liable in expenses to the pursuer. The Court held that that finding imported that the defender was bound to pay the expenses found due primarily out of the funds in his hands as factor, and failing thereof "to supply any deficiency *prima instantia* from his own funds, he having always relief against the estate." That expresses exactly what I think should be done here; it is what the Lord Ordinary has done in the interlocutor now under review.

On the second point maintained by the suspender, I am also adverse to him. It is said that the Lord Ordinary, by finding (in the original action) the defender *qua* judicial factor liable in expenses, limited the defender's liability to the extent of the factorial funds in his hands. The Lord Ordinary certainly did not intend to do so, for he expressly refused to insert in his interlocutor any finding so limiting the defender's (spender's) liability although moved by the defender to do so. Nor do I think the Lord Ordinary did by implication what he refused to do *per expressum*. The words "*qua* judicial factor" appear to me to be words merely of description, not words of limitation. This view is also supported by autho-

¹ 16 D. 260.

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ity. In the cases of *Scott v. Patison*¹ and *Gibson v. Pearson*² the defender was found liable "*qua* trustee," and in both of these cases the contention that such words limited the defender's liability to the funds in his hands as trustee was repelled, the Court holding that the defender under such a decree was bound *prima instantia* to pay the expenses found due to his opponent, leaving him thereafter to operate his relief against the estate he was administering. If a decerniture "*qua* trustee" or "as trustee" was so interpreted, I cannot see why the same interpretation would be objectionable if put upon the words "*qua* judicial factor."

It has been remarked upon that the suspender did not wrongfully enter upon the litigation in which he was found liable for expenses, and the Lord Ordinary's observation has been quoted that he was "without doubt justified in defending the action." It is not quite clear to my mind what bearing that observation has on the present question. The Lord Ordinary could not mean to say that the suspender was "justified in defending the action" as in a question between him and the pursuer of the action. If that had been the Lord Ordinary's meaning he would necessarily have found the suspender entitled to expenses, not liable in them. If, however, the Lord Ordinary meant (as I think he did) that the suspender's conduct, as in a question with the estate he represented was justified, I have no reason to doubt the justice of the statement, but it is of no importance here. The suspender could not be justified in opposing the respondent's demand, for his opposition was held to be ill-founded and decree went against him. As in a question with his opponent, an unsuccessful litigant is never justified in his opposition, and cannot be, for being unsuccessful he is held to have been wrong. But to prevent any misunderstanding as to my own view on this matter, I must add that I could not hold any judicial factor justified in entering into a litigation who had no funds or estate whatever belonging to the factory in his hands, and no reasonable prospect of ever getting any, which was the case here.

I am of opinion that the judgment of the Lord Ordinary should be affirmed.

LORD MONCREIFF.—What we have to decide in this case is, whether the decree for expenses granted by Lord Low in the previous action between the parties does or does not warrant personal diligence against the complainer. That question must be determined according to the legal construction of the decree, and the finding as to expenses upon which it proceeds, which is contained in Lord Low's interlocutor of 1st March 1894. If, properly construed, the decree warrants personal diligence against the complainer, this suspension must be refused. We cannot in this process determine whether in the circumstances the complainer should or should not be held personally liable; that is a matter which must be held to have been decided in the original process.

The question,—in my opinion the only question,—which it is necessary to decide is, whether the decree, according to its terms, imposes personal liability for expenses on the complainer? I agree with those of your Lord-

¹ 5 S. 172.

² 11 S. 656.

ships who hold that it does not, because the complainer was found liable in expenses "as judicial factor," and not as an individual. These are limiting words; their natural and legal signification and effect is to restrict the decree to one against the party in a representative capacity. No. 2.
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The case of *Gordon v. Campbell*,¹ is a strong authority as to the restrictive effect of such words. Although in that case the words "as trustees" occurred in a heritable bond, and not in a decree, the question was really the same as in the present case (the registered bond being a good warrant for letters of horning), viz., whether an obligation undertaken "as trustees" warranted personal diligence against the parties to the bond. It was pleaded for the charger (p. 453) that the words "as trustees" were used to describe the character of the parties, and not to limit their liability, just as in this case it is pleaded that the words "as judicial factor" were used in the summons and the decree simply to describe the character in which the complainer was sued. But this argument was disregarded. It may be observed that this judgment of the House of Lords was subsequent in date to the case of *Gibson v. Pearson*,² and the earlier case of *Scott v. Patison*³ (relied on by the respondent), the first of which at least was relied on by the appellant in *Gordon v. Campbell*.¹

Later cases cited for the complainer—in particular, *Kay v. Wilson's Trustees*,⁴ and *Davidson's Trustees v. Carr*⁵—shew that where it is intended that in the event of the trust or factory estate proving insufficient, the trustee or factor shall be personally liable to make good the deficiency, this should be expressly stated in the decree.

I do not proceed upon the ground that in the summons the pursuer concludes for expenses against the defender "as judicial factor," because in dealing with expenses the Court are in use to disregard such a limitation. What I do proceed upon is, that in his finding as to expenses the Lord Ordinary finds the defender liable only "as judicial factor." He says,— "Here the complainer was not found personally liable for expenses, and his right of relief against any estate which he may recover remains entire." But he seems to have thought that a personal decree is required only when it is intended to deprive the factor of his relief against the estate, and that in order to render the factor personally liable to the successful litigant, it is not necessary that he should be decerned against personally. In this I do not agree with him.

I may add that it is not disputed that an earlier part of the decree, viz., that in which decree is given for the principal sum of £159, 6s. 8d., and in which the same words "as judicial factor" are used, does not warrant personal diligence against the defender. It would be confusing and inextricable if the same words were held to bear a different signification in two parts of the same decree.

In what I have said I have assumed, as I think the Lord Ordinary has assumed, that there are no trust funds out of which the expenses can be paid. If this is admitted, I think the charge should be suspended.

¹ 1 Bell's App. 428.

² 11 S. 656.

³ 5 S. 172.

⁴ 12 D. 845.

⁵ 12 D. 1069.

No. 2. In the view which I have stated it is not necessary to consider the general question which was argued to us as to the personal liability of a judicial factor for expenses when the factory estate proves insufficient.

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I may say, however, that, as at present advised, I am not prepared to affirm that as a general rule a judicial factor who litigates unsuccessfully is not personally liable for the expenses of the successful party. Assuming, as I do, that a testamentary trustee is personally liable for such expenses as a general rule, I do not think that there is any solid distinction between the position of a judicial factor and that of a testamentary trustee. The factor has as good means as the trustee of knowing the amount of the funds at his disposal, and of obtaining legal advice, and consulting the beneficiaries or creditors interested. If there is a distinction it is against the factor, because he is paid for his services and the trustee is not.

I do not think that much aid is to be derived from the judgment of the Inner-House in the case of *Ferguson v. Murray*.¹ I confess that I read that judgment in the same way as the Lord Ordinary and the Lord Justice-Clerk and Lord Trayner; but it admits of being read, and has been read, in a different sense, and no reasons are given in the report to aid us in construing it. Leaving out of view this doubtful authority, it is a point in favour of the complainer that there is no express decision against his view. It must be remembered, however, that the law as to the liability of parties suing or being sued in a representative capacity has matured slowly, if indeed it has matured, and that even as regards the liability of testamentary trustees the decisions up to a recent date are by no means consistent.

But for reasons which I have already stated I think that we should not in this process attempt to lay down any general rule on the subject.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be recalled, and the charge suspended.

THE COURT pronounced this interlocutor:—"The Lords of the Second Division, along with three Judges of the First Division, having heard counsel on the complainer's reclaiming note against Lord Low's interlocutor of 10th January last, in conformity with the opinions of a majority of the whole of the Judges present at the hearing, recall the interlocutor complained against: Sustain the first and second pleas in law for the complainer: Suspend the charge and whole grounds and warrants thereof, and decern."

MARCUS J. BROWN, S.S.C.—J. SMITH CLARK, S.S.C.—Agents.

No. 3. HUGH M'CALLUM AND OTHERS, Petitioners.—*Sol.-Gen. Dickson—*
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THOMAS LOCHHEAD AND OTHERS, Respondents.—*Salvesen.*

Burgh—Police—Election of Police Commissioners—Casus improvisus—Order by Court—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 17.—A burgh administered by twelve police commissioners elected by the whole burgh was divided into four wards in 1895, and in 1896 an election fell to take place in each of the four wards for the purpose of filling the places of the four senior commissioners, who were bound to retire from

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office in that year. Prior to the date of the election a fifth commissioner intimated his resignation, and, as he had been elected by the burgh and not by a ward, the election of his successor did not fall to any particular ward. The commissioners applied to the Court for an order under sec. 17 of the Burgh Police Act of 1892, which empowers the Court "wherever in any burgh it has from any . . . cause become impossible to proceed with the execution of this Act," after certain procedure, to "pronounce any order which in their judgment will enable the proceedings for the execution of this Act within such burgh to be continued as nearly as possible as if the said . . . cause had not taken place."

The Court *ordered* the election of an additional commissioner by the First Ward.

THIS was a petition by the Police Commissioners of Dunoon, for 1ST DIVISION. an order under section 17 of the Burgh Police (Scotland) Act, 1892.*

The statements of the petitioners were to the following effect:—Dunoon was constituted a burgh in 1868, in terms of the General Police Act of 1862, and in 1892 the Sheriff of Argyllshire fixed the number of Commissioners at twelve, in terms of section 29 of the Burgh Police Act of 1892. In December 1895 the Sheriff, under the powers conferred by section 11 of the Act last mentioned, divided the burgh into four wards. In terms of sections 32 and 37 of the same Act, one-third of the existing Commissioners, who had all been elected by the burgh as a whole, were bound to retire on the first Tuesday of November 1896, and an opportunity would thus be afforded to each of the four wards of electing one Commissioner. Mr William Mackenzie Shields, not being one of the Commissioners who was bound to retire in November 1896, had also intimated his resignation, and it was necessary that another Commissioner, in addition to the four above mentioned, should be elected.

"The Act makes no provision for apportioning the existing Commissioners among the wards, so as to indicate by which ward casual vacancies are to be supplied during the period of three years immediately succeeding the division into wards, and in the present circumstances the question has arisen whether one of the four wards into which the burgh is now divided shall return two members at the forthcoming election."

The petitioners accordingly craved the Court "to pronounce an order directing by what ward or wards the places of the five retiring Commissioners shall, at the forthcoming election, to be held on the 3d November 1896, be filled up, or to pronounce such other order as will

* 55 and 56 Vict. c. 55, section 17, provides:—"Wherever in any burgh in existence before the passing of this Act, and which thereafter continues to be a burgh . . . it has, from a failure to observe any of the provisions of this Act, or any other Act, or from any other cause, become impossible to proceed with the execution of this Act, the following provisions shall have effect ; (1) It shall be lawful for any seven householders within the burgh to present a petition to the Court of Session, or to the Sheriff Court, . . . (3) Upon resuming consideration of the petition, with or without answers, and after receiving such evidence as they shall require, the Court may pronounce any order which, in their judgment, will enable the proceedings for the execution of this Act within such burgh to be continued as nearly as possible as if the said failure to observe the provisions of this Act, or any other Act, or other cause, had not taken place ; and such order shall be final, and shall be recorded in the Sheriff Court books of the county within which such burgh is situate."

No. 2. cation of the views which I have expressed. At the same time I think it right to say that my opinion extends to the case of a judicial factor who in the due performance of his duty makes a claim on behalf of the estate and raises action to establish it. I see no reason why the pursuer (the estate) should find caution for expenses, or why the obligation of a cautioner should be put on the factor as a condition of his performing his duty, which is, I assume, to institute and pursue the action.

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I also think it right to say that the considerations, with their result, which I have expressed and endeavoured to illustrate, apply, or may apply (for there may be exceptional cases), to trustees including executors, and generally to anyone holding an office involving duties to others whose common interests the law has placed in his charge, and involving no interest on his own part except the faithful and intelligent performance of these duties.

I stated in the outset of these observations that the qualifying and limiting words "as judicial factor" in the decree against the complainer are, in my opinion, inconsistent with the personal liability which the respondent contends for, and this opinion, if sound, is enough for the decision of the case. It was suggested in the argument for the respondent that Lord Low, who pronounced the decree, must have intended personal liability, seeing that he has refused this suspension to resist it. But I think it clear enough from his Lordship's notes that he had no intention of imputing misconduct to the complainer, and, on the contrary, was judicially satisfied that he had acted according to his duty, although he was nevertheless of opinion, in point of law, that personal liability attached to him. I have stated fully my reasons for differing from this opinion. Had there been grounds for thinking that his Lordship meant to impose personal liability because of any misconduct which would warrant it, I should not merely have regretted the inaccurate (in that view) language of the decree, but felt disposed if possible to overcome it.

It is important that there should be no doubt as to the meaning and effect of these qualifying and limiting words "as judicial factor," or "as trustee" or "as executor," or as to the grounds on which they ought to be used or avoided, and others importing personal liability employed. This must be my excuse for entering so fully into the subject, and was indeed the reason which induced the Second Division to refer the case to a full Bench.

With respect to the authorities to which we were referred, I have to say, first, that I am unable to accept the decision in *Gibson*¹ as an authority. It has never since been followed, and the practice of the Court, so far as my experience goes, has been at variance with it. Second, I think the decision and the opinions expressed in *Forbes v. Morrison*² are in accord with the views which I entertain and have expressed. Third, I think the case of *Ferguson v. Murray*³ is not in point. Fourth, the most recent case—*Lau v. Humphrey*,⁴ and the opinion of the Lord President, concurred in by all the Judges, are entirely in accord with the views which I hold. Fifth, in the English case—in *re Bolton & Company, Salisbury-Jones, and Dale's*⁵ case,

¹ 11 S. 656.

² 7 D. 853.

³ 16 D. 260.

⁴ 3 R. 1192.

⁵ L. R. [1895], 1 Ch. 333.

which was not cited to us, the Court proceeded on the same view adverse to the personal liability of a trustee who has been guilty of no misconduct or failure in duty.

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LORD ADAM.—I think it is clear that all questions of expenses as between the parties to an action must be determined in the action in which they are incurred. I think it is quite incompetent to inquire in this case whether, or in what capacity, the complainer should have been liable in expenses in the original action.

It appears to me therefore that the only question we can competently consider in this suspension is, What has the Lord Ordinary decided as to expenses in that action? And in that matter the interlocutor or decree must speak for itself. We cannot go to the Lord Ordinary's opinion to see what meaning he intended that the interlocutor should have. Third parties,—messengers-at-arms, for example, or arresters and others interested—have no access to such sources of information, and the interlocutor must have effect according to its legal meaning and construction, whatever that may be.

Now, the Lord Ordinary has in the original action ordained the complainer, as judicial factor, to make payment to the respondent of a principal sum of £159, 6s. 8d., with interest, and has found him “as judicial factor foresaid” liable in expenses to the respondent.

The question is, whether by the finding, expressed in the terms used, the complainer is bound to make payment of these expenses personally, out of his own pocket, or only out of the factory estate?

Now, as I have stated above, the complainer has been ordained to pay a principal sum of £159, 6s. 8d. as judicial factor. I have not heard the respondent or anybody else suggest that the complainer is personally liable to pay that sum, or that the words do not aptly express the intention of limiting liability to the factorial estate.

I can only say that throughout my long experience I have always understood that the words “as judicial factor” or “*qua* judicial factor” when used as here were intended to limit liability to the factorial estate, and I have always so used them. But if that is their undisputed meaning when used in this interlocutor in connection with the principal sum, how can it be maintained that they are not to have the same meaning when used in connection with the finding as to expenses? I cannot read the interlocutor as if no such words were in it, or as if it found the judicial factor personally liable. To my mind the construction of the interlocutor is clear, and it imposes on the complainer no personal liability for expenses.

I do not think that we have to consider what would be the effect as regards liability for expenses of an interlocutor finding the defender liable in expenses without qualification, or whether as regards such liability judicial factors or other officers of Court are in a different position from trustees in bankruptcy. But as the question has been argued to us, I may say that I concur with Lord Young on that matter.

I think that, if it is intended that such officers are to be personally liable in expenses to the opposing litigant, it should be expressly so found.

On the whole matter I am of opinion that the interlocutor of the Lord Ordinary is wrong.

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LORD M'LAREN.—Two questions were argued at the last hearing of the cause,—(1) Assuming that the Lord Ordinary's interlocutor in the action at the instance of the present respondent leaves open the question of the liability of the judicial factor, what is that liability? (2) Is this question left open, or is the suspender only liable for expenses in his representative capacity?

(1) On the first of these questions I shall say very little. I hold it to be settled in practice, and clear in principle, that in questions of expenses trustees are principals, and this on the ground that whoever opposes a just claim is liable to compensate the claimant for the expense to which he has been put in vindicating his claim. But this is not an absolute rule. One familiar exception is the case of litigation as to rights under a deed, where the difficulty is caused by the obscurity of the deed. Now, in all cases where the Court has a discretion as to costs, I should be disposed, in exercising that discretion, to consider favourably the case of trustees who are defending the interests of minors, or insane or absent persons; but where the question does not come within the region of discretion, I think that trustees must be liable for costs like other people, and this without reference to the character or purposes of the trust.

I have intentionally put the question as one of trustee liability, because it so presents itself to my mind. A judicial factor is for all practical purposes a trustee. It has repeatedly been observed that the reason for appointing judicial factors to administer trusts (rather than new trustees) is that the accounts of the former are audited under judicial supervision, while the latter are not directly responsible to the Court. But now that trusts may be brought under judicial supervision, the distinction is seen to be unsubstantial. I am unable to admit that the Court has the power to award to its officers a privilege of litigating without liability for expenses that is not shared by private trustees.

(2) The view which I take on the second question would (if I were sitting alone) make it unnecessary to consider the first. I think that the question whether a trustee or judicial factor is to be made liable in expenses individually, or only in his representative capacity, is a question that ought always to be decided in the original action. If the decree is simply against the "pursuer" or the "defender," I should understand this as meaning that the individual decerned against must pay the expenses, reserving his claim to be indemnified out of the trust-estate, a claim which of course cannot be determined one way or the other in an action to which beneficiaries are not parties. In the present case the interlocutor in the original action, which is the warrant of the decree, ordains Mr Craig, "as judicial factor of Archibald Rodan Hogg," to make payment to the pursuer of £159, 6s. 8d., with interest, and also finds the defender, "as judicial factor foresaid," liable in expenses to the pursuer. It is not disputed that the decerniture for principal and interest due under the account sued for is a decerniture against Mr Craig in his representative capacity; and it follows, in my opinion, that an award of expenses, qualified in identical terms, must be read subject to the same limitation.

In so reading the decree we are not, as I conceive, laying down new law. So long ago as 1842 the meaning of an obligation undertaken by obligants

"as trustees" was determined by the House of Lords. I refer to the case of *Gordon v. Campbell*.¹ This case arose out of a charge given on letters of horning to enforce payment of principal and interest under a bond granted by the suspenders "as trustees." The chargers had intimated their intention of following out the charge by a caption, and a suspension was brought on the ground that the suspender was not in the possession of trust funds to meet the claim. The Lord Ordinary, Lord Moncreiff, found "that there was no legal warrant in the heritable bond and disposition on which the letters of horning were issued for charging the suspender as on personal diligence for payment of the debt in question as due by him personally and individually," and therefore suspended the charge. To this interlocutor the Lords of the Second Division adhered, and their judgment was affirmed on appeal. This decision has been accepted and acted on as the charter of limited liability for trustees and representative persons in all cases where the parties to a contract are free to contract on such terms. In his judgment in *Muir's*² case the case is examined by Lord Cairns and approved, and his Lordship went so far as to say that in such a case, where there is authority to accept a contract so limited, "the words used could have no meaning and could be referred to no object other than that of limiting responsibility."

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I think it would be unfortunate if it should be held that an obligation constituted by decree in language which *ex facie* imports a limited responsibility has a different meaning from that which has been attached to the same words when used in a voluntary deed of obligation, and I see no reason for the suggested distinction. I think that as the chargers state their intention of using the charge so as to affect the private estate of the judicial factor, the charge ought to be suspended.

LORD KINNEAR.—I agree with the opinion of Lord Young, both (1) as to the construction and effect of such an interlocutor as that pronounced by the Lord Ordinary, and (2) on the general principle which ought to guide the Court in deciding whether a judicial factor should be liable personally or in his factorial capacity. My reasons for doing so have been stated so fully and so clearly by his Lordship that I do not think I would be justified in occupying the time of the Court by repeating them.

LORD TRAYNER.—The general rule of our practice is that an unsuccessful litigant is found liable in the expenses of the action in which he has unsuccessfully maintained a claim or a defence. I say either claim or defence, because in my opinion it makes no difference in the question of liability for expenses whether the unsuccessful party has voluntarily come into Court to pursue a claim which he has not been able to establish, or has been called into Court and stated a defence which has been repelled. If the general rule, as I have stated it, is applied in the case before us, the suspender (defender in the action in which expenses were decreed for) is bound to pay these expenses, and his suspension of the decree against him should be refused.

But the suspender maintains that the general rule is not applicable to his

¹ 1 Bell's App. 428.

² *Muir v. City of Glasgow Bank*, April 7, 1879, 6 R. (H. L.) 21.

No. 2. case (1) because he was called and appeared in his character of judicial factor merely, and that a judicial factor is not liable for expenses if he has no factorial funds in his hands; and (2) because in any view the terms of the decree pronounced against him—being against him *qua* judicial factor—limit his liability to the amount of the factorial estate in his hands.

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On the first point my opinion is adverse to the contention of the suspender. That he was called to the action and defended it as judicial factor does not, in my opinion, hinder in the least the application of the general rule as to liability for expenses, and I think there is neither authority nor principle for giving effect to the exception for which the suspender contends. Called to the action as judicial factor, he appears in it in his official capacity—that is, a representative capacity—he represents the factorial estate. Does that fact relieve him from liability for expenses? If it does, then a judicial factor is more favoured than other litigants who appear as representatives of interests other than their own. Testamentary trustees suing or being sued as such in matters connected with the trust-estate under their care are liable in expenses to their successful opponent, and must pay such expenses whether they have trust funds in their hands or not. So also, a trustee in bankruptcy, suing or being sued in reference to the sequestrated estate, is liable to his successful opponent in expenses, and (as has been decided in express terms) it is not a relevant answer to a charge for such expenses to say that he has no funds belonging to the sequestrated estate. There is no such difference between a judicial factor and testamentary trustees or a trustee in bankruptcy, as to make it necessary, expedient, or right that a rule should be applied in his case different from the rule applied in theirs. Indeed, a judicial factor is in very many cases, if not in all cases, practically a trustee in bankruptcy, or a testamentary trustee. He either represents beneficiaries, like a testamentary trustee, or creditors like a trustee in bankruptcy. In the present case, it appears from the statements of the parties that the suspender is acting chiefly in the interests of creditors, and he is therefore, as I have said, in the same position as a trustee in bankruptcy. It can make no difference in the question of his liability for the expenses of an unsuccessful litigation that he is called a judicial factor, and not a trustee, or that he acts under an extracted appointment made by the Court, instead of under an act and warrant by the Court confirming an appointment made by creditors. That being so, it appears to me to have been decided that it is no relevant answer for this suspender to make to the charge served upon him, that he has no trust or factorial funds in his hands to meet it. In giving this opinion, I am not forgetting that it was said in the case of *Forbes v. Morrison*¹ that the position of a trustee in bankruptcy is very different from that of a curator bonis. This difference is strongly asserted, but the only reason assigned for the difference seems to me, if I may with deference say so, quite inadequate. The reason was that a trustee in bankruptcy had always the creditors on the estate behind him to give him both advice and instructions as to whether he should *qua* trustee embark on a certain litigation; that he acted as mandatory for the creditors; whereas the curator bonis, in the case cited (he was curator to an insane ward), could

¹ 7 D. 853.

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not, from the very circumstances of his position, consult with the ward whose interests were involved in the litigation. Now, I cannot help thinking that this peculiarity in the position of the curator bonis had a good deal to do with the judgment arrived at, which, it may be thought, shewed more consideration for the difficult and embarrassing position of the curator bonis than for the just claims of his opponent. The difficulty of the curator's position was his misfortune, but why should that prejudice his opponent? But while I can see no difference in principle as regards liability for the expenses of an unsuccessful litigation between a curator bonis and a trustee in bankruptcy—both litigating in a representative capacity and in interests other than their own—I am not concerned for the purposes of this case to deny that such a distinction may exist; for the distinction,—at least the reason assigned for the distinction,—cannot avail the suspender. He had behind him both creditors and beneficiaries with whom he might have consulted before litigating with the respondent, and in that respect was not different from a trustee in bankruptcy. But as a trustee in bankruptcy would undoubtedly have been personally liable *prima instantia* for the expenses of an unsuccessful litigation, so should the suspender be liable, between whose case and the trustee's no real distinction can be drawn.

It is not, however, necessary to determine the question before us upon principle, for, in my opinion, it is already determined by authority. I refer to the decision in the case of *Ferguson v. Murray*.¹ Some observations have been made upon the interlocutor in that case, to the effect that it is complex and involved, if not unintelligible. I have not experienced any difficulty in understanding that interlocutor, the language and meaning of which seems plain enough; and it is just worth noticing in passing, that that interlocutor was pronounced by the First Division of the Court at a time when that Court was composed of Judges whose opinions have always been regarded by the profession as entitled to more than ordinary respect. In that case the Lord Ordinary found "the defender" (who was a judicial factor, and called as such) liable in expenses to the pursuer. The Court held that that finding imported that the defender was bound to pay the expenses found due primarily out of the funds in his hands as factor, and failing thereof "to supply any deficiency *prima instantia* from his own funds, he having always relief against the estate." That expresses exactly what I think should be done here; it is what the Lord Ordinary has done in the interlocutor now under review.

On the second point maintained by the suspender, I am also adverse to him. It is said that the Lord Ordinary, by finding (in the original action) the defender *qua* judicial factor liable in expenses, limited the defender's liability to the extent of the factorial funds in his hands. The Lord Ordinary certainly did not intend to do so, for he expressly refused to insert in his interlocutor any finding so limiting the defender's (suspender's) liability although moved by the defender to do so. Nor do I think the Lord Ordinary did by implication what he refused to do *per expressum*. The words "*qua* judicial factor" appear to me to be words merely of description, not words of limitation. This view is also supported by autho-

¹ 16 D. 260.

No. 2. rity. In the cases of *Scott v. Patison*¹ and *Gibson v. Pearson*² the defender was found liable "*qua* trustee," and in both of these cases the contention that such words limited the defender's liability to the funds in his hands as trustee was repelled, the Court holding that the defender under such a decree was bound *prima instantia* to pay the expenses found due to his opponent, leaving him thereafter to operate his relief against the estate he was administering. If a decerniture "*qua* trustee" or "*as* trustee" was so interpreted, I cannot see why the same interpretation would be objectionable if put upon the words "*qua* judicial factor."

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It has been remarked upon that the suspender did not wrongfully enter upon the litigation in which he was found liable for expenses, and the Lord Ordinary's observation has been quoted that he was "without doubt justified in defending the action." It is not quite clear to my mind what bearing that observation has on the present question. The Lord Ordinary could not mean to say that the suspender was "justified in defending the action" as in a question between him and the pursuer of the action. If that had been the Lord Ordinary's meaning he would necessarily have found the suspender entitled to expenses, not liable in them. If, however, the Lord Ordinary meant (as I think he did) that the suspender's conduct, as in a question with the estate he represented was justified, I have no reason to doubt the justice of the statement, but it is of no importance here. The suspender could not be justified in opposing the respondent's demand, for his opposition was held to be ill-founded and decree went against him. As in a question with his opponent, an unsuccessful litigant is never justified in his opposition, and cannot be, for being unsuccessful he is held to have been wrong. But to prevent any misunderstanding as to my own view on this matter, I must add that I could not hold any judicial factor justified in entering into a litigation who had no funds or estate whatever belonging to the factory in his hands, and no reasonable prospect of ever getting any, which was the case here.

I am of opinion that the judgment of the Lord Ordinary should be affirmed.

LORD MONCREIFF.—What we have to decide in this case is, whether the decree for expenses granted by Lord Low in the previous action between the parties does or does not warrant personal diligence against the complainer. That question must be determined according to the legal construction of the decree, and the finding as to expenses upon which it proceeds, which is contained in Lord Low's interlocutor of 1st March 1894. If, properly construed, the decree warrants personal diligence against the complainer, this suspension must be refused. We cannot in this process determine whether in the circumstances the complainer should or should not be held personally liable; that is a matter which must be held to have been decided in the original process.

The question,—in my opinion the only question,—which it is necessary to decide is, whether the decree, according to its terms, imposes personal liability for expenses on the complainer? I agree with those of your Lord-

¹ 5 S. 172.

² 11 S. 656.

ships who hold that it does not, because the complainer was found liable in expenses "as judicial factor," and not as an individual. These are limiting words; their natural and legal signification and effect is to restrict the decree to one against the party in a representative capacity. No. 2.
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The case of *Gordon v. Campbell*,¹ is a strong authority as to the restrictive effect of such words. Although in that case the words "as trustees" occurred in a heritable bond, and not in a decree, the question was really the same as in the present case (the registered bond being a good warrant for letters of horning), viz., whether an obligation undertaken "as trustees" warranted personal diligence against the parties to the bond. It was pleaded for the charger (p. 453) that the words "as trustees" were used to describe the character of the parties, and not to limit their liability, just as in this case it is pleaded that the words "as judicial factor" were used in the summons and the decree simply to describe the character in which the complainer was sued. But this argument was disregarded. It may be observed that this judgment of the House of Lords was subsequent in date to the case of *Gibson v. Pearson*,² and the earlier case of *Scott v. Patison*³ (relied on by the respondent), the first of which at least was relied on by the appellant in *Gordon v. Campbell*.¹

Later cases cited for the complainer—in particular, *Kay v. Wilson's Trustees*,⁴ and *Davidson's Trustee v. Carr*⁵—shew that where it is intended that in the event of the trust or factory estate proving insufficient, the trustee or factor shall be personally liable to make good the deficiency, this should be expressly stated in the decree.

I do not proceed upon the ground that in the summons the pursuer concludes for expenses against the defender "as judicial factor," because in dealing with expenses the Court are in use to disregard such a limitation. What I do proceed upon is, that in his finding as to expenses the Lord Ordinary finds the defender liable only "as judicial factor." He says,— "Here the complainer was not found personally liable for expenses, and his right of relief against any estate which he may recover remains entire." But he seems to have thought that a personal decree is required only when it is intended to deprive the factor of his relief against the estate, and that in order to render the factor personally liable to the successful litigant, it is not necessary that he should be decerned against personally. In this I do not agree with him.

I may add that it is not disputed that an earlier part of the decree, viz., that in which decree is given for the principal sum of £159, 6s. 8d., and in which the same words "as judicial factor" are used, does not warrant personal diligence against the defender. It would be confusing and inextricable if the same words were held to bear a different signification in two parts of the same decree.

In what I have said I have assumed, as I think the Lord Ordinary has assumed, that there are no trust funds out of which the expenses can be paid. If this is admitted, I think the charge should be suspended.

¹ 1 Bell's App. 428.

² 11 S. 656.

³ 5 S. 172.

⁴ 12 D. 845.

⁵ 12 D. 1069.

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In the view which I have stated it is not necessary to consider the general question which was argued to us as to the personal liability of a judicial factor for expenses when the factory estate proves insufficient.

I may say, however, that, as at present advised, I am not prepared to affirm that as a general rule a judicial factor who litigates unsuccessfully is not personally liable for the expenses of the successful party. Assuming, as I do, that a testamentary trustee is personally liable for such expenses as a general rule, I do not think that there is any solid distinction between the position of a judicial factor and that of a testamentary trustee. The factor has as good means as the trustee of knowing the amount of the funds at his disposal, and of obtaining legal advice, and consulting the beneficiaries or creditors interested. If there is a distinction it is against the factor, because he is paid for his services and the trustee is not.

I do not think that much aid is to be derived from the judgment of the Inner-House in the case of *Ferguson v. Murray*.¹ I confess that I read that judgment in the same way as the Lord Ordinary and the Lord Justice-Clerk and Lord Trayner; but it admits of being read, and has been read, in a different sense, and no reasons are given in the report to aid us in construing it. Leaving out of view this doubtful authority, it is a point in favour of the complainer that there is no express decision against his view. It must be remembered, however, that the law as to the liability of parties suing or being sued in a representative capacity has matured slowly, if indeed it has matured, and that even as regards the liability of testamentary trustees the decisions up to a recent date are by no means consistent.

But for reasons which I have already stated I think that we should not in this process attempt to lay down any general rule on the subject.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be recalled, and the charge suspended.

THE COURT pronounced this interlocutor:—"The Lords of the Second Division, along with three Judges of the First Division, having heard counsel on the complainer's reclaiming note against Lord Low's interlocutor of 10th January last, in conformity with the opinions of a majority of the whole of the Judges present at the hearing, recall the interlocutor complained against: Sustain the first and second pleas in law for the complainer: Suspend the charge and whole grounds and warrants thereof, and decern."

MARCUS J. BROWN, S.S.C.—J. SMITH CLARK, S.S.C.—Agents.

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HUGH M'CALLUM AND OTHERS, Petitioners.—*Sol.-Gen. Dickson—Craigie.*

THOMAS LOCHHEAD AND OTHERS, Respondents.—*Salvesen.*

Burgh—Police—Election of Police Commissioners—Casus improvisus—Order by Court—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 17.—A burgh administered by twelve police commissioners elected by the whole burgh was divided into four wards in 1895, and in 1896 an election fell to take place in each of the four wards for the purpose of filling the places of the four senior commissioners, who were bound to retire from

office in that year. Prior to the date of the election a fifth commissioner intimated his resignation, and, as he had been elected by the burgh and not by a ward, the election of his successor did not fall to any particular ward. The commissioners applied to the Court for an order under sec. 17 of the Burgh Police Act of 1892, which empowers the Court "wherever in any burgh it has from any . . . cause become impossible to proceed with the execution of this Act," after certain procedure, to "pronounce any order which in their judgment will enable the proceedings for the execution of this Act within such burgh to be continued as nearly as possible as if the said . . . cause had not taken place."

The Court ordered the election of an additional commissioner by the First Ward.

THIS was a petition by the Police Commissioners of Dunoon, for 1ST DIVISION. an order under section 17 of the Burgh Police (Scotland) Act, 1892.*

The statements of the petitioners were to the following effect:—Dunoon was constituted a burgh in 1868, in terms of the General Police Act of 1862, and in 1892 the Sheriff of Argyllshire fixed the number of Commissioners at twelve, in terms of section 29 of the Burgh Police Act of 1892. In December 1895 the Sheriff, under the powers conferred by section 11 of the Act last mentioned, divided the burgh into four wards. In terms of sections 32 and 37 of the same Act, one-third of the existing Commissioners, who had all been elected by the burgh as a whole, were bound to retire on the first Tuesday of November 1896, and an opportunity would thus be afforded to each of the four wards of electing one Commissioner. Mr William Mackenzie Shields, not being one of the Commissioners who was bound to retire in November 1896, had also intimated his resignation, and it was necessary that another Commissioner, in addition to the four above mentioned, should be elected.

"The Act makes no provision for apportioning the existing Commissioners among the wards, so as to indicate by which ward casual vacancies are to be supplied during the period of three years immediately succeeding the division into wards, and in the present circumstances the question has arisen whether one of the four wards into which the burgh is now divided shall return two members at the forthcoming election."

The petitioners accordingly craved the Court "to pronounce an order directing by what ward or wards the places of the five retiring Commissioners shall, at the forthcoming election, to be held on the 3d November 1896, be filled up, or to pronounce such other order as will

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* 55 and 56 Vict. c. 55, section 17, provides:—"Wherever in any burgh in existence before the passing of this Act, and which thereafter continues to be a burgh . . . it has, from a failure to observe any of the provisions of this Act, or any other Act, or from any other cause, become impossible to proceed with the execution of this Act, the following provisions shall have effect ; (1) It shall be lawful for any seven householders within the burgh to present a petition to the Court of Session, or to the Sheriff Court, . . . (3) Upon resuming consideration of the petition, with or without answers, and after receiving such evidence as they shall require, the Court may pronounce any order which, in their judgment, will enable the proceedings for the execution of this Act within such burgh to be continued as nearly as possible as if the said failure to observe the provisions of this Act, or any other Act, or other cause, had not taken place ; and such order shall be final, and shall be recorded in the Sheriff Court books of the county within which such burgh is situate."

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enable the proceedings for the execution of the said Act within the burgh of Dunoon to be continued as nearly as possible as if such cause had not taken place."

Answers were lodged by Thomas Lochhead and others, ratepayers in the burgh of Dunoon. The respondents admitted the accuracy of the statements in the petition, but suggested that the Court should pronounce an order directing all the Commissioners to retire before the election in November. They stated that this course, which would bring the ward system into full working order at once, had been unanimously approved at a meeting of ratepayers, and that it was the only course which would make such a difficulty as had occurred impossible in the future. "Any allocation by the Court of the Commissioners to particular wards would besides be entirely arbitrary, and might operate serious injustice to the retiring Commissioners, who might be entirely unknown to the ratepayers of the particular ward which, by the finding of the Court as sought they were practically held to represent. Further, the constitution of the Commission would be anomalous, five of the members representing the specific wards, and the other seven representing the whole community."

The petitioners argued ;—The Court should order two Commissioners to be elected by the first ward. This would enable the proceedings for the execution of the Act to be continued "as nearly as possible as if" Mr Shields' resignation, which was the "cause" of the difficulty "had not taken place." To compel all the Commissioners to retire would be unjust. No doubt section 6 of the General Police Amendment Act of 1868 (31 and 32 Vict. c. 102) provided that, when a burgh was divided into wards, the Commissioners in office at the time of such division should remain in office only until the expiry of the current year of office, but that Act had been repealed by the Act of 1892.*

Argued for the respondents ;—The simplest way out of the difficulty was that the whole Commissioners should retire, and that each ward should elect three members. The new system of election by wards would thus get a fair start, and no confusion would occur in the future.

* Section 32 of the Burgh Police Act of 1892 enacts,—“There shall be an annual election of commissioners under the Act on the first Tuesday of November ; and such annual election in the burgh, or, if it is divided into wards, in the several wards thereof, shall be conducted under the rules, regulations, and provisions applicable by law to the election of town-councillors in burghs in Scotland : And for all the purposes of such annual election, first meeting of commissioners and election of magistrates, and after procedure consequent upon such annual election, a burgh under this Act shall be deemed a burgh, having to provide for the appointment and election of magistrates and councillors therefor, in terms of the Acts relating to the election of magistrates and councillors in royal and parliamentary burghs in Scotland which may be in force for the time.”

Section 37 enacts,—“One-third of the commissioners shall, on the first Tuesday of November annually retire, in order prescribed by law for the retirement of councillors in burghs having to provide for the election of magistrates and councillors as aforesaid.”

By section 16 of the Act 3 and 4 Will. IV. cap. 76, which is entitled an Act to alter and amend the laws for the election of the magistrates and councils of the royal burghs in Scotland, it is enacted that one-third of the council of each such burgh, consisting of the councillors who have been longest in office, shall annually go out of office.

Section 12 of the Act 3 and 4 Will. IV. cap. 77, contains a like provision with regard to the councils of Parliamentary burghs.

No. 3.

LORD PRESIDENT.—If our province under section 17 were to fill up and complete the scheme of legislation contained in the Act of 1892 as regards burghs divided into wards, there would be much to say for our holding that, there being no provision for the next election after such a division, we should order that there be an election for all the seats according to wards. But when I turn to the section which we have to administer, I find that there is a narrower province assigned to us in this matter. We are only entitled to act if and in so far as it appears that in the burgh which we are considering it is impossible to execute the Act at the coming election owing to some cause which has occurred. Now, I would first consider the case as if Mr Shields had not resigned. Could it be said that if Mr Shields had not resigned it was impossible to proceed with the execution of the Act? Most certainly it could not, for we are told by both sides at the bar that the authorities were going on to execute the Act in the very sensible way of filling the vacancies caused by the retirement of four councillors by holding an election in each of the four wards. Things would have run quite smoothly, and we are not to consider what might have happened if things were in a totally different position. Therefore the thing seems to me to be limited to the case arising from the resignation of Mr Shields. That I think is the cause which in the sense of section 17 has made it impossible to proceed with the execution of the Act without an order.

Well, now, Mr Shields having resigned, we are not merely to enable the Act to be carried out, but to enable it to be carried out in such a way that matters should go on as nearly as possible as if Mr Shields had not resigned. My observation on that is that to order an election to fill all the seats on the council would be to wander very far indeed from the ambit of our duty; and it seems to me that all we have to do is to find some means ready to hand for getting an election to fill Mr Shields' vacancy. It must be by one of the wards, for the town is now divided into wards, and it cannot, I think, be suggested that we should revert to the old system which has been abolished. Now, if it be by a ward, it seems to me that the first ward has a clear ground of preference merely by reason of its being the first ward. In some of the Acts of Parliament there is a provision that where there is equality, or some similar emergency arising, the decision should be by lot. We are not required to do that, and accordingly we proceed to take the first ward that comes, and the first ward that comes is the First Ward. And I therefore think that we should order that an additional election of a councillor take place in the First Ward.

LORD ADAM concurred.

LORD M'LAREN.—I agree, and shall only add that the principle of ward elections in this Act, as also in the Municipal Corporation Act of 1833 and subsequent statutes, is that of rotation, a certain number of members retiring each year from the bottom of the list. It seems to me that we are carrying out the principle of rotation if in this matter we take the wards in numerical order.

LORD KINNEAR.—I agree with your Lordship.

THE COURT pronounced the following interlocutor:—"Order that at the next ensuing election of Police Commissioners in Dunoon,

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M'Callum v.
Lochhead.

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two Commissioners, and not one only, shall be elected by the electors in the First Ward, and decern: Allow the expenses of both parties to be paid out of the funds of the Burgh General Assessment."

ALEXANDER CAMPBELL, S.S.C.—STURROCK & STURROCK, S.S.C.—Agents.

No. 4.

Oct. 20, 1896.
Robertson v.
Park, Dobson,
& Co.

ROBERT ROBERTSON, Petitioner.—*Shaw—Constable.*
PARK, DOBSON, & Co., Respondents.—*C. J. L. Boyd.*

Inhibition—Composition on debt for which inhibition was used—Refusal of debtor to discharge inhibition—Petition for recall—Expenses.—A creditor raised an action for payment of a debt and used inhibition on the dependence, but he acceded to a composition arrangement on his debtor's estate, and the summons was not called.

He subsequently refused to discharge the inhibition on payment of the composition being tendered. In a petition at the instance of the debtor, held that he was entitled to have the inhibition discharged, and that the creditor was liable for the expenses of the application.

Roy v. Turner, March 18, 1891, 18 R. 717, referred to.

2D DIVISION.

ROBERT ROBERTSON, builder, Leith, presented this petition praying for recall of inhibition used by Messrs Park, Dobson, & Co., merchants, Leith, who were called as respondents.

On 23d September 1892 the respondents, who were creditors of the petitioner in a business account, served on him a summons containing warrant to inhibit, and inhibition was used thereon. The inhibition was duly registered on 7th October 1892.

Shortly thereafter the petitioner's creditors agreed to accept a composition of 2s. 6d. per £ on their claims against him. Along with the other creditors, the respondents signed a minute of concurrence in this arrangement, and their summons against the petitioner was never called in Court.

On 9th May 1896 the petitioner's agents wrote to the respondents' agents enclosing for signature a discharge of the inhibition, in return for which they promised to send the amount of the composition due to them. On 11th May the respondents' agents replied that they were not aware that their clients had agreed to the composition, but promising to inquire, and on 19th May they wrote that their clients had no recollection of the alleged agreement. The petitioner's agents in reply sent the formal concurrence signed by the respondents. After further correspondence the petitioner's agents on 26th May sent a cheque for the amount due to the respondents, whose claim at this time was almost the only one outstanding. On the return of this cheque, with the intimation that it could not be accepted in satisfaction of the respondents' claim, the petitioner's agents consigned the money in bank. On 13th June they wrote,—“We trust you have now gone into this matter and that your clients have signed discharge of inhibition. The instructions which we have are to apply for recall of inhibition, failing settlement by Wednesday, 17th curt.” On 26th June they wrote,—“We shall be glad if you now state whether your clients are to take payment of this consignment, or whether you leave us without alternative but to apply for recall of inhibition. If you drive us to the latter course we shall found on our correspondence with you and ask expenses against your clients.” On 27th the respondents' agents replied,—“We are favoured with your letter of

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yesterday's date. As we have already explained to you, our clients are not satisfied to take the money consigned by you. So far as they are aware there was no agreement to accept this composition, and unless their debt is paid in full at once, we are instructed to proceed with the action for recovery."

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This petition was then lodged, praying for recall of the inhibition, for warrant for marking the same as discharged on the Register of Inhibitions, and to find the respondents liable in the expenses of the application. The petitioners set forth the facts above narrated, and produced the correspondence.

Answers lodged for the respondents admitted the statements in the petition, apart from the statement that they had agreed to accept the composition, which was denied. This was, however, admitted at the bar, and the respondents did not oppose recall of the inhibition, but they opposed the application for expenses.

Argued for the petitioner;—When the action fell the inhibition fell along with it, and the petitioner was entitled to the expenses of his application. An unsuccessful pursuer who had used inhibition was bound to clear the record at his own expense.¹ The present case was analogous. The existing debt to the respondents did not affect the applicability of the authority, because the inhibition was not used on any document of debt, but on the dependence of the action, and the inhibition was unavailing unless followed by decree in the action.² Besides, the petition had been rendered necessary by the unreasonable conduct of the respondents. [LORD TRAYNER cited the case of *Roy v. Turner*.³] That case was distinguishable. The pursuer who had used arrestments on the dependence was successful. Here the respondents did not call their case, and could not claim that they would have been successful. *Turner*³ profited by his arrestment, for he secured payment. Here the inhibition had been futile. Further, this was a more serious case than *Roy*,³ in which arrestments alone were used. An inhibition used and recorded must be cleared away by a formal document.

Argued for the respondents;—It was settled that if they were right in using diligence they were not bound to pay the expense of discharging it.³ This inhibition was justified. Here there was an existing debt in respect of which inhibition was used. It was not satisfied by the composition offered. Accordingly, they were not bound to sign the discharge. The reason for not calling the action was the impecuniosity of the petitioner. He could take no benefit from that, and in such circumstances the respondents were not bound to pay the expenses of clearing the record.

LORD YOUNG.—The facts in this case are of the simplest possible nature. The petitioner was debtor to the respondents in a sum of money for which the respondents brought action. They did not proceed with that action, very sensibly, no doubt, because the petitioner, I suppose, was not in funds to meet their claim, and was making an arrangement to pay a composition to his creditors. That arrangement was concluded, the respondents agreeing, among other creditors, to accept the composition. Inhibition had been used

¹ *Laing v. Muirhead*, Jan. 28, 1868, 6 Macph. 282, Auditor's report therein, and Authorities there cited, 40 Scot. Jur. 154.

² *Erskine*, Inst. ii. 11, 3.

³ *Roy v. Turner*, March 18, 1891, 18 R. 717.

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on the dependence of the action. When the petitioner's agents were in a position to proceed to carry out the composition arrangement, they sent a discharge of the inhibition to be signed by the respondents, intimating that the inhibition stood in the way of the petitioner's making payment, and that upon receiving the discharge signed they would settle with the respondents. The respondents' agents replied that they were not aware whether their clients had agreed to accept the composition, but they would inquire. Their clients said that they had no recollection of having done so. Thereupon the petitioner's agents sent the composition agreement bearing the respondents' signature. Ultimately they sent a cheque for the amount due under the composition contract to the respondents. There was thus no question of security such as had been raised by the respondents' agents, for the petitioner was ready to make payment at once. The respondents' agents returned the cheque. They refused to accept anything but payment in full, or to sign the discharge of the inhibition, and so the correspondence goes on till the end of June, shewing the conduct of the respondents to have been most unreasonable, and certainly nimious. On the 27th June their agents wrote —[His Lordship read the letter of that date above quoted]. Now, after that letter, there being an agreement for a composition, all the other creditors having been paid in terms of that agreement, as appears from the letter of date 30th May, and the respondents who had signed that agreement having refused to accept the amount due them under it in full of their claim, or to discharge the inhibition, what was the petitioner to do but make the present application? Accordingly this petition was presented about a fortnight after the letter of 27th June had been received. It asks for recall of the inhibition, with expenses. I think the conclusion for expenses is altogether reasonable. The inhibition might have been discharged, as was proposed by the petitioner, without any expense to the respondents. But this the respondents refused to do, and no other course was left open to the petitioner but to present this application. I think the conduct of the respondents has been most unreasonable and nimious, and that the petitioner is entitled to his expenses.

I may say that I have formed this opinion after reading the opinions delivered in the case of *Roy v. Turner*.¹ It is not necessary to make any observation on that case further than to say that, after reading the opinions of the learned Judges who took part in the decision of it, in this case I am of opinion that the respondents should be found liable in expenses.

THE LORD JUSTICE-CLERK, LORD TRAYNER, and LORD MONCREIFF concurred.

THE COURT pronounced the following interlocutor:—"Recall the inhibition referred to in the petition, and grant warrant for marking the same as discharged on the Register of Inhibitions, and find Messrs Park, Dobson, & Company liable in the expenses of this application," &c.

WALLACE & PENNELL, W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.

WILLIAM HUNTER MARSHALL, Pursuer (Respondent).—*Johnston—John Wilson.*

THE CALLANDER AND TROSSACHS HYDROPATHIC COMPANY, LIMITED, Defendants (Reclaimers).—*Sol.-Gen. Dickson—W. Campbell.*

THE EAGLE PROPERTY COMPANY, LIMITED, Defendants.

JOHN WILSON, Defender.

No. 5.

Oct. 22, 1896.
Marshall v.
Callander and
Trossachs
Hydropathic
Co., Limited.

Process—Appeal to House of Lords—Interlocutor ordaining defender to commence building operations within specified period—Effect of judgment in appeal affirming interlocutor—Decree ad factum præstandum.—By interlocutor dated 18th July 1895, the First Division ordained the defenders in an action to commence certain building operations “within three months from the date of this interlocutor.” The defenders appealed to the House of Lords, but subsequently, with their consent, the interlocutors appealed against were affirmed and the appeal dismissed.

Held (rev. judgment of Lord Kyllachy) that the period within which the defenders were bound to commence building was three months from the date of the judgment of the House of Lords.

(SEE 22 R. 954, and 23 R. (H. L.) 55.)

In conjoined actions at the instance of William Hunter Marshall against the Callander and Trossachs Hydropathic Company, Limited, the Eagle Property Company, Limited, and John Wilson, the Lord Ordinary (Kyllachy), by interlocutor dated 1st March 1895, *inter alia*, decerned and ordained “the whole defenders, jointly and severally, forthwith to proceed to rebuild the buildings of the hydropathic establishment, which were erected on the subjects contained in the feu-contract referred to in the summons in terms thereof, and which were on or about 7th November 1893 destroyed by fire, and that to the extent necessary to maintain said buildings as of the total value of £15,000, said rebuilding to be commenced within three months of the date hereof, to be duly proceeded with to the satisfaction of John Peddie, architect, Edinburgh, and to be completed to his satisfaction within two years from the date hereof.”

1st Division.
Ld. Kyllachy.

The defenders having reclaimed, the First Division, on 18th July 1895, adhered to the portion of the interlocutor above quoted, “with this variation, that the rebuilding is to be commenced within three months from the date of this interlocutor.”

The defenders the Callander Company and the Eagle Company appealed to the House of Lords against these interlocutors, but at the hearing their counsel informed the House that the appellants consented to the appeal being dismissed; whereupon, on 8th May 1896, the interlocutors appealed against were affirmed by the House of Lords, and the appeal was dismissed with costs.

On 9th July 1896 the pursuer presented a note to the Lord President, in which he stated that the period within which the defenders were appointed to commence the rebuilding of the subjects, in terms of the interlocutor of the First Division had expired on 18th October 1895; that the defenders had not yet commenced to rebuild, and that he desired to insist in the alternative conclusions of the supplementary summons. He accordingly craved his Lordship “to move the Court to resume consideration of the cause, and to dispose of the conclusions of the summons remaining undisposed of, or otherwise, to remit the said cause to Lord Kyllachy to proceed therein as accords.”

The Court having remitted the cause, the Lord Ordinary, on 18th July 1896, pronounced the following interlocutor:—“Having heard

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counsel, in respect the defenders have failed to implement the order to rebuild contained in the interlocutor of 18th July 1895, afterwards affirmed by the House of Lords, finds therefore that the pursuer is entitled to damages: Allows the pursuer a proof of his averments in regard to the amount of damages, and the defenders a conjunct probation thereanent, the proof to be taken on a day to be afterwards fixed."

The defenders the Callander Company reclaimed, and argued;—The defenders had not failed to implement the order of the Court, as the three months within which they were to commence rebuilding fell to be reckoned from the date upon which the interlocutor of the First Division was affirmed by the House of Lords. The effect of the interlocutor was necessarily suspended until the date upon which it was affirmed.

Argued for the pursuer;—The judgment of the House of Lords being a simple affirmance of the interlocutors appealed against left these interlocutors standing, and accordingly the interlocutor of the First Division must be held to have taken effect from its date. If the defenders desired to have the interlocutor varied that might have been done by motion in the House of Lords, or even after the House of Lord's judgment, by motion in this Court, but such a motion was too late now that they had been found to be in default. In any view, the defenders were not entitled, as matter of right, to have the period for the commencement of rebuilding prorogated.

At advising,—

LORD PRESIDENT.—When this case was withdrawn by the appellants' counsel from the consideration of the House of Lords, the parties omitted to advert to the fact that the interlocutor to be affirmed specified a date for the commencement of the work which was already past. This seems to me to have been the fault of the respondent as well as of the appellants, for the pursuer of an action *ad factum præstandum* is interested, and it is his duty to obtain a decree plainly specifying what is to be done.

The order of the House of Lords, however, does not present any practical difficulty in construction. In affirming the interlocutor of this Division, the Lords decided that there was to be rebuilding, that this was to be forthwith, and that from the date of final judgment three months were to be given for beginning, and two years for finishing, the work. That, I think, is the fair reading of the order, as applied to the pleadings and statements before the House.

Now, the orders of this Court fixing the dates of commencement and completion having been orders of an executory nature, they might have been modified to meet any change of circumstances; and the affirmance by the Lords would probably not have rendered them the less flexible, no question having been raised on them specifically. Neither party, however, came to the Court proposing such a change, and accordingly when the case came before the Lord Ordinary, the proper footing was that the three months were current from 8th May, the date of the judgment of the Lords. The Lord Ordinary, however, on 18th July 1896—much within the three months—found that the defenders had failed to implement the order to rebuild, and allowed a proof of damage.

I do not think that this judgment can be supported, and that on the ground that the time allowed for commencing had not expired.

The pursuer, by making this premature motion, may have slightly complicated the question of the time of commencement by interrupting the currency of the permitted period, and virtually calling on the defenders to stop preparing to build, and to pay damages. But the defenders must remember that their primary duty was, and is, to commence forthwith, and that, whether any allowance is to be made for the intervention of the pursuer or not, more than two months of the time of grace had expired before this intervention took place. None of those questions require present decision, nor do I think it necessary that we should do more than recall the Lord Ordinary's interlocutor.

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LORD ADAM concurred.

LORD M'LAREN.—I concur. I think it is perfectly clear that the true date of the interlocutor considered by the House of Lords is the date on which it was affirmed, the effect of the interlocutor having been suspended by the appeal to the House of Lords. Accordingly, the meaning of the order contained in the interlocutor, that the defenders should commence to build within three months, is that they must begin to build within three months of the interlocutor taking legal effect,—that is, within three months reckoned from the date of the judgment of the House of Lords. It follows, therefore, in my opinion, that the Lord Ordinary has been premature in holding that the defenders were in default at the time when his Lordship came to consider the cause.

LORD KINNEAR concurred.

THE COURT recalled the interlocutor reclaimed against.

J. & J. TURNBULL, W.S.—SIMPSON & MARWICK, W.S.—Agents.

PAUL ROTTENBURG, Pursuer (Appellant).—*Sol.-Gen. Dickson—Clyde.*

JOHN THOMSON DUNCAN, Defender (Respondent).—*D.-F. Asher—C. J. Guthrie—Orr.*

JAMES BROWN, Defender (Respondent).—*W. Campbell—Aitken.*

THE TRITON STEAMSHIP COMPANY, LIMITED, Defenders (Respondents).—*D.-F. Asher—C. J. Guthrie—Orr.*

No. 6.
Oct. 23, 1896.
Rottenburg v.
Duncan.

Process—Amendment of Record—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 29.—A brought an action in the Sheriff Court against B and C and the D company, averring that he had invested £450 in the purchase of certain shares in a ship; that B and C had held the ship in part in trust for him, and that in breach of this trust they had sold the whole ship to the D company. He prayed for decree against the defenders, jointly and severally, for payment of £450, with interest from the date on which the investment had been made. In the record as closed the pursuer did not state his claim to be for damages, but after certain procedure in the action he craved leave to amend his record by adding certain averments, and a plea that he was entitled to the sum sued for as damages.

The defenders objected that the proposed amendment was incompetent as not being within the scope of the action as originally laid.

The Court allowed the amendment.

Process—Interlocutor pronounced in error—Cancellation.—An interlocutor dismissing an action in respect of an undertaking by the defenders

No. 6. was pronounced in ignorance of circumstances which made its fulfilment impossible. The Court, on the joint application of the parties, *cancelled* the interlocutor.

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Harvey v. Lindsay, July 20, 1875, 2 R. 980, *followed*.

1st Division.
Sheriff of
Lanarkshire.

THIS was an action raised in the Sheriff Court at Glasgow by Paul Rottenburg, merchant in Glasgow, against John Thomson Duncan, Glasgow, and James Brown, coal-merchant, Glasgow, and the Triton Steamship Company, Limited, carrying on business and having its registered office in Glasgow. The pursuer concluded against the defenders, jointly and severally, (first) for payment of the sum of £450, with interest from 9th May 1892, or otherwise (second) for payment of that sum, with interest from 2d January 1895, and of the pursuer's share of the profits earned by the steamship "Triton" between 9th May 1892 and 2d January 1895.

The pursuer averred;—(Cond. 1) "The pursuer is a merchant in Glasgow. The defenders Duncan and James Brown are two of the persons in whom the steamship 'Triton' was, until recently, vested, the third being Thomas Brown, Milford Haven. Said ship was held by these parties in trust for the other defenders, the Triton Steamship Company, Limited, and in part for the pursuer." (Cond. 2) "The pursuer, on or about 9th May 1892, invested £450 in purchase of a part interest in the steamship 'Triton,' conform to receipt of said date produced in process." (Cond. 3) "A limited company was formed in or about November and December 1892 to acquire said ship, and, without the pursuer's authority, he was entered as a shareholder in respect of his interest in the 'Triton.' The pursuer thereafter presented a petition for rectification of the register. . . . the petitioner's name was by order of the Court removed from the register." (Cond. 4) "Thereafter the pursuer intimated to the defenders Duncan and James Brown, and to Thomas Brown, that the ship being held in part for him, he withdrew all authority from the defenders to deal with the ship, and asked for an account of the dealings with the ship. The defenders the Triton Company were also given a similar intimation." (Cond. 5) "Notwithstanding his intimations, on or about the 2d January 1895, the defenders Duncan and Brown and Thomas Brown, in breach of trust, conveyed the whole ship 'Triton' to the defenders the Triton Company, including the part held for the pursuer. The said company were well aware that the part of the ship in which the pursuer was interested was held by the defenders Duncan and Brown and Thomas Brown for him, and that they had no right or authority to convey it to the company." (Cond. 6) "The said ship 'Triton' has, it is believed and averred, been traded with to this date. The pursuer has received no account whatever of the intromissions with said ship." (Cond. 7) "In these circumstances this action has been rendered necessary. The pursuer reserves his whole further rights in the premises."

The pursuer pleaded;—(1) The defenders Duncan and James Brown having, in concert with Thomas Brown and the other defenders, in breach of trust, conveyed to the company the ship "Triton," including the pursuer's interest therein, the pursuer is entitled to decree, with interest, as craved. (2) *Separatim*, or otherwise, the pursuer is entitled to decree, with interest from 2d January 1895, as craved, and to an accounting with the funds of the ship down to said date, and in his option to decree for any balance due thereon.

The defenders Duncan and Brown denied that they held any part of the vessel in trust for the pursuer, and stated that the £450 had been paid by the pursuer under an agreement that the ship should be transferred to a limited company.

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The defenders the Triton Steamship Company stated in answer 6 that they were willing to account to the pursuer for his share of the profits, if any, earned by the "Triton" from 1st January 1893, from which date they had traded with the steamship. In answer 7 they made the following tender,—To grant a bill of sale in the pursuer's favour of six 64th shares of the "Triton" steamship, being the number of shares of the purchase price of the vessel represented by the amount subscribed by him, under burden of the existing mortgage for £2500 over the vessel, and to pay the pursuer's expenses to date.

All the defenders pleaded, that in respect of the tender by the Triton Company they should be assoilzied.

After various procedure in the Sheriff Court, including a proof by writ of the trust alleged by the pursuer, the Sheriff-substitute (Balfour) assoilzied the defenders.

The pursuer appealed, and after hearing parties the Court, on 25th June 1896, pronounced this interlocutor:—"Recall the interlocutors subsequent to 20th May 1895 [the date when the case was sent by the Sheriff-substitute to the Procedure Roll]; and in respect of the undertaking of the defenders on record (1) to procure and grant in favour of the pursuer a bill of sale for six 64th shares of the 'Triton' steamship under burden of existing mortgages, and (2) to account for the ship's profits from 1st January 1893, dismiss the action, and decern: Find the pursuer liable in expenses in both Courts," &c.

Thereafter the pursuer presented a note to the Lord President, in which he stated that since the date of the above-quoted interlocutor it had come to his knowledge that on 27th January 1896 the whole steamship "Triton" had been sold by a mortgagee to a Mr Blethyn, and accordingly craved his Lordship to move the Court to cancel the interlocutor.

All the parties to the action also concurred in a joint minute making a similar application to the Court.¹

On 10th July 1896 the Court pronounced the following interlocutor:—"The Lords having considered the joint minute, No. 31 of process, in respect of said minute, and in respect that it is stated that prior to the date of the previous interlocutor, dated 25th June 1896, the steamship 'Triton' had been sold, and that by error on the part of the defenders the Triton Steamship Company, Limited, this fact was not stated to the Court, and that the pursuer and the defender James Brown were ignorant of the sale having taken place, appoint the Clerk of Court to cancel the said interlocutor: Open up the record: Allow the defenders within four days to alter their record by deleting the tender of shares of the said steamship, and statement relative thereto, and continue the cause in order that the pursuer may state what amendments, if any, he desires to make on his record, reserving all question of expenses."

The pursuer subsequently lodged a minute stating that he proposed to amend the record by adding to Cond. 5 the following:—"The said ship, including the pursuer's interest therein, has, since August 1893, been held by the defenders Duncan and Brown, who were also

¹ Authority referred to.—Harvey v. Lindsay, July 20, 1875, 2 R. 980.

No. 6. directors of the Triton Company, for behoof of that company, without regard to the pursuer. In December 1894 or January 1895 the existing mortgage was discharged. Thereafter the defenders Duncan and Brown formally transferred the title in the whole ship to the Triton Company. That company of new mortgaged the ship to the Marine Securities Corporation, Limited, London, which corporation, on or about 27th January 1896, sold the whole ship to Charles Thomas Blethyn, Milford Haven, county of Pembroke, ship-chandler. Since 27th January 1896 various other transactions have taken place, conform to copy register produced herewith. None of the defenders have in any way consulted with or taken the authority of the pursuer to these transactions or to the way in which his interest in said ship was to be managed or dealt with, and that though they knew they had no authority to act for him. The value of pursuer's interest in said ship was at May 1892 and August 1893 not less than £450. In March 1894 the pursuer, in ignorance that the defenders Duncan and Brown had given up control of his interest in said ship, and were holding the whole ship for behoof of the Triton Company, agreed with Brown, Sons, & Company to sell his interest in said ship to them for £337, 10s., and the pursuer by his agents received a deposit of £33, 15s. to account. Brown, Sons, & Company failed to complete the transaction, and forfeited the amount of their deposit, it having been agreed between the pursuer and the said Brown, Sons, & Company that if the transaction should fall through (which it did) the said £33, 15s. should remain the property of the pursuer. The pursuer is willing to take as the value of his interest in said ship at January 1895 said sum of £303, 15s., being said sum of £337, 10s., less the deposit of £33, 15s., with interest at the rate of 5 per cent from 30th March 1894 till said 2d January 1895. Said value was not less than that sum. The pursuer has by the defenders' actings suffered loss to at least the amount of £350."

By adding to condescendence 6 the following:—"In the event of the pursuer obtaining decree for £450, with interest from 9th May 1892 or 2d January 1895, or even for £303, 15s., with interest from 30th March 1894, he is willing to abandon his claim to an accounting."

By adding the following pleas:—"(3) The defenders having illegally and without the pursuer's knowledge or authority appropriated, or otherwise disposed of the pursuer's interest in said ship 'Triton' are bound to make good the value of said interest to him, and the pursuer is therefore entitled to decree as craved. (4) The value of pursuer's interest in said ship being not less than the sum sued for, or at all events (in the circumstances condescended on) not less than £303, 15s., with interest from 30th March 1894, the pursuer is entitled to decree for said sum of £450, or at all events for said sum of £303, 15s., with interest, conform to his offer on record. (5) The pursuer, having, through the actings of the defenders as condescended on, sustained loss and damage, is entitled to be compensated therefor. (6) The loss and damage sustained by the pursuer being moderately estimated at the sum sued for in the first alternative conclusion, or at all events at the sum of £350, which the pursuer is willing to accept in full of his damage, he is entitled to decree in terms of said first alternative conclusion, or at all events for said sum of £350."

The defenders objected to the amendment being allowed.

Argued for the defenders;—The pursuer brought his action for

restoration of a specific sum, and he now desired to turn the action into one of damages, which would be an entirely new case. The amendment was therefore incompetent as not being within the scope of the action as originally laid.¹

No. 6.

Oct. 23, 1896.
Rottenburg v.
Duncan.

The defender Brown further argued ;—The Court had a discretion to reject an amendment, even if competent,² and should exercise it in this case, even if they held the amendment to be within the scope of the action as originally laid. It would raise delicate questions as to the extent of this defender's knowledge of the transactions now complained of, which were not raised before.

LORD PRESIDENT.—In my opinion the proposed amendments fall sufficiently within the scheme of the action to be within the section of the Act. I think they are necessary for the purpose of determining in this action the real question in controversy between the parties, and cannot be said, in the sense of the section, to subject to the adjudication of the Court any larger or other fund than that specified in the original action. The term "fund" seems to have been misapplied in the discussion, because in the Act it surely is applied to money set apart in the hands of some person, or earmarked and set aside for a special purpose. I may mention by way of illustration the fund *in medio* in a multiplepinding. In this case the pursuer on record is seeking compensation simply. He says to the defenders Duncan and Brown,—“I gave you £450 to put into a ship; you put it into the ‘Triton.’ You held the ship in trust for me, and to that amount you disposed of it without my consent, and I have never got back my money.” It is true that he said on record,—“Because I gave you the money, you must give it me back,” but his first view, from which he lapsed, but which he never abandoned, seems to be the more proper view, namely, that he has a claim of damages against the defenders, and the action is, I think, calculated to bring out this claim.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT allowed the amendments.

J. & J. Ross, W.S.—CLARK & MACDONALD, S.S.C.—Agents.

ALEXANDER MUIRDEN AND ANOTHER (Atherstone's Trustees), AND
OTHERS, Petitioners.—*Brodie Innes.*

No. 7.

Oct. 24, 1896.
Atherstone's
Trustees.

Trust—Nobile Officium—Petition for authority to pay income of legacy for behoof of minor legatee domiciled in England to his father.—Petition by trustees acting under a Scottish trust-settlement for authority to pay the income of legacies to the fathers of minor beneficiaries who were domiciled in England, and from whom, according to the law of England, a valid discharge could not be obtained, *refused* on the ground that the Court had no power to grant the authority craved.

THIS was a petition at the instance of the trustees under the trust-^{1ST DIVISION.} disposition and settlement of the deceased John Greasley Atherstone,

¹ Court of Session Act, 1868, section 29 (30 and 31 Vict. c. 101); Russell, Hope, & Co. v. Pillans, Dec. 7, 1895, 23 R. 256; Laming & Co. v. Seater, June 21, 1889, 16 R. 828; Forbes v. Watt's Trustees, Nov. 9, 1870, 9 Macph. 96.

² Taylor v. M'Dougall & Sons, July 15, 1885, 12 R. 1304.

No. 7. a domiciled Scotsman, for authority to pay the income of certain pecuniary bequests made in the settlement to the fathers of the respective legatees.

Oct. 24, 1896.
Atherstone's
Trustees.

The petitioners stated that the legatees in question were all in minority; no tutors or curators were appointed to them by the settlement, nor did that deed provide for payment of either the principal or income of the bequests to the parents of the legatees. The legatees and their fathers were all domiciled in England, and the petitioners had been advised by English counsel that the legatees could not, either alone or along with their parents, grant a valid discharge for the said legacies, and that the petitioners must retain the same until the legatees attained majority; and further, that by the law of England there was considerable doubt whether the petitioners could, without the authority of the Court, pay the income of said legacies to the fathers of the legatees.

The petition was unopposed.

The petitioners argued;—Had the legatees been domiciled in Scotland, no difficulty would have arisen, but being minors domiciled in England, they could not, either alone or along with their parents, grant a legal discharge. The Court in England had a discretionary power to authorise payment such as the petitioners here were willing to make. In Scotland the Court, in the exercise of its *nobile officium*, had a similar power.

LORD PRESIDENT.—This seems to be a case of overdriving the *nobile officium* of the Court. The inherent difficulty is that no one is in a position to give a valid discharge of payment, and no decree of ours can supply that defect.

Mr Innes emphasises the impossibility of payment being made at the trustees' own hand, and thus makes clear that the quality of the difficulty makes it one which the Court cannot get over.

LORD ADAM.—The question is whether we can authorise the trustees to pay money belonging to infants without obtaining a discharge. I think we cannot.

LORD M'LAREN.—I express no opinion on the question whether without an order the trustees would be entitled to pay the legacies to the minor children. I should imagine that if the money was paid for their benefit, it would be unlikely that the trustees should ever be reproached with it. We cannot enter into that question; but if the trustees have not power to make such payment, we certainly cannot give it to them.

LORD KINNEAR.—The statement of the trustees is, that the legatees, or those who may ultimately be found entitled to these sums, are according to the law of their own domicile infants incapable of granting a discharge, and they have no legal guardians capable of giving one binding on them and their heirs. The trustees say they are not in a position to make payment to the legatees themselves or anyone on their behalf, because they can get no valid discharge. That shews that we have no power to supply a defect which makes it impossible for them to proceed upon their own responsibility.

THE COURT refused the petition.

DOVE, LOCKHART, & SMART, S.S.C., Agents.

POLICE COMMISSIONERS OF BURGH OF GOVAN, Pursuers (Reclaimers).—

No. 8.

C. J. Guthrie—M'Lennan.

ALEXANDER LINDSAY AIRTH (Logan's Trustee), Defender
(Respondent).—*J. Wilson—Findlay.*

Oct. 24, 1896.
Police Com-
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Police—Street—Footway—Statute—Construction—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), secs. 6, 141, and 327—General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. c. 101), sec. 149.—Section 149 of the General Police and Improvement Act, 1862, enacted that owners of premises abutting on any street should, on the requisition of the Commissioners, and at their own expense, construct footways on the sides of such street in such way as the Commissioners should direct, and that the owners should “thereafter from time to time, as occasion may require, repair and uphold such footways.”

The Burgh Police Act, 1892, by section 6, repealed the General Police and Improvement Act, 1862, and enacted by section 141 that the owners of premises abutting on any street should “at their own expense, when required by the Commissioners, cause footways before their properties respectively on the sides of such street to be made, and to be well and sufficiently paved or constructed with such material . . . as the Commissioners shall direct, and the Commissioners shall thereafter from time to time repair and uphold” the footways.

Held (rev. judgment of Lord Kincairney) that section 141 applied to cases where a footpath had already been constructed under the Act of 1862.

ON 25th July 1894 the Police Commissioners of the burgh of Govan issued an order under the Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), section 141,* requiring Alexander Lindsay Airth, Angus Logan's trustee, to cause the footway abutting on certain tenements in Carmichael Street, Govan (belonging to the deceased Angus Logan), to be made and well and sufficiently paved, in the manner stated in the order, with Caithness flag or granolithic pavement.

1st Division.
Lord Kin-
cairney.

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), sec. 141, enacted,—“The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the Commissioners, cause footways before their properties respectively on the sides of such street to be made, and to be well and sufficiently paved or constructed with such material and in such manner and form and of such breadth as the Commissioners shall direct, and the Commissioners shall thereafter from time to time repair and uphold such footways.”

Section 142.—“It shall be lawful for the Commissioners to resolve . . . to undertake the maintenance and repair of all the footways of the burgh. When the Commissioners shall undertake the maintenance and repair of the foot-pavements in the burgh, they shall call upon all owners to have their foot-pavements before their properties put in a sufficient state of repair, and failing their doing so within six weeks, the Commissioners may cause the same to be done at the expense of such owners, and thereafter the said foot-pavements shall be maintained by the Commissioners.”

Section 327 empowered the Commissioners, in default of their orders being implemented by the owners, to execute the necessary work at the expense of the latter.

Section 339 gave persons aggrieved by any order of the Commissioners right to appeal either to the Sheriff Court or to the Court of Session.

Section 6 repealed the General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. c. 101).

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Mr Airth refused to comply with the order, on the ground that in terms of an order by the Police Commissioners, dated 6th July 1878, acting under the General Police and Improvement (Scotland) Act, 1862,* he had been called upon to pave the footway opposite the property in question with second-class pavement or asphalt, and had implemented the order by laying down a pavement of asphalt.

The Commissioners accordingly executed the work under section 327 of the Burgh Police Act, 1892; and on 8th March 1896 they raised this action against Mr Airth for payment of the cost of the work, amounting to £43, 6s. 8d.

The pursuers admitted that the defender had implemented the order of the Commissioners in 1878, but averred,—“The pursuers, in the exercise of their duty, declined to take over the footway in front of the defender’s said property until the same was formed as prescribed by said last-mentioned Act, and in the manner prescribed by them and specified in said order of 1894.”

The pursuers stated that the defenders’ pavement was in a bad state of repair, and that “in the public interest they could not undertake to relieve him of the future maintenance of the footway, made with asphalt nearly twenty years ago, which since then has been gradually superseded by the more enduring and satisfactory material of granolithic; but the defender still continues to refuse payment of the account for the work done by the Commissioners. At the date of the said order of 1894, the footway in question was in a state of disrepair, as before stated.”

The defender averred that section 141 of the Burgh Police Act, 1892, was inapplicable, and that the order of the Commissioners thereunder was unwarranted. He also “explained and averred that the order of 25th July 1894 was an order to reconstruct the said footway, and no such obligation is laid upon the defender by either of said Acts.”

The pursuers pleaded, *inter alia*;—(1) By the provisions of the Burgh Police Act of 1892 the pursuers were entitled to issue the order of 25th July 1894 upon the defender. (2) The defender having failed to comply with the said order served upon him, the pursuers were entitled to execute, at his cost, the work therein specified, and he is liable to them in repayment of the sum sued for, with interest.

The defender pleaded, *inter alia*;—(3) The order of 25th July 1894 being unwarrantable and without statutory authority, the pursuers are not entitled to charge the defender for any work done in terms thereof, and he should be assoilzied, with expenses.

The Lord Ordinary (Kincairney), on 12th June 1896, pronounced this interlocutor:—“Finds it admitted that in 1878 the defender constructed a pavement of asphalt opposite his property in Carmichael Street, Govan, in compliance with an order to that effect by the Police Commissioners of Govan acting under the General Burgh

* The General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. c. 101), section 149, enacted,—“The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the Commissioners, cause footways before their property respectively on the sides of such street to be made, and to be well and sufficiently paved with flat hewn or other stones, or to be constructed in such other manner and form and of such breadth as the Commissioners shall direct, and shall thereafter from time to time, as occasion may require, repair and uphold such footways. . . .”

Police Act, 1862 : Finds it not alleged that that pavement is in such a condition as to be beyond repair : Finds that in these circumstances the order by the pursuers, dated 25th July 1894, is unauthorised by the General Burgh Police Act, 1892 : Therefore assails the defender from the conclusions of the summons.*

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* "OPINION.—This is a case of some difficulty and of general importance in reference to the provisions of the Police Act of 1892 (55 and 56 Vict. cap. 55), in regard to the paving of public streets. The facts are simple. The Commissioners of the burgh of Govan have ordered the defender to cause the footway abutting on his property in Carmichael Street, Govan (admitted at the bar to be a public street), to be paved in the manner stated in the order with Caithness flag or granolithic paving. The order bears to be issued in virtue of the Burgh Police Act, 1892, 'particularly clause 141.' It is not an order which proceeds on any averment that the existing pavement had fallen into a state of disrepair. It is not an order to repair or to reconstruct an existing pavement. It could not have been, because section 141 of the Act imposes no obligation on owners to repair or to reconstruct pavements. The order is expressed just as if there were no existing pavement, and in being so expressed it corresponds with its warrant (clause 141), which imposes on owners the obligation to make pavements, but not to repair or reconstruct them.

"The defender has not complied with the order, and the work ordered has been completed by the Commissioners, under section 327 of the Act, and they now sue for the cost. The defence is that in 1878 the defender had been ordered by the Police Commissioners, acting under the General Police Act, 1862, to pave the street in question opposite his property with second-class pavement or asphalt, and had implemented the order by laying down a pavement of asphalt. That defence is admitted to be true in point of fact, and the question is, whether it justifies the defender's refusal to implement the pursuers' order. I am of opinion that it does.

"The defender had right under section 339 to appeal against the order either to the Sheriff Court or Court of Session ; and I suppose that the question now raised might have been decided in the appeal. It may be that the pursuers could have pleaded that the defender, not having adopted that remedy, cannot now be heard to object to the order. But the pursuers have—advisedly, as I was informed—abstained from stating a plea to that effect, because they are desirous of obtaining a judgment on the question.

"Although the Commissioners have chosen to proceed under clause 141, yet they had other remedies under the statute, if they were dissatisfied with the condition of the pavement of Carmichael Street. They might have proceeded under clause 142, but that would have involved undertaking the maintenance of all the footways in the burgh ; or they might have proceeded under section 129, which confers very wide powers to improve and form not only public streets, but also public pavements and footpaths ; but in that case they must, I apprehend, have done the work at their own expense, and not at the charge of the owners. But they have elected not to proceed under that section ; and this case does not relate to the powers of the Commissioners under either clause 129 or clause 142, but solely to their powers under clause 141.

"Now clause 141 is not a novelty introduced into the Act of 1892, and confers no new power on the Police Commissioners. It may be traced back to the Burgh Police Act of 1833 (3 and 4 Will. IV. c. 46). The 105th section of that Act enacted that the proprietors of houses fronting the street should, when required by the Police Commissioners, 'cause footpaths before their property respectively on the sides of the said . . . streets . . . to be made and to be well and sufficiently paved with flat, hewn, or other stones, or to be constructed in such other manner and form and of

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The pursuers reclaimed, and argued ;—The Commissioners could not call upon the defender to repair the footpath under section 142 of the Act of 1892, for they were not in the position of having taken over all the footpaths. They had to proceed then under section 141, by which owners were bound, when required, to construct them. The section made no distinction between imperfect and non-existing footways, nor between existing footways which had or had not been made under statutory order. The Act of 1862 had been repealed by the Act of 1892, and the defender, therefore, could not found upon the order under it.¹

Argued for the defender ;—It was vain for the Commissioners to attempt to use section 141 of the Act of 1892 for their purpose. That section was framed on the assumption that there was no existing pavement at the place to which the order related. Here the statutory obligation to construct had been admittedly implemented in 1862, and the Commissioners could not reimpose it. The obligation to uphold and maintain contained in the 1862 Act still subsisted, and the defender was quite willing to implement it.²

such breadth as the said Commissioners shall direct.' The next General Police Act was 13 and 14 Vict. cap. 33, 1850, and the 212th section is substantially to the same effect. Neither statute expressly declares who shall repair and uphold the pavement when made. The corresponding clause in the Burgh Police Act, 1862 (25 and 26 Vict. cap. 101), is the 149th, and it is substantially to the same effect, except that it enacts that, after the pavements are made, the owners shall 'repair and uphold such footways.' Section 141 of the Act of 1892 is substantially to the same effect, with the important difference that it enacts that when pavements are made, 'the Commissioners shall thereafter, from time to time, repair and uphold such footways.'

"There is substantially no difference in the primary obligation imposed on owners by these clauses of the several statutes. It is to construct, not to repair pavements. No new power is conferred by any of these Acts on the Police Commissioners. The old power, conferred in 1833, has been continued from statute to statute, and under all the Acts it is vested in one permanent and continuing body—the Police Commissioners. All these statutes confer power on the Commissioners to do the work themselves, on the failure of the owners, at the owners' expense. The requirements of the Police Authorities are satisfied by the construction of the works, either by the owners or by the Commissioners. The legal result in either case is the same.

"Now, if a pavement were constructed under any of these Acts—say under the Act of 1850—on the order of, and to the satisfaction of, the Commissioners, or by the Commissioners at the owners' expense, I think that the obligation of the owners under that statute to make a pavement would have been exhausted, and that the Commissioners could not repeat that order under the same powers of that Act, unless indeed the pavement had become so destroyed as to be past repair, in which case there might be a question. Repeated orders to construct pavements do not appear to be contemplated, and, if so, I cannot see why there should be any difference when a new Act is passed not altering the powers of the Commissioners or the

¹ Baillie v. Shearer's Judicial Factor, Feb. 1, 1894, 21 R. 498 ; Aberdeen Harbour Commissioners v. Granite City Steamship Co., July 2, 1896, 23 R. 918.

² Police Commissioners of Old Aberdeen v. Leslie, &c., March 18, 1884, 11 R. 733.

At advising,—

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LORD PRESIDENT.—I am unable to agree with the Lord Ordinary. I think his Lordship gives too much weight to the repealed statutes, and too little to the statute which is in force. I Oct. 24, 1896.
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It would have been a very intelligible plan for the Act of 1892 expressly to take account of existing pavements which had been made under former statutes, and to limit the compulsory power in section 141 accordingly. But it has not done so. Or, the statute might have provided for the Commissioners requiring repairs of pavements to be made by individual owners, where such repairs are required. But again, it has not done so, for section 142 only applies to the event of the Commissioners taking over all the footways of the burgh.

On the other hand, the scheme of the Act, in the matter in hand, is simple enough, if a little crude. It authorises the Commissioners to order an owner to find them a pavement to their satisfaction; and, on this being done once for all, the owner is relieved of all further responsibility. The

obligation of the owners. So, in this case, the owners, having in 1878 constructed a pavement in implement of the order of the Police Commissioners, I consider that the Police Commissioners could not in 1890, when the same Act was in force, have ordered the work to be repeated, unless, as before said, the work had gone into such decay as to be past repair, when there might possibly be a question. In such a case, under the Act of 1862, not only is the obligation of the owner to make a pavement exhausted, but a different burden is expressly imposed on him, viz., the burden of repair. Can it then (repeating the question) make any difference that a new statute has been passed continuing the power of the Commissioners and the obligation of the owner? I think that the passing of a new statute can make no difference in that respect, and I do not see that the new provision, which throws the burden of maintenance on the Commissioners, affects that question.

“Consistently with this view, the words of clause 141 appear to me to apply to the case where there is no previous pavement, and to be inapplicable to the case where a pavement exists. The right of appeal may, it is true, protect the owners from oppression. But I do not proceed on the ground that it would be unreasonable and oppressive to hold that an owner could be compelled to construct a pavement twice, but on the ground that the sections of the various Acts which have been quoted impose the burden of constructing a pavement once for all, and are framed on the assumption that there is no existing pavement at the place to which the order authorised relates. Reference was made to the case of the *Commissioners of Old Aberdeen v. Leslie*, 18th March 1884, 11 R. 733. There an order as to a pavement under the 149th clause of the Act of 1862 was sustained, notwithstanding a defence that the pavement was existing, and was to be held as having been made under the Act of 1850. It had not in fact been so made, because it had been made before that Act was adopted. The Lord President, who gave the judgment of the Court, was careful to rest his opinion on the ground that the order was an order to execute repairs (which might be ordered under the 149th section of the Act of 1862, although not under the 141st section of the Act of 1892), and the impression seems permissible that, had the order been an order to pave of new, the judgment might have been different.

“I was referred to a judgment pronounced by Sheriff Blackburn in the Sheriff Court at Dumbarton, in reference to section 149 of the Act of 1862, to the effect that the obligation to pave was exhausted by implement of an

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section does not distinguish between imperfect footways and non-existing footways,—still less between those existing footways which have, and those which have not, been made under statutory order; it recognises but one kind of footway, and that is a footway up to the requirements of the Commissioners under the Act of 1892.

In the administration of this section, two things are to be observed. First, the Commissioners will of course take account of existing footways, where what has formerly been done can be utilised, so as to diminish what has to be required in order to bring the footway up to the legitimate wants of the community. Second, any excessive requirement is subject to the review of the Sheriff on summary appeal. Accordingly, the existing state of the pavement is necessarily taken account of; and anything done aforetime will go to the credit of the owner, if and in so far as it in reason affects what ought yet to be done. But I can see no warrant for holding that an existing footway is, under section 141, any better (or worse) for having had a statutory origin under a repealed Act.

The contrary view is very frankly stated in a passage in the Lord Ordinary's opinion. His Lordship, first, by way of illustration, puts the case as if it had occurred before the passing of the Act of 1892,—to wit in 1890,—and says that the Commissioners could not have ordered work to be repeated in 1890, when the same Act was in force as in 1878, when the work was first done. Then the Lord Ordinary goes on,—“Can it then make any difference that a new statute has been passed continuing the power of the Commissioners and the obligation of the owner?”

Now, with deference to the Lord Ordinary, I think the passing of the new statute makes all the difference; but then I do not think that his Lordship quite accurately describes the statute as “continuing the power of the Commissioners.” The scheme of the statute is to make a fresh start, to repeal the former statutes, and (in the matter in hand) to authorise Commissioners in absolute terms, to order certain things, without any qualification by way of reference to what has been ordered or done before.

I am for recalling the interlocutor reclaimed against, and granting decree in terms of the conclusions of the summons.

order of the Police Commissioners, in which judgment I concur—Irons on Burgh Police Act, 1892, p. 200.

“It is not to be denied that this construction of the Act involves some difficulty. In particular, the pursuers pointed out that the Act of 1862 has been repealed by section 6 of the Act of 1892; and they say that it follows that persons who have made pavements under the Act of 1862 are therefore released from their obligation to uphold them, and that no such obligation can be enforced at all unless it can be enforced under section 141, and that they represented as a *reductio ad absurdum* of the defender's contention. That, however, is not a conclusive argument in regard to the construction of a statute. But while I do not require to decide what obligation now lies on persons in the position of the defender to uphold the pavements they have made, I see no obvious absurdity in supposing that it was the intention of the Legislature to relieve the owners in such a case, and to lay the burden on the Commissioners. That difficulty, if it be one, cannot, however, convert clause 141 into a clause empowering the Commissioners to order repairs of an existing pavement, or the order under consideration, into an order to repair, which it admittedly is not.”

LORD ADAM, LORD M'LAREN, and LORD KINNAR concurred.

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THE COURT recalled the interlocutor reclaimed against, and granted decree in terms of the conclusions of the summons.

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MARCUS J. BROWN, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

SIR ROBERT DRUMMOND MONCREIFFE, BARONET, Pursuer (Respondent).

No. 9.

—*Macfarlane—Sym.*

WILLIAM SCOTT FERGUSON, Defender (Reclaimer).—*W. C. Smith—C. K. Mackenzie.*

Oct. 24, 1896.
Moncreiffe v.
Ferguson.

Bankruptcy—Trust for creditors—Adoption of lease by trustee—Deed of assignation and renunciation—Liability for rent.—The tenant of a farm under a lease, granted in 1886, "excluding all assignees, whether legal or voluntary, and all subtenants or trustees or managers for behoof of creditors," on 13th May 1895 executed a trust-deed for behoof of his creditors, in which he assigned to the trustee his whole estate, including the lease of his farm, with full power to enter on and manage the farm till the natural expiry thereof, or to renounce the lease. The landlord on 20th May executed a deed acceding to the trust-deed, and consenting to the assignation of the lease on condition that the trustee should execute a renunciation of the lease as from the next term of Martinmas. On 29th June the trustee executed a renunciation of the lease as from Martinmas 1895, reserving to the landlord his whole rights under the lease down to that term. The trustee managed the farm for six months, and ingathered the crop for the year.

Held that under the deeds the trustee must be held to have possessed the farm as tenant under the lease, and that he was personally liable for the rent of the year during which he had possessed.

By lease dated 22d July 1886, Thomas Richmond became tenant of the farm of Hilton, in the parish of Forteviot, Perthshire, of which Sir Robert Drummond Moncreiffe, Baronet, of Moncreiffe, was the proprietor. The lease "excluded all assignees, whether legal or voluntary, and all subtenants and trustees or managers for behoof of creditors." It further provided that if the tenant should become bankrupt or insolvent, or should execute a trust for creditors, or otherwise divest himself of his effects, the landlord should have the option of declaring the lease void and null at the term of Martinmas following upon such bankruptcy, insolvency, or other act. As arranged by minute of agreement of 20th July 1887, the lease was to endure for ten years, the termination being at Martinmas 1896, and the rent was to be £380.

On 13th May 1895 Mr Richmond executed a trust-deed for behoof of creditors in favour of William Scott Ferguson, farmer, Pictons-hill, Perthshire, by which he disposed, assigned, and conveyed to the latter his whole estate, heritable and moveable, "surrogating hereby and substituting the said William Scott Ferguson as trustee foresaid in my full right and place of the premises"; "and in particular to take charge of and manage in such way as he shall think best the farms of Hilton and Broomhill, of which I am tenant, with the stock and cropping thereon, purchasing and selling from time to time such live stock as may be necessary and expedient for the due and proper conduct and management of said farms, and to carry on the leases of the said farms until the natural expiry thereof, or to renounce and give them up at such time as he shall consider expedient."

1st Division.
Ed Stormonth-
Darling.

No. 9.

Oct. 24, 1896.
Moncreiffe v.
Ferguson.

On 20th May 1895 Sir Robert Moncreiffe executed the following deed:—"I . . . accede to the trust-deed executed by Mr Thomas Richmond on May 13th, 1895, and consent to the assignation of the lease of Hilton therein contained; this accession and consent being on the footing that that lease be renounced by Mr Ferguson as from Martinmas next, and a formal renunciation delivered within three weeks from this date."

Mr Ferguson entered into possession of the farm in May 1895, and on 29th June he executed a renunciation of the lease as at Martinmas following, reserving to Sir Robert Moncreiffe "his whole rights and claims under the lease so far as applicable to the tenancy of the subjects thereunder for the period to the said term of Martinmas 1895."

Mr Ferguson continued in possession of the farm till Martinmas 1895, managing and cultivating it during that time, and reaping the crop of the year.

On 23d January 1896 Sir Robert Moncreiffe raised this action against Mr Ferguson for payment of the sum of £380 as the rent for crop and year 1895, which the pursuer maintained he was bound to pay as assignee of the tenant.

The defender averred,—“The particulars of the defender’s administration as trustee are stated in the joint minute for the parties,* which is referred to for this purpose. In his administration of the estate the defender has done nothing beyond realising crop 1895 and stock in terms of the trust-deed for behoof of the creditors, including the pursuer. No benefit was received by the trust-estate or the conditional defender by the limited assignation of the lease contained in the trust-deed. Explained that in July 1895, after the execution of the renunciation above referred to, a note of the rent due by Mr Richmond to the pursuer, amounting to the said sum of £795, 11s., was lodged with the defender as trustee, and intimation was made that the pursuer claimed out of the trust-estate a preference and full pay-

* “Sym for the pursuer and Smith for the defender concurred in admitting that the total acreage of the farm of Hilton, referred to on record, is 273·606 acres; that when the defender entered on the farm, the whole of the white crop, extending to 89·835 acres, and the whole of the potato crop, extending to 17·848 acres, were already sown; that Swedish turnips, extending to about 12 acres, were also sown; that the remaining turnip crop, extending to about 20 acres, was not sown, but the ground was prepared for sowing, and the defender purchased manure and seeds to the value of £21, 19s. 4d. and applied them, along with other manures purchased and delivered before the trust-deed, and then lying at the farm, in sowing the remainder of the turnip crop; that, at the date of the defender’s appointment, there was a considerable quantity of manure lying at the farm ready for application to the ground, and this was applied by him, the expenditure of the sum stated being all that was required, in addition to said last-mentioned manure, to complete the sowing of the turnip break, and all other manuring; that the defender did not purchase any live stock nor any manure or seeds other than as above mentioned; that the total cost of sowing, manuring, and working the farm for crop 1895 amounted to between £500 and £600, of which all, excepting £40, 5s. 9d., had been expended before the appointment of the defender as trustee; that the grass parks on the farm extended to 112·036 acres, of which 38½ acres were in hay; that all the parks were let by Thomas Richmond, except the break in hay, up till Martinmas 1895; that the defender sold the hay crop on 2d August 1895, and has since sold the white and green crop and stock.”

ment of at least the rent for crop 1895. The defender, as trustee on Mr Richmond's estate, rejected the pursuer's claim for full payment of the rent for crop 1895, but admitted him to rank as an ordinary creditor on said sum of £795, 11s."

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The pursuer pleaded ;—(1) The defender, as Mr Thomas Richmond's assignee in said lease, having occupied and possessed the farm of Hilton thereunder as condescended upon, is liable for the rent stipulated therein for crop and year 1895, with interest thereon, and decree should be pronounced in terms of the conclusions of the summons accordingly. (2) The defender having adopted the lease, is liable for the rent.

The defender pleaded ;—(2) The pursuer having acceded to the said trust-deed, and intimated a claim thereunder, including the sum now sued for, is bound to accept a composition or dividend along with the other creditors, and is barred from suing the present action. (3) The defender, not having adopted the lease in question, should be assoilzied. (4) No benefit under the lease having been assigned to the defender or the trust-estate, and the pursuer having consented to the assignation only conditionally for the limited purpose of enabling the defender to execute the trust by realising the stock and crop 1895, the pursuer is not entitled to found on said assignation as inferring personal liability against the defender.

On 17th June 1896 the Lord Ordinary (Stormonth-Darling) decreed against the defender conform to the conclusions of the summons.*

* "OPINION.—Questions of difficulty have sometimes arisen (as in the case of *M^r Gavin v. Sturrock's Trustees*, 18 R. 576) where it was necessary to gather from the conduct of parties whether a trustee for creditors had adopted the lease of a farm so as to render himself personally liable for its prestations.

"Here the question of adoption or non-adoption is to be solved, not by conduct, but by documents, and the material documents are (1) the trust-deed in favour of the defender, dated 13th May 1895 ; (2) the accession by the pursuer, dated 20th May 1895 ; and (3) the renunciation by the defender, dated 29th June 1895. The combined effect of these writings is that the lease was assigned to the defender as at 13th May 1895, that the pursuer consented to the assignation on condition that the defender renounced the lease as at the term of Martinmas following, and that the defender did so renounce, expressly reserving to the pursuer his whole rights and claims under the lease, so far as applicable to the tenancy down to that term.

"The defender had full possession under the deeds for six months. His acts of possession are fully detailed in the joint minute, and they probably amounted to nothing more than what was necessary for working and reaping the crop of 1895, with a view of realising and distributing the estate among the creditors. It is probably also true that if there had been no consent by the landlord, and no renunciation by the trustee, the same results could have been achieved, because, by the terms of the lease, the landlord could not have exercised his option of terminating the tenancy till Martinmas 1895, and in the meantime he could not have prevented the tenant continuing in possession and managing for the trustee.

"But the parties chose to arrange matters differently. The assignation in the trust-deed was validated by the landlord's consent. The trustee thereupon became himself the tenant, and in that capacity he renounced the lease. I cannot doubt therefore that he became personally liable for the rent payable during the period of his possession.

"It was argued for the defender that if so he must also be liable for

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The defender reclaimed, and argued;—(1) The first question was whether, apart from the deeds, the defender had adopted the lease as tenant so as to render himself liable in its prestations. Now all that he had done was perfectly consistent with the view that he had occupied the farm merely with the view of realising and distributing the estate among the creditors, and without becoming actual tenant.¹ But (2) the various deeds were not inconsistent with this view. The pursuer had consented to the assignation of the lease, not in order to receive the defender as assignee of a continuing liability, but, as the deed of accession bore, to confirm his title to obtain a valid renunciation of the lease with a view to re-letting the farm. The bargain conferred no benefit such as would induce the defender in the interest of the creditors to increase the extent of his liability,²—indeed it was a bargain entirely in favour of the pursuer. The defender could have done all he did without the landlord's consent. If the Lord Ordinary was right, the defender was saddled with liability for arrears of rent as well as for the rent of the current year.³ Such a claim was not made here, and there being nothing to shew an absolute adoption by the defender of the lease, he could not be held liable as tenant under it.⁴

Argued for the pursuer;—The cases relied on by the defender arose with trustees in sequestrations, whose rights were statutory. In this case the trustee derived his rights from a voluntary agreement with the landlord contained in the deeds. Under these deeds he became tenant of the farm, and having the full benefit of the crop for the year, was personally liable for the rent to the pursuer. The fact that the pursuer had not sued for arrears of rent could not deprive him of his right to sue for the rent due in the year of the defender's occupation.

At advising,—

LORD ADAM.—It appears to me to be clear, on the face of the documents produced, that the defender possessed and cultivated the farm till Martinmas 1895 as tenant under the assignation granted in his favour by Mr Richmond and consented to by the pursuer.

But it is said by the defender that that was not the character in which he possessed the farm. He avers that in point of fact the pursuer never consented to any beneficial assignation of the lease, but only agreed to the occupation of the farm by the defender till Martinmas 1895 in order that the defender might realise the stock and wind up the tenancy, and that in administering the farm he has done nothing beyond realising the crop of the year 1895, and stock, in terms of the trust-deed.

arrears of rent. That is a claim which may sometimes be made against a trustee who adopts a lease, but a landlord by his conduct may very easily waive it, and here it is not made. Certainly, what I am deciding by no means implies that it could be successfully made in the present case."

¹ *M'Gavin v. Sturrock's Trustee*, Feb. 27, 1891, 18 R. 576.

² *Gibson v. Kirkland & Sharpe*, March 25, 1833, 6 W. & S. 340, *per* Lord Wynford, p. 351, 5 Scot. Jur. 322; *Kirkland v. Cadell*, March 9, 1838, 16 S. 860, at p. 881, 10 Scot. Jur. 363.

³ *Ersk. Inst.* ii. 6, 34; *Ross v. Monteith*, Feb. 5, 1786, M. 15,290; *Dundas v. Morison*, Dec. 4, 1857, 20 D. 225, *per* Lord Cowan, 229, 30 Scot. Jur. 120; *Munro v. Fraser*, Dec. 11, 1858, 21 D. 103, 31 Scot. Jur. 70.

⁴ *Lord Strathmore's Trustees v. Kirkcaldy's Trustees*, June 21, 1853, 15 D. 752, 25 Scot. Jur. 455.

It may be, as the Lord Ordinary says, that the defender might have done substantially all that he did towards realising the crop and stock without becoming actual tenant of the farm. I do not know how that may be, but if that was all that was intended it is not easy to understand why the transaction should have taken the form which it did, or why the pursuer's consent to the assignation of the lease in the defender's favour should have been sought and obtained, and the renunciation of the lease by him as tenant stipulated for. I think it is clear that his possession of the farm was as tenant under the aforesaid lease.

It is true that the pursuer acceded to the trust, but it does not follow from that that he was entitled only to a dividend on the rent of the farm for crop and year 1895. If I am right in what I have before said, that rent was not a debt of Mr Richmond's, but was due by the defender himself as tenant of the farm for that period.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

LINDSAY, HOWE, & Co., W.S.—HOPE, TODD, & KIRK, W.S.—Agents.

G. & W. RIDDELL, Petitioners (Respondents).—*Abel*.

WALTER GALBRAITH, Respondent (Reclaiming).—*Graham Stewart*.

No. 10.

Bankruptcy—Sequestration—Defect in statement of concurring creditor's claim—Petition for recall—Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), secs. 21 and 49.—In a petition by a debtor for sequestration the affidavit of the concurring creditor described the debt due to him as "being the amount contained in an account for goods supplied by the deponent" to the debtor. The relative account contained forty-eight items of varying amounts and under different dates. The sole description in the case of each item was "Goods." The Court (*aff. judgment of Lord Pearson, diss. Lord M'Laren*) granted a petition for recall of the sequestration on the ground that the account produced by the concurring creditor was not sufficiently specific in its terms to satisfy the requirements of the Bankruptcy Act.

Ballantyne v. Barr, January 29, 1867, 5 Macph. 330, followed.

On 17th June 1896 the Sheriff of Aberdeen awarded sequestration of the estates of Alexander Walton, cycle manufacturer, upon the petition of the bankrupt, with the concurrence of John Gordon, cycle warehouseman, Banff, a creditor to the amount of £271, 19s. 10d., who produced an affidavit and relative account.

In the beginning of the following July, Messrs G. & W. Riddell, manufacturers in Aberdeen, creditors of the bankrupt to the amount of £24, 0s. 6d., presented a petition, in which they stated that the account referred to in the affidavit of Mr Gordon, the concurring creditor, was invalid and defective on the ground that no specification was given of the goods alleged to be furnished, "the items being simply stated 'to goods,' and no further vouchers were produced instructing the said items," and craved the Court to recall the sequestration in terms of section 31 of the Bankruptcy Act, 1856.*

* Section 21 of the Bankruptcy Act, 1856, enacts that in all petitions for sequestration "the petitioning or concurring creditor shall produce with such

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Answers were lodged for Walter Galbraith, C.A., Glasgow, trustee in the sequestration, who submitted that there was no defect in the award of sequestration, and that the petitioners were in any event barred from challenging its validity, in respect that they had appeared and voted at the meeting for the election of a trustee.

The affidavit of Mr Gordon, the concurring creditor, and the account signed as relative thereto, were produced. The affidavit described the deponent's debt as "being the amount contained in an account for goods supplied by the deponent to the said Alexander Walton," commencing 21st November 1895, and ending 30th May 1896. The account contained forty-eight items of varying amounts and under different dates, the words "to goods" being the only information given as to each item.

On 24th July 1896 the Lord Ordinary (Pearson) recalled the sequestration.*

petition an oath to the effect hereinafter specified, and also the account and vouchers of the debt as hereinafter provided; failing which production, the petition shall be dismissed."

Section 49 enacts,—“To entitle a creditor to vote or draw a dividend he shall be bound to produce at the meeting, or in the hands of the trustee, an oath to the effect, and taken in manner hereinbefore appointed in the case of creditors petitioning for sequestration, and the account and vouchers necessary to prove the debt referred to in such oaths.”

* “OPINION.— . . . Messrs Riddell now petition for recall of the sequestration, on the ground that the affidavit and claim of the concurring creditor was radically defective, on the face of it. . . .

“The statutory requisites are set forth in section 21 of the Bankruptcy Act, thus:—‘The petitioning or concurring creditor shall produce with such petition an oath to the effect hereinafter specified, and also the account and vouchers of the debt as hereinafter provided; failing which production, the petition shall be dismissed.’ The old statute of 54 George III. required production of ‘the grounds of debt or a certified copy of the account’; but these words do not occur in the Act of 2 and 3 Victoria, or in the subsisting Act. The requisite now is, production of ‘the account and vouchers of the debt as hereinafter provided,’ that is (apparently) as provided in section 49, namely, ‘the account and vouchers necessary to prove the debt referred to in such oath.’

“Now in the case of a claim upon an open account for goods supplied, there are no vouchers in the strict sense of that word. But it is the more necessary that the account itself should be specific, not merely as to date and price, but as to the description of the goods supplied. It was pointed out that here the ‘goods’ were furnished by a cycle warehouseman to a cycle manufacturer; and I was asked to draw the inference that the goods had to do with cycles and their appurtenances. But in my opinion that is not enough. I think that all parties concerned are entitled to more specific information in the account itself; and the tradesman's own books ought to have enabled him to furnish that information. Accordingly this seems to me not so much a failure to vouch, but rather a failure to lodge a proper account.

“The point seems to me to be decided by the case of *Ballantyne v. Barr* (1867), 5 Macph. 330. There the concurring creditor's account amounted to £57, 10s. It consisted of five items. The first three were unobjectionable. The fourth was £10 for ‘cash lent you’; and the fifth was, ‘June 18.—To amount of goods, £17.’ The Court held that both these were inadmissible; Lord Neaves saying expressly, ‘the £17 which is essential to bring the creditor's claim up to the statutory amount is stated in a form which is quite insufficient and incompetent.’

“This being so, the question is not one of discretion but of competency.

The respondent reclaimed, and argued;—The account was sufficiently specific, and the Lord Ordinary was wrong in holding that the case fell under the judgment in *Ballantyne*.¹ While that case resembled the present, it was distinguishable in two respects—(1) There was some possibility in that case of the account embracing a variety of goods. Here it was clear from the nature of the buyer's and seller's business that the "goods" must have been cycles. (2) In *Ballantyne*¹ goods supplied at different times appeared to have been slumped together in the account. At all events the defect was not such as necessarily to lead to the recall of the sequestration, and that being so, the petitioner having taken an active part in the proceedings under the sequestration was not entitled to succeed.²

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Argued for the petitioner;—The account was not sufficiently specific in its terms. The nature of the goods supplied must be specified. The defect was a radical defect, on account of which the Court was bound to recall the sequestration.³

LORD PRESIDENT.—I agree with the Lord Ordinary. I think with his Lordship that the point is decided by the case of *Ballantyne*.¹ It is extremely difficult, as Mr Stewart avowed, to find any distinction, and I do not think, so far as I can satisfy myself, that the distinctions which have been pointed out are substantial. I think they are rather superficial. It seems to me that the view of the Court there was that, in as much as an open account cannot be instructed by vouchers in the proper sense of the term, there is the more need for there being such a specification as shall indicate to the body of creditors what is the origin and nature of the claim. Now, in the case there, as here, the use of the general word "goods" does not advance knowledge at all, and accordingly it seems to me that, in reason, the Court had very good ground for holding that that was not an adequate compliance with the rule of the statute, and that they were not furnished with the measure of information which enabled the persons interested to scrutinise and judge of the validity of the claim. Accordingly, treating this as a subject-matter upon which the law ought to be settled by a decision, I for my part am disposed to follow the case of *Ballantyne*,¹ which disposes both of the question of the sufficiency of the account and

The objection is one which appears on the face of the claim, and is not within the rule applicable to cases where the objection is latent, that the Court may recall the sequestration or not, upon general grounds of expediency—*Mitchell v. Motherwell* (1888), 16 R. 122.

"For the same reason, I think the plea of acquiescence in the sequestration, through Messrs Riddell having voted in the election of trustees, must be rejected. This question also arose in the case of *Ballantyne v. Barr*, and was so decided by the Court, distinguishing it from *Ure v. M'Cubbin* (1857), 19 D. 758.

"I therefore recall the sequestration. The expenses of the petition itself cannot be allowed—*Smith Brothers & Co.* (1860), 23 D. 140; and with regard to the expenses caused by the opposition, I think that in the circumstances none should be awarded."

¹ *Ballantyne v. Barr*, Jan. 29, 1867, 5 Macph. 330, 39 Scot. Jur. 149.

² *Ure v. M'Cubbin*, May 28, 1857, 19 D. 758, 29 Scot. Jur. 353.

³ *Ballantyne v. Barr*, *supra*, note 1; *Tennant v. Martin & Dunlop*, March 6, 1879, 6 R. 786, *per* Lord President Inglis at p. 788; *Mitchell v. Motherwell*, Nov. 22, 1888, 16 R. 122.

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also of the legal result. For if this be not a claim vouched in terms of the statute, then the sequestration should not have been granted, and it is not a matter of discretion, but of right, that the sequestration should be recalled.

LORD ADAM concurred.

LORD M'LAREN.—My opinion does not affect the decision of this case, but it is right that I should indicate the grounds upon which it proceeds. The statute requires that the petitioning creditor should supplement his affidavit of debt by production of the account and vouchers instructing the claim. That has been, I think, quite correctly interpreted to mean that he must produce the account of his claim, and the vouchers, if any. Of course there could not be any in the case of an account of goods sold. The question therefore is whether the account is correctly stated. Now, in my opinion, the account in this case is a perfectly good account. It is stated in the form in which accounts are usually rendered by one dealer to another, and no doubt it is just a transcript of the account in the creditor's ledger. The objection made is that there is not a description of the goods supplied under each item. I think such description is not necessary to the correctness of a business account, and although there is a case to the contrary decided in the other Division of the Court, I do not think it necessary to suppress my opinion in deference to a single decision.

If the question were one of mere form I should say nothing. The decision would only involve the presentation of a new petition for sequestration. But the point is of substance, because one important object of a sequestration is to prevent the acquisition of preferences, and of course such may have been acquired if the existing sequestration is cut down. Now, a bankrupt might be induced to present an application for sequestration on an imperfect account knowing that the other creditors would rely upon it, and a secured creditor might in the meantime acquire a preference contrary to the spirit of the bankruptcy laws.

LORD KINNEAR.—I agree with your Lordship in the chair and Lord Adam. I think that the question is ruled by the case of *Ballantyne v. Barr*,¹ and that we are bound to follow that decision. This is a branch of law in which it is extremely important that rules of practice once authoritatively laid down should be fixed, and that the Sheriffs of this country would be placed in a difficult position if the decisions in this Court varied from time to time. I think we should follow the decision in *Ballantyne*,¹ and I confess I do not see any ground to doubt the soundness of that decision.

THE COURT adhered.

ALEX. MORISON, S.S.C.—CAIENS, M'INTOSH, & MORTON, W.S.—Agents.

No. 11.
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Tosh v.
Ferguson.

MRS MARTHA FERGUSON OR TOSH AND ANOTHER, Pursuers
(Respondents).—*J. A. Reid*.

WILLIAM FERGUSON, Defender (Appellant).—*Sym.*

Process—Appeal for jury trial—Proof—Remit to Lord Ordinary—Judicature Act, 1825 (6 Geo. IV. c. 120), sec. 40.—In an action of account—

ing raised in a Sheriff Court the defender, having appealed under the 40th section of the Judicature Act, 1825, moved for a proof in the Court of Session. The pursuer submitted that the case should be sent back to the Sheriff Court for proof. No. 11.
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Held that the proper course was to take the proof in the Court of Session, there being no circumstances rendering the case specially suited for trial in the Sheriff Court.

THIS was an action raised in the Sheriff Court of Forfarshire at the instance of Mrs Martha Ferguson or Tosh and her husband against William Ferguson, farmer, Glen Prosen, her father. The pursuers craved decree ordaining the defender to account for his intromissions with the funds of the female pursuer, and in particular with a sum of £486, of which he was alleged to have had the custody, and with which he was alleged to have intromitted, between 1889 and 1896. 1st DIVISION.
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farshire.

Proof having been allowed in the Sheriff Court, the defender appealed under the 40th section of the Judicature Act; and, after stating an objection to the relevancy, moved, in the event of that objection not being sustained, for a proof in the Court of Session.

He argued;—It was competent for the Court to treat the case as if it had originated in the Court of Session, and there being no circumstances rendering the case peculiarly adapted for trial in the Sheriff Court, the proper course of procedure was that proof should be taken before a Judge of the Court of Session.¹

Argued for the pursuers;—The case was suitable for trial in the Sheriff Court, and could be more conveniently and inexpensively tried there. The case not being suited for jury trial should therefore be remitted to the Sheriff for proof.²

LORD PRESIDENT.—At this time of day it is of course impossible to dispute that the Court has power to send back to the Sheriff Court for trial there a case appealed under the 40th section of the Judicature Act. But then it is necessary to observe that that has only been done where circumstances could be pointed to which rendered the Sheriff Court peculiarly appropriate as a tribunal for ascertaining the facts. Now, in this case I do not think that Mr Reid has succeeded in pointing to any such specialties. It is a substantial case; it has not more local colour than belongs to other questions of disputed fact; and there are no greater facilities in the Sheriff Court for its determination than here. Accordingly, I think that, having regard to the authorities, the proper course is to have a proof in the Court of Session, and I suggest that it should be remitted to the Outer-House, and in the Outer-House to Lord Kincairney.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT remitted to Lord Kincairney to take the proof.

REID & GUILD, W.S.—MACRAE, FLETT, & RENNIE, W.S.—Agents.

¹ *Cochrane v. Ewing*, July 20, 1883, 10 R. 1279; *Willing & Co. v. Hays & Sons*, Nov. 15, 1892, 20 R. 34; *Crabb v. Fraser*, March 8, 1892, 19 R. 580; *Willison v. Petherbridge*, July 15, 1893, 20 R. 976.

² *Bain v. Countess of Seafeld*, Feb. 13, 1894, 21 R. 536.

No. 12.

Oct. 28, 1896.
Sangster's
Trustees v.
General
Accident
Insurance
Corporation,
Limited.

of his representatives. I do not think that a fair way of reading the contract, because the general words "or otherwise wilfully, wantonly, or negligently exposing himself to any unnecessary danger," follow an enumeration of specific cases, and the kind of case intended to be embraced by the general words must be such as the cases specifically enumerated. Now, the characteristic of the specifically enumerated cases is this, that in them the danger was obvious. It was not that the thing might be dangerous according as the circumstances on subsequent examination turned out, but the thing itself must be dangerous. For example, "travelling by rail in any other than a passenger carriage," or "acting in violation of the bye-laws of a railway or tramway company," or "riding horse or cycle races or steeple-chases," all these things have got danger written on the face of them, and it does not depend upon an examination and analysis of the circumstances whether they are found to be dangerous or not, but they are seen to be dangerous. All that can be said in the present case is that the deceased did not sufficiently realise the cold of the water, or his own capacity to stand cold, or that the boat was so constructed that it would be difficult to get into it without assistance. Whatever view as to the state of the facts the reclaimers choose to take—and they have left the matter rather vague—they are not able to say that what the deceased did was of itself a dangerous operation, or rather, I should say, they are not able to shew that it was seen to be, or was obviously, a dangerous operation. Accordingly, I think the circumstances of the case will not sustain the contention of the reclaimers, and I thoroughly concur in the judicious view of the case taken by the Lord Ordinary.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

WM. RITCHIE RODGER, S.S.C.—MILL, BONAR, & HUNTER, W.S.—Agents.

No. 13.

Oct. 29, 1896.
Somerville v.
Hardie.

THOMAS FERGUSON SOMERVILLE, Pursuer (Appellant).—

A. S. D. Thomson—Munro.

WILLIAM BURNETT HARDIE, Defender (Respondent).—*D. Dundas.*

Reparation—Negligence—Unfenced hatchway in shop.—A small shop had a counter on one side extending 8 feet from the door, but the part intended for customers was only the 5½ feet nearest the door. At this distance from the door a barrier was formed across the shop by a box 2 feet wide placed close to the wall opposite the counter, and by the hinged lid of an open hatchway 3 feet square which fenced the hatchway from the front shop. The space between the edge of the lid and the counter, 11 inches, was kept open as a passage for the shopman. The side of the hatchway adjoining the passage was not fenced.

A customer on entering the shop found the shopkeeper engaged with another customer, and the shopboy standing near the door. He playfully took the latter by the ear and led him to the narrow passage leading to the back of the shop. The boy then went round to the back of the counter and the customer stood in the narrow passage joking with him. On turning to leave it he fell into the hatchway and was injured.

In an action of damages brought by the customer against the shopkeeper, *held* (1) that the defender was in fault in not having the hatchway sufficiently fenced, and (2) that there was no contributory negligence on the

part of the pursuer,—*diss.* Lord Moncreiff, who held that if there was fault on the part of the defender there had been contributory negligence on the part of the pursuer. No. 13.

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THOMAS FERGUSON SOMERVILLE, pattern-maker, Glasgow, brought this action in the Sheriff Court at Glasgow against William Burnett Hardie, ham-curer, Glasgow, for damages for injuries sustained by the pursuer from falling into a hatchway in the floor of the defender's shop. The pursuer pleaded that the defender was in fault in not having the hatchway fenced. 2^D DIVISION.
Sheriff of
Lanarkshire.

The defender pleaded ;—(1) The accident to the pursuer having been the result of his own negligence and carelessness, the defender should be assolizied, with expenses. (2) The pursuer having by his own negligence contributed to the accident in question, defender is entitled to absolvitor.

The following facts were proved :—The defender's premises consisted of a small shop with one window, and a counter 8 feet in length along one side. The only part of the counter intended for customers was the 5½ feet next the door. At this distance from the door the front shop was separated from the back of the shop by a heavy box 2 feet wide, placed against the wall opposite the counter, and by the hinged lid of a hatchway 3 feet square, which stood open and rested for a few inches on the box and fenced the open hatchway behind from the front shop. Between the edge of this lid and the counter a narrow passage of 11 to 12 inches was left for the use of the shopman as an access to the back of the shop. There was no fence between the open hatchway and the narrow passage.

On the occasion in question the pursuer and a friend on entering the shop found the shop-assistant Knox, a boy of fourteen, standing at the door. The defender was in the shop attending to a female customer. The pursuer addressed Knox in a playful manner, and asking him if he had no work to do, he took him by the ear and led him from the door to the narrow passage. Knox went behind the counter by the narrow passage past the hatchway. The pursuer, standing in this passage, continued to laugh and jest with Knox until the woman was served, when he turned in order to approach the defender. In doing so he fell into the hatchway and dislocated his shoulder.

It was proved that on a previous occasion a little boy who had visited the shop as a customer fell down the hatchway.

The details of the evidence are given in the opinions of the Judges.

The Sheriff-substitute (Balfour), after finding the facts above stated, proceeded :—“ Finds that there was abundant space for the pursuer and his friend to stand at the counter alongside the female customer without coming in contact with the hatch : Finds that there were no goods lying for sale on the counter, but they were exposed for sale at the window : Finds that the narrow passage between the hatch and the counter is about 12 inches broad, and that the passage is not intended for customers at all, and there was no occasion for the pursuer going into that passage to make his intended purchase : Finds that the trap-door covering the hatch was standing in a vertical position protecting the end of the hatch, and it was kept in position by a box 3 feet long and 2 feet broad, which was placed against the wall of the shop and against a portion of the end of the trap-door, all as shewn on the plan : Finds that the pursuer was not drunk, but he was affected by liquor, having had a glass of whisky and a glass of beer immediately before the accident, and he was in a frolicsome humour : Finds that

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on the occasion in question the pursuer, although an ordinary customer of the shop and intending to make a purchase, was not acting as a customer should have acted, but he led both the boy and himself into danger by dragging the boy by the ear into the narrow passage: Finds that to an ordinary customer conducting himself properly the hatch was little source of danger, especially when only three customers had to be served: Finds that the pursuer brought the accident on himself by his frolicsome and irregular conduct, and the defender is not to blame for it: Therefore assolvies the defender from the conclusions of the action, and decerns." *

The pursuer appealed to the Court of Session.

Argued for the pursuer;—(1) The defender was in fault because in that part of the shop to which the public were invited there was an open trap, which was dangerous. The pursuer had a right to stand in the narrow passage as it was in front of the counter, and therefore it was offered to the public as safe for standing.¹ The pursuer was not bound to examine the floor. He was entitled to count on its safety. The hatchway should have been fenced, especially as it was usual to have it open for ventilation.² Accordingly (2) the pursuer had not been so negligent as to have lost his remedy. Even if the evidence for the defender were believed, the pursuer was entitled to prevail. The Sheriff-substitute attributed the accident to the foolish behaviour of the pursuer, but it was clear that any frolic on his part was over before the accident occurred. When he fell he was behaving like any ordinary customer. Ordinary care would not have saved the pursuer, and therefore, even if he had been negligent, he still could sue, as the main cause of the accident was the negligence of the defender.³

Argued for the defender;—The shopkeeper was bound to provide a safe floor, but the customer was also bound to take reasonable care. The defender had taken sufficient precaution to protect customers from falling down the trap, and only great carelessness, against which he was not bound to provide, would result in such injury. It was such carelessness to enter the narrow space between the counter and the hatchway. A customer had no occasion to do so on business. There were no goods exposed on that part of the counter. The pursuer had no business or excuse to be there. There was room for him to stand

* "NOTE.—If I believed the pursuer's story I would probably find the defender liable in damages. If he had acted as an ordinary customer on the occasion, and had got into the narrow space between the hatch and the counter while waiting to be served, I think the defender might have been liable for his falling into the hatch, because a customer should not have been allowed to stand in the narrow space without at least being cautioned. But I have no confidence whatever in the pursuer's story, and I believe entirely in the version of the facts given by the defender and his witnesses. It would be absurd to hold that where a man goes into a shop and drags the shopboy by the ear into a passage near a hatch which is not intended for customers, the shopkeeper is liable in damages for his falling down the hatch. There was no occasion for the pursuer to be in that part of the shop at all. There was plenty of room for him at the counter, away altogether from the hatch, and he got into the narrow passage through his own silly conduct."

¹ Brady v. Carter, June 7, 1887, 14 R. 783, per Lord Craighill, p. 789; Prentice v. Assets Co., Limited, Feb. 21, 1889, 17 R. 484.

² Cairns v. Boyd, June 5, 1879, 6 R. 1004.

³ Davies v. Mann, Nov. 4, 1842, 10 M. & W. 546.

at the counter in the front of the shop. Besides the place was sufficiently fenced. The hatch in an upright position was a sufficient obstacle, or at least a warning. The narrowness of the footway past it was another call upon the pursuer's vigilance. It was his desire for a frolic which blinded him to such patent warning, and the consequences should fall on him. Such carelessness took the case out of the rule of *Davies v. Mann*,¹ and it would be a hardship on the defender to hold that he should have provided more elaborate fencing.

At advising,—

LORD JUSTICE-CLERK.—(After describing the shop and the position of the trap-door)—The first question which we have to consider is, was that a proper state of things, so that if a person who was present as an ordinary customer fell through the trap-door no blame would attach to the owner of the shop? I have given this question careful consideration, and have ultimately come to be of a definite opinion that it was not a proper state of things. Any customer coming into the shop would find a box upon the floor supporting a board, and suppose there were people filling up the shop, or suppose he had to give way to other customers coming in, he might quite well move up the shop with his face to the counter, and get between the counter and this board, without any idea that there was a pit open behind his feet. There was no protection to keep such a customer from falling into the hatchway except the board and a box which kept the board upright. The hatchway was necessarily in shade owing to the position of the counter, which came between it and the window, and the board itself, which came between it and the glass door. There was therefore nothing to call the attention of a customer to the fact that there was a hole in the floor. Indeed, that seems to have been the view of the Sheriff-substitute, for he says, "If he (the pursuer) had acted as an ordinary customer on the occasion, and had got into the narrow space between the hatch and the counter while waiting to be served, I think the defender might have been liable for his falling into the hatch, because a customer should not have been allowed to stand in the narrow space without at least being cautioned." I agree in that. I hold that an ordinary customer standing where the pursuer did, and falling into the hole, would have had a good claim against the defender.

The only remaining question therefore is, whether the pursuer did anything that deprives him of that claim. Now, the allegation is that he was not in a fit state to look after himself; that he had been drinking, and that accordingly he himself was to blame for the accident that occurred to him. That is a charge which must be clearly proved. I am of opinion that it is not proved. The Sheriff-substitute does not hold that it is proved, and the evidence does not support it. The woman who was in the shop says, "I did not see anything in his conduct to show that he was the worse of drink, except that he was carrying on, and coming in arm-in-arm with the other man to the shop, and then laughing and joking at the other end of the counter." There is no counter evidence. But in my opinion the strongest, and indeed the conclusive evidence on this matter is that of the doctor who examined him immediately after the accident. He has necessarily experience

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¹ 10 M. & W. 546.

No. 13. in such matters. It is his business to look into such cases and to distinguish drunkenness from other causes of confusion. He says that the pursuer was perfectly sober, and there is evidence that such was his own belief at the time, because he put the pursuer under chloroform, which he says he would not have done if the pursuer had been the worse of drink. The pursuer therefore was not unfit to look after himself.

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It is said that he was in a frolicsome humour, and took the shop-boy by the ear. But it may very well be that he may have done so without being drunk, and without doing anything to deprive him of his claim against the defender if the defender was in fault. To take a boy by the ear in a frolicsome humour is not fault or negligence. It is not disputed that the pursuer came into the shop to buy. He says he moved up the counter a little to let a woman in to the counter who was beckoned forward by the defender. It may be that this was not necessary, but he may have moved so as to give her more room. When he had moved up he still stood at the counter although the hole of the hatchway was just behind him. Now, when he was standing waiting to be served as a customer at the counter, in such a position, as the Sheriff-substitute says, he should have been cautioned. He certainly should have been cautioned by the defender or his assistant, who, it is proved, saw him standing there and was speaking to him at the time. But he was allowed to stand in such position that by moving his foot slightly he fell into the hole. It was certainly no reason for not cautioning him that he was in a frolicsome humour and had taken a boy by the ear.

I am therefore unable to hold that the shop was in a proper condition, and I am also unable to hold that, if the defender would have been liable to an ordinary customer, the pursuer did anything to deprive him of his claim.

I have considered the question of damages, and I would move your Lordships to award the sum of twenty-five pounds.

LORD YOUNG.—This is a case of the kind and class in which we are especially unwilling to interfere with the judgment of the Sheriff-substitute. Having, as the result of the hearing, formed an impression adverse to his judgment in this case, I have considered the case with care and anxiety, reading the evidence carefully. The impression which I formed after the argument has been confirmed into a distinct opinion that the judgment is erroneous and cannot stand.

With reference to the question—which is the first question in the case—whether the floor was in a safe condition—that is, safe for customers who were entitled and invited to come into the shop—there is in my opinion no room for doubt. The Sheriff-substitute himself is of opinion that the floor of the shop was not in a proper state. He says, no doubt, that “to an ordinary customer conducting himself properly the hatch was little source of danger, especially when there were only a few people in the shop,” but he is of opinion that the shop was not in a safe condition. It was a small shop. I do not need to describe the hatchway, but it was situated only 11½ inches from the counter, and the only but quite distinct and reliable evidence is to the effect that it was dangerous, and that evidence is

uncontradicted. That is the evidence of Robert Hay, the architect who made the plan. He says,—“If there was a box on which the hatchway door was resting, that would mislead customers. I would consider that if the hatch was to be left open during business hours it would be dangerous to customers. That danger could have been obviated by putting something in front of the opening between the counter and the hatchway, so that it would have been impossible for the customers to get through.” The defender explains why the hatchway was left open, and why nothing was done to prevent customers getting into the narrow space. He says,—“The narrow space is not intended for customers at all; we need it for ourselves; but I fancy nobody would attempt to go through there. I cure my hams down stairs. For ventilation purposes that hatchway is open night and day, unless when we are getting in anything, and we then require to put it down to let the goods get past, but after that it is put up again.” But it was used as a passage. The defender says he used to walk sideways between it and the counter, but he did not expect customers to do so, but a customer did do so. I think this was a dangerous state of matters. If a customer coming in failed to see the hole, or omitted to remember that there was a hole, and came along the counter as far as the narrow place, if he attempted to turn when he was in that position it might have cost him his life. In the present case the pursuer only dislocated his shoulder, but his injuries might have been much more serious, and even fatal. That is a danger to which customers ought not to be exposed.

Of course a customer may deprive himself of his right to claim damages for injuries resulting from the faulty condition of the shop if such injuries are attributable to notable misconduct or impropriety of conduct on his part. I do not think the pursuer was guilty of any such conduct on this occasion. I would not be inclined to characterise his conduct as even frolicsome. But even if it could properly be so characterised, I do not think that the taking of a boy by the ear would be notable misconduct of such a class as to prevent him from suing for damages for injuries caused by the state of the floor. What are the facts? It appears that the pursuer came into the shop to buy some lard. Before he came in the defender and the shop-boy were playing dominoes. When the woman came in they left off playing dominoes. The boy says he went to the door to talk to a friend. When the pursuer came in and found the boy outside he seems to have used a word of which we cannot approve, and told him to go on with his work. But that was not such impropriety of conduct as to deprive him of his claim against the defender. Then he caught hold of the boy by the ear. The Sheriff-substitute uses the expression “dragging the boy by the ear.” That was not proper language to describe what happened. So far as appears, the boy was not hurt at all. The woman White says the pursuer was “laughing and joking at the end of the counter” with the boy. The boy went round inside, and the pursuer remained on the other side and was laughing with the boy. The master was there and saw them, and he did not say, “Come out of that passage, it is only for our use.” The pursuer took up a knife and drew it along the counter. The Sheriff-substitute says he was carving on the counter, but that was quite an exaggeration. The pursuer, in all that he did, was not acting like a drunk man or a man

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affected by drink. What happened was, that as he was standing at the counter joking with the boy, and waiting to be served, and not knowing, or not remembering, that there was an open hatchway behind him, he put back his foot and met with his accident. It is not doubtful that he met with the accident in consequence of the state of the floor. As I have said, I think the state of the floor was dangerous. I do not think that his conduct was characterised by any such impropriety as would deprive him of his claim to damages for the accident. In accordance, therefore, with your Lordship, and in accordance with the Sheriff-substitute, and with the only evidence on that matter in the case, I think that a hatchway open to a passage which was open to customers was dangerous and improper. Affirming that proposition, and negating the proposition that there was any such impropriety in the conduct of the pursuer as to deprive him of his claim, I am bound in law to hold that he is entitled to damages from the defender for the injuries he has sustained. I think the sum of £25 is a very moderate amount at which to assess these damages.

LORD TRAYNER.—If I could concur in the finding of the Sheriff-substitute that the “pursuer brought the accident on himself by his frolicsome and irregular conduct,” I should probably concur in his judgment absolving the defender. But I think the Sheriff-substitute’s finding is wrong. The pursuer’s conduct may perhaps be described as frolicsome and irregular, but I can find no connection between it and what subsequently happened. The frolic with the boy had ceased before the accident in question took place, and the accident was not the result of the frolic. The frolic, perhaps, led the pursuer further into the defender’s shop than he would otherwise have gone. But it did not take him beyond the area of the shop, nor to any part of the defender’s premises to which he might not legitimately go as an ordinary customer. He was still in front of the counter at which the defender did business with his customers, and there was nothing to bar the pursuer from taking, as a customer, the position which he did. I think the defender was to blame in having an unprotected open hatchway in his shop, to which all concerned were invited to come. He knew it was dangerous, because a boy had fallen into it before. I think, therefore, that the defender is liable for the damage suffered by the pursuer, and I agree with your Lordship as to the amount which should be awarded.

LORD MONCREIFF.—I am of opinion that the Sheriff’s judgment should not be disturbed. It is possible that a customer might have been elbowed into the narrow passage between the counter and the trap without being aware that he had left the safe part of the floor, and that the trap was open behind him, and might thus, without fault on his part, have fallen backwards and been injured. Even this is improbable, at least in the case of a grown man, the entrance to the passage being so narrow—only $10\frac{1}{4}$ to $12\frac{1}{2}$ inches. If such an accident had occurred we should have had to decide whether the defender was in fault in leaving the trap open.

But in this case, even assuming fault on the part of the defender, the pursuer, with the exercise of ordinary care, might have avoided the risk. He must, or should, have seen the open lid off the trap; and as he could only go into the narrow passage sideways, he must have squeezed himself in

deliberately, not in order to be served at the counter, but as I read the evidence, to continue his jokes with the boy. I think it sufficiently appears that the passage was not a place where customers were invited or intended to stand. I must add that I do not think it proved that the pursuer was the worse of drink. No. 13.
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It is a fair jury question whether this recklessness on the pursuer's part materially contributed to the accident. The Sheriff thought it did, and I see no sufficient grounds for differing from him.

If damages are to be given, I think that the sum proposed is moderate.

THE COURT pronounced this interlocutor:—"The Lords having heard counsel for the parties on the appeal, sustain the same, and recall the interlocutor appealed against: Find in fact (1) that on the occasion in question there was a hatchway left standing open, 11½ inches back from the outer edge of the counter, and 5 feet 6 inches from the inside of the entrance-door of the defender's shop; (2) that the pursuer, when standing at the counter, lost his footing in consequence of the hatch being open, and fell down the hatchway; (3) that his shoulder was dislocated by the fall, and that he received a severe shock to his system; and (4) that the pursuer's fall was due to the fault of the defender in leaving the hatchway open and unguarded: Therefore find the defender liable to the pursuer in damages, and assess the same at the sum of £25, for which decern against the defender: Find the pursuer entitled to expenses in this and the inferior Court," &c.

DAVID FORSYTH, Solicitor—J. GORDON MASON, S.S.C.—Agents.

ROBERT MACFARLANE MITCHELL AND OTHERS (M'Morland's Trustees), No. 14.

Pursuers (Reclaimers).—*Vary Campbell—Wilson.*

WILLIAM FRASER AND OTHERS, Defenders (Respondents).—

D.-F. Asher—Ure—McClure.

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Company—Shares—Prospectus—Application for shares "on the faith" of the prospectus—Fraud—Proof—Onus—Companies Act, 1867 (30 and 31 Vict. c. 131), sec. 38.—The Companies Act, 1867, section 38, enacts that any prospectus of a company which does not specify any contract entered into by the company or its promoters before the issue of such prospectus "shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

A person applied for shares in a joint stock company on a form which requested allotment "upon the terms of the prospectus," and shares were allotted to him.

In an action brought by his representatives against the directors for declarator that the prospectus was fraudulent within the meaning of section 38 of the Companies Act, 1867, in respect that it did not specify a certain agreement, the pursuers, to shew that the deceased had applied for the shares on the faith of the prospectus, founded on the terms of his application, and proved that the prospectus had been widely advertised in Glasgow, where the deceased was living. There was no direct evidence that the deceased had read the prospectus. The defenders proved that the deceased had applied for the shares in reliance on the advice of one of the directors who was a personal friend.

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Held that the pursuers had failed to prove that the shares had been applied for on the faith of the prospectus, and that section 38 did not apply.

Company—Application for Shares—Fraud—Concealment of material facts by director who was also vendor to company.—In an action raised by the representatives of A, a deceased coalmaster against one of the directors of a colliery company, which had gone into liquidation, for damages on the ground that the deceased had been induced to take shares in the company by fraudulent representation and concealment on the part of the defender, it was proved—that the deceased, who was an intimate friend of the defender, applied to him for his opinion as to whether the shares of the company were a good investment; that the defender said that the best answer he could give was that he had himself invested in it, and that he had examined the coalfield, and was satisfied that the supply of coal was unlimited and of the best quality, and near shipping ports,—and that these statements were true;—that the defender did not inform the deceased that the coalfield had been bought by him and the other directors (who were described in the prospectus as the vendors) for £30,000, and had been sold to the company for £60,000. It appeared from the report of a mining engineer printed with the prospectus that the collieries were of the value of £60,000, but that it would require a preliminary outlay of £58,000 to develop them properly. It was proved that about a year after the shares were taken by A, two of the directors who were very large shareholders fell into financial difficulties, and that thereafter sufficient capital could not be obtained for the development of the colliery, and the company went into liquidation.

Held that the proof shewed that there was no fraudulent misrepresentation or concealment on the part of the defender.

2D DIVISION.
Ld. Kyllachy.

ON 30th June 1892 James and William Wood, coalmasters, Glasgow, carrying on business under the firm name of James & William Wood, lessees of the Bryndu Cefu and Glyn Collieries in South Wales, by minute of agreement sold their rights in the leases and the collieries to the said James and William Wood, as individuals, and to George Anderson and William Fraser, for the sum of £30,000, the purchasers to take possession at 1st July 1892. It was afterwards arranged that James M'Killop should join in this speculation, and on 18th August 1892 an agreement was executed in terms identical with that of 30th June, except that M'Killop was named as one of the purchasers, the term of entry being stated to be as at 1st July 1892.

On the same day, 18th August 1892, a minute of agreement was entered into between (1) these five persons, on the first part, as vendors, and (2) Robert King, coalmaster, Glasgow, on behalf of a limited company intended to be formed, with the name Bryndu Coal and Coke Company, Limited, for the sale of the vendors' rights in the collieries at the price of £60,000. It was agreed that the vendors should be deemed to have carried on the business for the company from 1st July 1892.

On 22d August 1892 a prospectus was issued,* in which Messrs

* The prospectus stated that the capital of the company was fixed at £180,000, in 18,000 shares of £10 each, of which 9000 were six per cent cumulative preference shares, and 9000 were ordinary shares.

Further, that "the vendors, who are the promoters of the company, have fixed the price to be paid by the company for the collieries, including leases, pits, machinery, goodwill, and all plant belonging to them on the leaseholds, at £60,000, payable as to £30,000 in 3000 ordinary shares, fully paid up, and the balance of £30,000 in cash. The business will be taken over as at 1st July 1892, from which date all profits will belong to the company. The vendors will receive interest on the portion of the purchase price, payable

James and William Wood, Anderson, Fraser, and M'Killop were No. 14. named as the directors, and also as the vendors.

At a meeting of the directors held on 5th September 1892, it was agreed that the vendors would waive their right to a dividend on their shares for a period of five years, unless a dividend at the rate of 7½ per cent per annum should be paid on the ordinary shares. At that meeting it was also determined to proceed to allotment, and 4012 preference and 1392 ordinary shares were allotted accordingly.

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On 20th October the directors met to consider the financial position of the company, and being of opinion that £30,000 additional capital was required to work the mines, they agreed respectively, in certain proportions, to take, or get their friends to take, ordinary shares to that amount. At this time the total number of shares taken up, including those which the directors had agreed to take, was 11,400, representing a capital of £114,000, of which £60,000 fell to be deducted as the price of the collieries, leaving £54,000 for working capital, development, &c.

On 26th October Mr Patrick M'Morland, coalmaster, Glasgow, applied for 400 shares, and they were allotted to him on 10th November, "in terms of" his application.*

Owing to insufficient capital for the development of the colliery, the company went into liquidation in the end of 1894, and there was no prospect of any return to the shareholders.

In November 1895 Robert Macfarlane Mitchell and others, the testamentary trustees of Mr M'Morland, who died in April 1893, raised this action against William Fraser, James M'Killop, and Robert Alexander Murray, C.A., Glasgow, trustee on the sequestrated estates of James and William Wood, (1) for declarator that the prospectus of the company was fraudulent on the part of the defenders Fraser and M'Killop and of James and William Wood, within the

in cash as before mentioned from that date until payment, at the rate of 5 per cent per annum. The book and other debts of the business, and the liabilities connected therewith up to 30th June 1892, will be received and discharged by the vendors. The following contract has been entered into, viz. :—An agreement, dated the 18th August 1892, between James Wood, William Wood, William Fraser, George Anderson, and James M'Killop, on the one part, and Robert King, coalmaster, Glasgow, as trustee on behalf of the company, on the other part. The vendors will provide all preliminary expenses incidental to the purchase of the company, up to and including registration. There are also various contracts connected with the properties as a going concern, which it would be inexpedient to publish, and all applicants for shares must be deemed to waive the insertions of dates and names of the parties to any such contracts as may be required under section 38 of the Joint Stock Companies Act, and to accept the above statements as a sufficient compliance with the Act."

A report by Mr Geddes, mining engineer, printed in the prospectus, stated that the collieries were of the value of £60,000, but that an outlay of £58,000 would be required for their development.

* The application was as follows :—"To the Directors of the Bryndu Coal and Coke Co., Ltd.—Gentlemen,—Having paid to your bankers, the Commercial Bank of Scotland, Limited, or the National Provincial Bank of England, Limited, the sum of £1000, being a deposit on 400 ordinary shares of £10 each of the above company, I request you to allot the same to me upon the terms of the prospectus dated the 22d August 1892 . . . and I declare that I waive any fuller compliance with section 38 of the Companies Act, 1867, than that contained therein, and all my rights and remedies (if any) in connection therewith whether under the said section or otherwise."

No. 14. meaning of section 38 of the Companies Act, 1867,* and was issued by them or on their behalf, and that they were bound, jointly and severally, to make reparation for the damage sustained by M'Morland by taking shares in the company on the faith of the prospectus; (2) for payment by the defenders Fraser and M'Killop of £5000; and (3) for declarator that this sum was a just and lawful debt of James and William Wood.

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The pursuers averred;—(Cond. 6) "On the faith of said prospectus and the statements contained therein, the said deceased Patrick M'Morland applied for and was allotted 400 ordinary shares of £10 each of the company, and he paid thereon £4000. His application, which was dated 26th October 1892, especially bears to be made 'upon the terms of the prospectus dated the 22d August 1892, and the memorandum and articles of association of the company.' . . . The letter of allotment, dated 10th November 1892, proceeds 'upon the terms of your application.' The application was made in a printed form issued by the defenders, and which accompanied the prospectus. Mr M'Morland had received and seen a prospectus before he applied. . . . The company, about October 1892, was, as now appears, suffering from having started with too little capital available for actual work after deducting the promotion money. The defenders were all alike anxious to raise more capital, and they mutually agreed and resolved to get persons whom they or any of them knew or could influence to join their company on the faith of the prospectus. The defender Mr M'Killop thereupon, acting for himself and the other defenders, represented to Mr M'Morland, contrary to the facts as then known to the defenders, that the undertaking and arrangements of the company were good, genuine, and satisfactory for an investing shareholder, and that his own personal interest was that of an investing shareholder. . . . Mr M'Morland acted upon the statements in the prospectus conveyed and confirmed to him personally by the defender Mr M'Killop, acting for himself and the other defenders, as aforesaid." (Cond. 11) "The said prospectus was fraudulent within the meaning of section 38 of the Companies Act, 1867, in respect of the failure to disclose the said first agreement of 18th August 1892. It was knowingly issued by the Messrs Wood, and the defenders Fraser and M'Killop and Anderson; and the said deceased Patrick M'Morland took shares on the faith of the prospectus. The said first agreement was a material one to be considered by any person taking shares in the company, and the vendors were bound to set the same forth in the prospectus under and in terms of said Act." (Cond. 12) "The statements in the said prospectus were further false and fraudulent in respect (1) The prospectus set forth that the object of the company was to take over and acquire 'the business now carried on

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by James Wood, William Wood, William Fraser, George Anderson, and James M'Killop, at the collieries known as the Bryndu and Cefu,' whereas, in point of fact, that business had been carried on by James Wood and William Wood alone; and (2) in setting forth that the vendors had fixed the price to be paid for the collieries at £60,000, the prospectus was calculated and intended to represent, and did represent, that that sum had been fixed as the fair value of the collieries, and was to be paid by the company to the proprietors in respect thereof, whereas, in point of fact, the price which they had fixed as the fair value of the collieries to be paid to the proprietors in respect thereof was £30,000. . . ."

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The pursuers pleaded, *inter alia*;—2. The pursuers are entitled under the statute, and also at common law, to decrees as concluded for, in respect (1) the said prospectus was knowingly issued by the defenders Fraser and M'Killop, and the said James and William Wood, and was fraudulent within the meaning of section 38 of the Companies Act, 1867; (2) the said deceased Patrick M'Morland was induced to take shares in said company through the false and fraudulent statements and concealment of material facts made by the defenders Fraser and M'Killop, and the said James and William Wood. 3. The pursuers are, in any event, entitled to decree as concluded for against the defender M'Killop at common law, in respect Mr M'Morland was induced to take shares through the fraud of that defender.

The defence was that there had been no misrepresentation or concealment at common law, and that the contract of 30th June and the first contract of 18th August were not of such a nature as to require disclosure in the prospectus, and that assuming that it should have been disclosed, it fell under the waiver clause in the prospectus, and that Mr M'Morland did not take the shares on the faith of the prospectus.

Proof was led. It appeared that Mr M'Morland was a partner of the firm of James Nimmo & Company, of which Mr M'Killop was also a partner. As delicate health compelled him to spend the winters abroad, he sold his residence in Glasgow in 1890, and after that date when he required to be in Glasgow he lived in the Central Hotel.

It was proved that Mr M'Morland was residing in the Central Hotel from 8th August to 27th August, from 29th August to 1st September, and from 11th October to 27th October in the year 1892, and that the prospectus was largely advertised during the last fortnight of August in the *Glasgow Herald* and other newspapers supplied to the visitors, and that 50,000 copies of the prospectus were circulated to investors and to persons interested in the coal trade.

Mr M'Killop deponed that at Mr M'Morland's request he called upon him at "the Central Hotel in Glasgow on the 26th October 1892. . . . There were several business matters in connection with our colliery which required to be spoken of between us, and I accordingly went and saw him at the hotel on the date I have mentioned. . . . Mr M'Morland then said that he understood I was associated with some Welsh mining concern, and he wanted to know about it; and he asked my opinion about it as an investment, considering the usual mining risks. Of course mining risks are speculative, and I said to Mr M'Morland that the best answer I could give to his question was the fact that I was putting a considerable stake in it myself. I told him that I had looked over the plans, and that I had never in my experience contemplated such an area of workable coal. I explained that there was an illimitable supply of coal, that

No. 14. meaning of section 38 of the Companies Act, 1867,* and was issued by them or on their behalf, and that they were bound, jointly and severally, to make reparation for the damage sustained by M'Morland by taking shares in the company on the faith of the prospectus; (2) for payment by the defenders Fraser and M'Killop of £5000; and (3) for declarator that this sum was a just and lawful debt of James and William Wood.

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it was in thick sections of first-class quality, and very near the shipping ports. Mr M'Morland followed up my statement by saying that he had a disposition to take a share in the concern, seeing that I was associated with it in the way that he understood. He asked me if there were any shares to dispose of, and I said yes, that they had not all been taken up by the public, and he volunteered to go to the Bryndu office with me in order to take out an allotment at once. So far as I saw, Mr M'Morland had no prospectus of the company. I had no prospectus, and there was no allusion made at that conversation at all to the prospectus of the company. Mr M'Morland's willingness to associate himself with the concern was entirely in confidence of my individuality, seeing that I was associated with the mines. (Q.) He had confidence in you? (A.) Well, he had great reason to have confidence in me from past experience. Nothing passed at that meeting at all to indicate that he had ever seen the prospectus, or that he was proceeding to any extent on the facts stated in the prospectus. As far as I could judge, in taking the shares he was proceeding entirely upon the fact of my being associated with the mines. After our conversation Mr M'Morland and I went to the office of the company; he volunteered to go, as he intended to leave Glasgow within a few days. When we got to the office of the company, Mr M'Morland asked for a form to fill up. He sat down to write out the form, and when I asked how many shares he purposed to take out he said 500 shares. I then told him I thought that he should not take out such a number, and that he should restrict himself to not more than 400 shares. He then wrote out an application for 400 shares, and handed it to the secretary." In cross-examination Mr M'Killop stated that he did not mention the unregistered agreement of 18th August 1892, and added,—“I did not think it would have been fair to tell him about that.” He did not tell him of the resolution of the directors on 20th October 1892,* that £30,000 additional capital was required, because he had no reason to doubt that capital would be got. With reference to this meeting, witness further deponed,—“When I entered into that arrangement I had no doubt in my mind that, by the application of capital to this colliery, it could be made a profitable concern. Neither I nor the other directors had any motive or interest to decide to put in an additional £30,000 except to get profit out of the concern. (Q.) At that time had your view to any extent changed as to its being an excellent thing? (A.) It never has changed. I had the same opinion of it in October 1892 as I had when I first decided to go into it, and I had the same view when the company went into liquidation.”

* Minute of meeting of directors, 20th October 1892. All the directors present:—“The directors considered the financial position, and were of opinion that £30,000 additional capital was required to carry out the undertaking at Bryndu, and also to open up new shaft at Glyn . . . and the directors agreed to take or get their friends to take ordinary shares to the extent of £30,000 in the following proportions:—

“ James Wood to the extent of . . .	£10,000
“ William Wood „ „ . . .	10,000
“ James M'Killop „ „ . . .	3,330
“ Wm. Fraser „ „ . . .	3,340
“ George Anderson „ „ . . .	3,330
<hr/>	
“ £30,000 ”	

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Mr Fraser, one of the defenders, deponed,—“I was present at the meeting of 20th October 1892. I am put down in that minute for £3340 worth of shares. That was of course in addition to the 350 shares which had been already allotted to me. I was an assenting party to that arrangement. That was virtually an agreement amongst the directors to put £30,000 more into the concern. As the result of our deliberations at that meeting we had all the greatest confidence in the value of the property if we had the thing developed. (Q.) By the arrangement in the minute to which I have just referred you, you become virtually liable for £3340. In assenting to that arrangement, had you any doubt that you were putting your money into a good concern? (A.) The fact that I had at that stage put between £6000 and £7000 into the concern is the best evidence of my opinion. It was undoubtedly my opinion at that time that I was putting my money into a good concern. As far as I had any means of judging, that was also the opinion of my co-directors who consulted with me and concurred in the minute of 20th October. I took the £3340 worth of shares which I had undertaken by the minute to take, and paid for them myself. All the other directors, with the exception of Mr Anderson, carried out their part of the minute and put into the concern the money which is opposite their names, by themselves or their friends.

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(Q.) When did you begin to find out that the Woods' financial position would not enable them to contribute so much towards the development of the colliery as you had expected? (A.) When we got to the point where £7, 10s. had been paid on the shares and the next call became due, we discovered that the Woods were not in a position to meet that call. I should say that was in July 1893, about a year after the formation of the company. The Woods had large commercial enterprises going on at different places, including very extensive collieries over the west of Scotland, and up till that date everybody had regarded them as men with a very large amount of capital. When we discovered that they could not meet this last call on their shares, Mr M'Killop and I took over the shares they had, and paid the calls upon them which were then due. (Q.) Did this failure on the part of the Messrs Wood to continue to take their part in financing the company seriously disturb your arrangements within the company for financing it? (A.) It was the failure of the Messrs Wood that was the sole cause of the failure of the Bryndu Company. They were of course by far the largest holders of stock amongst the directors. After that the question of providing further capital from time to time engaged the attention of the directors. (Q.) Did they ultimately find that they were not in a position to obtain the amount of capital necessary for the development of the colliery? (A.) Mr M'Killop and I felt the whole burden to rest upon ourselves, and we felt ourselves quite unequal, in view of what we had already sunk in the business, to go further with the thing, and we appealed to the shareholders to assist us with the necessary capital to complete the development, but the shareholders declined, and hence liquidation followed. My opinion is still the same, that if the development had been carried through, as foreshadowed in the prospectus, the collieries would have been highly successful.”

Mr Thomas Russell, solicitor, Paisley, deponed that he prepared the agreement of 30th June 1892; that he asked the parties to it whether it was their understanding that it should be a binding agreement whether a company was formed or not, and that they said that it was;

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and in regard to the prospectus, he deponed,—“I acted as law-agent in the matter. I considered whether the agreement of the 30th June fell to be mentioned in the prospectus or not. My opinion was, that as the parties at the time were neither directors nor promoters, it was not necessary to refer to the agreement of 30th June in the prospectus. I also considered the question with regard to the agreement of August, and my opinion was that as it was the same agreement, the same in substance, with the mere addition of a name, it could not affect the matter. I got no instructions of any kind from any of the parties as to either putting in or keeping out that agreement from the prospectus. That was a matter which was entirely in my hands as law-agent, and the question was never put to me.”

The following letters from Mr M'Morland to his law-agent, Mr Taylor, were produced:—“London, 17th Nov. 1892.—I have yours of the 11th. I told Mr M'Killop to call on you to explain matters about the Bryndu Colliery, which I thought he would have done, otherwise I would have written you about it. I only fixed the 400 shares on the eve of starting for London. You might drop him a note the first time he is in town to call on you, when he will give you full particulars. From what he says and assures me of his personal knowledge with regard to everything connected with the colliery seems very good. Of course a good deal depends upon the management, but from what I hear, both from himself and others, I have reason to believe it will be a good venture. Mr M'Killop is a director, and has personally examined the mines, and finds them in every respect satisfactory. The quality and thickness of seams good, and within easy access of Cardiff for shipment, being only eight miles, which is a great advantage. Therefore, if well managed, I don't see why it should not pay well. However, that is to be seen in the future. I wired you to pay the first call on allotment, which I presume you have done.”

“London, 23d Nov. 1892.— . . . Regarding the Bryndu Colliery, I have written M'Killop to call on you and explain matters, which I have no doubt he will do when in town. I have reason to believe from all accounts it is a good genuine venture. Had Mr Mac. not been interested and surveyed the mine for himself, I would not have put a penny into it, as I don't believe much in mining unless the subjects are good, from good authority, and also the management. He will give you a prospectus, and give you all particulars.”

On 6th June 1896 the Lord Ordinary (Kyllachy) assoilzied the defenders.*

* “OPINION.—The pursuers here sue for damages in respect that their author, the late Mr M'Morland, was induced to take shares in a certain mining company by the fraud of the defenders, who were the promoters and vendors, and also the whole directors of the company. The leading ground of action is that the defenders failed to disclose in the prospectus a certain contract—or, rather, two contracts—which, according to the pursuers, ought to have been disclosed in terms of section 38 of the Companies Act of 1867. The pursuers also allege a case of misrepresentation or concealment at common law. Now, I have not found it necessary to decide the somewhat difficult questions upon the construction of the 38th section of the Act of 1867, which were raised and argued at the debate. The contract of 18th August 1892 (following on the previous contract of 30th June 1892) is one as to the duty to disclose which I should have had little doubt, but for one circumstance, and that is, I think, the somewhat unusual circumstance that in this case the promoters and directors are themselves disclosed as

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The pursuers reclaimed, and argued ;—*On the statute*.—In buying his shares M'Morland relied on the statements in the prospectus. As a man engaged in business akin to that of the company, he must be taken to have seen and read it in one of the numerous forms in which it was circulated. On M'Killop's evidence it was clear that M'Morland knew of the company, and the natural inference was that he had seen the prospectus. His letters pointed in the same direction. This application was made on the form attached to the prospectus, and he bought upon the terms in the prospectus, which warranted the inference that he had read it, especially in a question with the defenders, who, since they were bound by its terms, were barred from denying the inference. The inference was enough, and actual proof unnecessary.¹ His consultation with M'Killop did not affect the position. It was not necessary to prove that he had bought in sole reliance on the prospectus.² Nor did the pursuers require to shew that he would not have taken the shares if he had known about these contracts. It was enough that he had been influenced by a prospectus which contained this vice.³ The failure to specify the first contract of 18th August 1892 made the prospectus fraudulent.⁴

The waiver clause.—It was questioned whether such clauses were

the vendors to the company. The defenders are the sole vendors and the sole directors, and it was therefore plain to any person reading the prospectus that the directors of the company, and every one of them, had an interest adverse to the company. How any intending investor should have invested in a company where that was the state of affairs, I do not myself understand. But that is undoubtedly a peculiarity in this case,—a peculiarity which appears to me to raise a perhaps difficult question as to whether or not the prospectus was fraudulent in respect of the non-disclosure of the contract or contracts in question. I have not found it necessary, as I have said, to determine that difficult question, and I am glad that that is so, because it may come up in some other case. What appears to me to be enough for the decision of this case is, that I have come to the conclusion, upon the evidence, that the pursuers have failed to shew that their author took shares in this company on the faith of the prospectus. That is a question of fact; and having given full attention to the evidence and to the excellent argument which I had upon its import from the pursuers' counsel, I am unable to hold that there is sufficient evidence that Mr M'Morland took shares on the faith of the prospectus. That being so, it is admitted the 38th section of the Companies Act does not apply.

"Then as to alleged misrepresentation at common law, I confess I do not think that was made out. I do not think there is evidence that Mr M'Killop or any of the defenders made misrepresentations to the pursuers' author upon material matters of fact. And that being so, I think the result is that the defenders are entitled to absolvitor, and, of course, with expenses."

¹ Smith v. Chadwick, 1884, L. R., 9 App. Ca. 187, per Lord Blackburn, p. 196; Peek v. Gurney, 1873, L. R., 6 Eng. and Ir. App. Ca. 377, p. 410.

² Andrews v. Mockford, 1896, L. R., 1 Q. B. 372.

³ Arnison v. Smith, 1889, L. R., 41 Ch. D. 348, p. 359.

⁴ Cornell v. Hay, 1873, L. R., 8 C. P. 328; Askew's case, 1874, 22 W. R. 833 (not reversed on this point), L. R., 9 Ch. App. 664; Charlton v. Hay, 1874, 31 L. T. (N. S.) 437; Twycross v. Grant, 1877, L. R., 2 C. P. D. 469, per Cockburn, C. J., and Brett, L. J., pp. 527 and 546; Sullivan v. Mitcalf, 1880, L. R., 5 C. P. D. 455, per Theisger and Baggallay, L. J. J., pp. 460-465; Huntingdon Copper Co. v. Henderson, Jan. 12, 1877, 4 R. 294, 5 R. (H. L.) 1; Buckley, Companies Acts, 570; Palmer's Company Precedents, 85; Lindley's Law of Companies, 91.

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legal.¹ But even assuming their validity, the defenders could claim no advantage from this clause, as they were confronted with this dilemma—either the clause admitted that there were contracts not divulged, and pretended that these were trading contracts, whereas the contracts of 30th June and 18th August 1892 were not trading contracts, and the defenders could not take benefit from their fraudulent pretence; or the application of the clause was in fact confined to trading contracts and the contracts suppressed were not of this character, but concerned the very initiation and existence of the company, and formed a material consideration for persons who might judge of the company as a means of investment. Either alternative was fatal to the defenders' case. The latter alternative was probably the correct view, for the contracts alluded to were "contracts connected with the properties as a going concern," and the waiver applied to "such contracts." This was the fair reading, and was preferable to any more strained construction. But in any case the waiver clause was part of the prospectus, and if the defenders claimed the benefit of the prospectus they must also grant it. If so the late Mr M'Morland must be taken to have bought on the faith of the prospectus, and this was enough for the pursuers' case. The defenders were agents for the shareholders, and when the shareholders found that they had been defrauded by such a secret agreement they could repudiate all relations with the defenders, and seek complete redress.² The secret agreement of 30th June and 18th August was a fraud on the shareholders, for the true price was £30,000, which was paid to the real vendors, who were the Messrs Wood. The additional £30,000 was a bribe to the other three promoters to induce them to lend their names and influence.

At common law.—There were authorities under the head of common law giving a different remedy from that given by section 38, and illustrating the awkwardness of the shareholder being without such a remedy, and only dependent on statute.³ M'Killop's representations to M'Morland were a clear fraud. He enumerated the advantages of the company and the mines, but he was silent about the financial difficulties with which it was struggling. Even then they were in straits for money. If M'Morland had known this he would never have invested, however excellent the property might be. A partial disclosure might be the most dangerous fraud.⁴

Argued for the defenders;—*On the statute.*—The *onus* of proof lay on the pursuers. They must prove that M'Morland bought on the faith of the prospectus. This *onus* was not discharged. Indeed the evidence was all one way, and shewed that he bought in reliance on M'Killop's representations, but this was superfluous. It was enough that the pursuer had not discharged the *onus*.⁵ They must shew that if the

¹ Lindley's *Law of Companies*, 92; Palmer's *Company Precedents*, 86.

² *Huntingdon Copper Co., Limited, v. Henderson*, Jan. 12, 1877, 4 R. 294, Lord Young, p. 301, and Nov. 29, 1877, 5 R. (H. L.) 1, *per* Lord Cairns, L. C., p. 3; *Erlanger v. New Sombbrero Phosphate Company*, 1877, L. R., 5 Ch. D. 73, *per* Jessel, M. R., p. 113, and July 31, 1878, L. R., 3 App. Ca. 1218, *per* Lord Blackburn, p. 1267.

³ *Bland's Case*, L. R. [1893], 2 Ch. 612.

⁴ *Peek v. Gurney*, 1873, L. R., 6 Eng. and Ir. App. Cases, 377, p. 410, *per* Lord Cairns, p. 403.

⁵ *Smith v. Chadwick*, L. R. [1884], 9 App. Cases, 187; *Arnison v. Smith*, 1889, L. R., 41 Ch. Div. 348; *Sullivan v. Mitcalf*, 1880, L. R., 5 C. P. D.

pursuer had known of the contract concealed he would not have taken shares. This failure of the pursuers really removed this case from the application of the other authorities cited. But in any case the prospectus was quite frank. It disclosed that the promoters were vendors. It was also natural that the promoters should have sold at a larger price than they paid. M'Morland's letters pointed to reliance on M'Killop. His letter of application could of itself never be held to import dependence on the prospectus. Thus the pursuers' case, as founded on the prospectus, failed. But even assuming that M'Morland had proceeded on the prospectus, the contract of 30th June and the first contract of 18th August did not fall within the scope of section 38. They were truly private contracts, which put it in the power of the purchasers to offer the collieries to the public. They were not contracts for payment of promotion money. The vendors' obligation to the company was fulfilled when they published the price at which they sold the property. They were not bound also to publish the price at which they bought.¹ The contracts were contracts before the company was formed, and binding whether the company was formed or not. The only case applying on this point was *Craig v. Phillips*.² The section only applied to contracts the benefits of which were transferred to the company. It did not deal with transactions by which vendors acquired property which they afterwards sold to the company.³

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The waiver clause.—Such clauses were valid. Lindley's statement⁴ cited by the pursuers was unsupported.⁵ This clause related to all contracts falling under section 38. "Such contracts" meant contracts falling under the 38th clause, not trading contracts.

At common law.—It was necessary to see from the record what was the fraud alleged. The only averments were in cond. 6 and cond. 12. These were based on the statements in the prospectus, and if the pursuers failed to prove that M'Morland saw the prospectus these statements must fall. Even assuming that he saw the prospectus, the averments did not amount to an allegation of fraud. They amounted to this (1) that the business was taken over and carried on by the five promoters, and (2) that they bought at £30,000 and sold at £60,000. There was no concealment of material facts, and no misrepresentation. There was no duty of disclosure. If both parties were silent on this point there was no fraud. Concealment of a material fact was concealment of a fact which, if known, would make a material modification.³ Material concealment arose when withholding a statement made what was stated false. M'Morland did not rely on M'Killop's past manage-

455, *per* Thesiger, L. J., p. 460; *Arkwright v. Newbold*, Feb. 28, 1881, L. R., 17 Ch. D. 301, *per* Cotton, L. J., p. 324.

¹ *Craig v. Phillips*, 1876, L. R., 3 Ch. D. 722; *Gover's case*, 1875, L. R., 20 Eq. 114, 1875, L. R., 1 Ch. D. 182, *per* James, L. J., p. 187, *Bramwell*, L. J., 191; *Sullivan v. Mitcalf*, 1880, L. R., 5 C. P. D. 455, *per* *Bramwell*, L. J., p. 470, *Baggallay*, L. J., p. 467; *Twycross v. Grant*, 1877, L. R., 2 C. P. D. 469, *per* *Bramwell*, L. J., 496, *Kelly*, C. B., p. 506, *Cockburn*, C. J., p. 533.

² *Craig v. Phillips*, 1876, L. R., 3 Ch. D. 722; *Cornell v. Hay*, 1873, L. R., 8 C. P. 328, *per* *Honeyman*, J., 333.

³ *Peek v. Gurney*, 1873, L. R., 6 Eng. and Ir. App. 377, *Lord Chelmsford*, 390, *Lord Cairns*, 403.

⁴ *Lindley*, *Law of Companies*, p. 92.

⁵ *Palmer's Company Precedents*, pp. 86, 94; *Buckley*, *Companies Acts*, 574.

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ment, but on his future management, and on his inspection of the coal, and his investments, and his expressed belief. That belief was genuine, and was warranted at the time. The company only failed from want of capital.

At advising,—

LORD JUSTICE-CLERK.—The late Mr Patrick M'Morland, a coalmaster in Glasgow, applied for and had allotted to him certain shares in a company which was at the time being formed to take over certain interests in collieries, with their machinery, goodwill, &c., under a limited company, to be called the Bryndu Coal and Coke Company, Limited. The pursuers, as the trustees under his trust-disposition and settlement, sue this action to have it found and declared that the prospectus issued by the promoters was fraudulent within the meaning of section 38 of the Companies Act, 1867, and that those who issued the prospectus are bound to make reparation for damage sustained by Mr M'Morland through his taking shares on the faith of the prospectus, and the summons concludes for £5000 of damages. There is further a special conclusion inserted, in respect that certain of the parties being bankrupts, declarator should be pronounced finding that the damages sustained form a just and lawful debt of the bankrupts. The alleged fraud consisted in the failure to disclose in the prospectus, that in addition to the agreement set forth in the prospectus, by which the company were to pay £60,000 to the vendors, half in cash and half in paid-up shares, other agreements had been entered into by which James and William Wood, who were in right of the collieries and business, sold them to themselves and the other defenders for £30,000, these gentlemen then becoming the vendors to the company at £60,000. It is further averred that the prospectus was fraudulent, in respect it described the business as "now carried on" by the two Woods and Messrs Fraser and M'Killop, whereas it had never been carried on by the latter, but only by the Woods.

These questions arise in the case,—

1. Whether it is proved that the deceased took shares on the faith of the prospectus?

2. Whether, if he did so, the prospectus was fraudulent, in respect of its not setting forth the agreement between the Woods and Fraser and M'Killop, and was therefore struck at by section 38 of the Companies Act, 1867?

3. Whether, upon the assumption that section 38 applied, its force was taken away in this transaction by a clause in the prospectus setting forth that there were various contracts which it would be inexpedient to publish, and that all applicants for shares must be deemed to waive the insertion of dates and names of the parties to any such contracts as might be required under section 38 of the Joint Stock Companies Act, and to accept the above statements as a sufficient compliance with the Act?

4. Whether, at common law, it can be held upon the evidence that Mr M'Morland was induced to become a shareholder by false representations made to him by either of the Woods or by Fraser or M'Killop?

It appears that in June 1892 Messrs Wood, who carried on business as a firm, entered into an agreement by which they sold to themselves, as individuals, and to George Anderson and William Fraser, the Bryndu,

and certain other collieries, at a price of £30,000 ; and that subsequently, on 18th August of the same year, an agreement was entered into in similar terms, but bringing in Mr M'Killop as one of the purchasers. On the same day these five gentlemen entered into an agreement to sell the same subjects to one Robert King, upon the narrative that a company was about to be formed, and that articles of association had been signed by these five on behalf of the vendors, and that the sale to King was on behalf of the company, and in terms of the articles of association. By that agreement the price was £60,000, and this agreement was set forth in the prospectus issued with a view to obtaining subscriptions of shares. The previous agreements were not disclosed in the prospectus.

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After considering the proof and the documents put in evidence, with the very full and able debate from the bar upon them, I have been unable to see any ground for holding that any false representations were made to Mr M'Morland to induce him to take shares in the company, which would at common law give him a claim against the defenders, or any of them. I believe that Mr M'Killop, who was Mr M'Morland's friend, and had for many years been his partner, acted in the *bona fide* belief that the collieries were a good speculation, in recommending them to Mr M'Morland for investment, and as Mr M'Morland's action in taking shares was the direct consequence of communication with Mr M'Killop, I see no ground for holding that there was any misrepresentation made to him.

Upon the question whether the non-disclosure of the agreement of August in the prospectus was to be deemed fraudulent under section 38 of the Companies Act of 1867, very forcible arguments on both sides were laid before us, and much instructive authority was quoted. I agree, however, with the Lord Ordinary in thinking that a decision of this somewhat difficult question is unnecessary in this case, as the case may be decided on another ground. And if it is unnecessary to decide whether the prospectus should have referred to the agreement, it is also unnecessary to decide whether, upon that assumption, the clause of waiver in the prospectus affords a sufficient answer, in respect that the buyer of shares bought them on the understanding set forth in the prospectus that he must be deemed to waive the insertion required under section 38. These are both very important points, and would call for very careful consideration were it necessary to pronounce a definite opinion upon them. Upon the latter I have formed a pretty definite opinion, but I think it better not to express it. For I am of opinion with the Lord Ordinary that it is sufficient for the decision of this case that it is not proved that Mr M'Morland took shares on the faith of the prospectus. Indeed, the evidence seems to shew that he had never seen it. I think it must be held that, when one who has bought shares seeks reparation for loss said to be caused by his acting on a statement, or a failure to include a statement in a prospectus, he must shew that he was deceived or misled thereby, and that he acted upon the prospectus to his prejudice. That seems to me to be the plain import of the case of *Arkwright*¹ in the Chancery Division, which was quoted to us.

There can be no doubt that the ascertained facts disclose a somewhat

¹ L. R., 17 Ch. D. 301.

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extraordinary state of matters. The directors set forth on the face of the prospectus were the same persons and the only persons disclosed in it as being the promoters and the vendors to the company of the subjects to be purchased. Thus, as the Lord Ordinary points out, it was plain upon the face of the prospectus that the directors had an interest adverse to the company. Whoever proposed to invest was informed that he was buying from those who were getting up the company. It is very difficult to understand how anything but an unbounded faith in the integrity of these persons could lead to an application for shares in such circumstances. But if a purchaser did not see the prospectus, but relied only on advice obtained from a gentleman in whose advice he had confidence as regards such a matter, I cannot hold that he, or those who represent him, can obtain damages from those who put out the prospectus, on the ground that he was fraudulently deceived into making the purchase. In such circumstances he cannot shew that he was deceived by the statements in it, or by the omissions in it, and that he being so deceived acted upon it to his prejudice.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD YOUNG concurred.

LORD TRAYNER.—The pursuers base the claim made in this action upon two grounds,—(1) That the prospectus of the company in which the late Mr M'Morland took shares was fraudulent, under the terms of section 38 of the Companies Act, 1867, in respect the contract or agreement of 18th August 1892 was not disclosed in that prospectus; and (2) misrepresentation and concealment at common law. The defenders meet the second of these grounds of action with a denial; and, with regard to the first, maintain that the contract in question was not one disclosure of which was required by statute, but that even if it was, the late Mr M'Morland waived his right to challenge the prospectus on that ground, as well as all his rights and remedies (if any) "in connection therewith, whether under the said section or otherwise."

I agree with the Lord Ordinary in thinking that the pursuers have failed to establish any claim on the ground of misrepresentation or concealment at common law. The evidence of Mr M'Killop, the only defender who saw or spoke to Mr M'Morland on the subject of the company in question, very distinctly negatives the pursuers' averments. This is the only evidence now available as to what passed between him and Mr M'Morland, unless it be the statements contained in Mr M'Morland's letters. These statements, so far as they go, which is not far, appear to me to support Mr M'Killop's evidence, and in no sense, and to no extent, to contradict it. I think it due to Mr M'Killop to say that there is no foundation in anything which appears before us for the suggestion that he deceived, or wished or intended to deceive, his friend either by misrepresentation or concealment.

The first ground of action can only be pleaded by one who took shares in the company "on the faith of such prospectus." Now, I agree also with the Lord Ordinary in thinking that there is not sufficient evidence to shew that Mr M'Morland took his shares on the faith of the prospectus. I think one might go farther, and say that there is no evidence in support of

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the view that he did so. That Mr M'Morland saw the prospectus in some newspaper is probable, but by no means certain. Still less is it certain that he ever read it or relied on it in applying for shares. My opinion on this matter is, that Mr M'Morland applied for shares solely on the ground that Mr M'Killop represented it to be, what he thought it was, an investment which promised favourable results. If that is so, then the first ground of action fails the pursuers equally with the second, and the defenders are entitled to absolvitor.

The Lord Ordinary indicates an opinion that the contract of 18th August 1892 was one that should have been disclosed had it not been that the promoters and directors of the company were themselves the disclosed vendors. How that circumstance may affect the duty to disclose imposed by the 38th section of the Act of 1867, I do not think it necessary to consider. But I reserve my opinion entirely on the question whether the contract referred to was one which in any case the promoters or directors were bound to disclose, and what, assuming the duty of disclosure to be affirmed, would have been the effect of Mr M'Morland's waiver in his letter of application for shares.

LORD MONCREIFF.—I think that the Lord Ordinary is right, and I am satisfied with the grounds on which he places his judgment. As to the ground of action founded on the 38th section of the Companies Act of 1867, I think it is not proved that Mr M'Morland took the shares on the faith of the prospectus. Mr M'Morland being dead we had not the advantage of his evidence; but it appears very clearly from the letters which he wrote to his agents on 17th and 23d November 1892, that in agreeing to take the shares he relied entirely upon his partner Mr M'Killop's declared confidence in the concern (the *bona fides* of which I see no reason to doubt), and the examination which he had personally made of the mines. In the latter letter he says,—“Had Mr Mac. not been interested and surveyed the mine for himself, I would not have put a penny into it, as I don't believe much in mining unless the subjects are good, from good authority, and also the management.” From his business relationship with Mr M'Killop, it is plain that Mr M'Morland must have known perfectly well what collieries Mr M'Killop was personally carrying on, and cannot have been influenced by the erroneous supposition that Mr M'Killop had been carrying on the Bryndu collieries previous to the formation of the company. Mr M'Killop says,—“He (that is, M'Morland) was led to associate himself with the company entirely through my individual position and connection with it.” So far as I can see from the evidence before us, that is the truth. It may be assumed,—I think it must be assumed,—that M'Morland saw the prospectus, but I do not think it is proved that he bought on the faith of it, or that he was induced to buy by misrepresentations made to him by any of the defenders.

In this view it is not necessary to consider the vexed question whether the minute of agreement of 18th August 1892 was or was not a contract of which notice should have been given under section 38 of the Companies Act of 1867, and I prefer to reserve my opinion upon that point, and also on the question whether, assuming that notice should have been given of the con-

No. 14. tract, Mr M'Morland's waiver, contained in his letter of application, was or was not effectual to free the defenders from liability. If the case depended on these questions, I think, looking to their importance and the great difference in judicial opinion in the English Courts, it would have been proper to submit the question to the whole Court, or a Court of seven Judges.

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THE COURT adhered.

KEITH R. MAITLAND, W.S.—J. W. & J. MACKENZIE, W.S.—Agents.

No. 15. JAMES DUNCAN M'INTOSH, Pursuer (Appellant).—*Salvesen—J. Purves Smith.*

Oct. 31, 1896.
M'Intosh v.
Waddell.

R. D. WADDELL, Defender (Respondent).—*Ure—Cook.*

Reparation—Negligence—Leaving horse unattended in street.—A brought an action of damages against B, averring that the servant in charge of a horse and van belonging to the defender had left the same unattended in a street in Glasgow, although the horse was known to the defender to be a spirited animal, and that the horse had bolted and dashed into the window of the pursuer's shop.

Held that the action was relevant.

1ST DIVISION.
Sheriff of
Lanarkshire.

THIS was an action of damages raised in the Sheriff Court at Glasgow by James Duncan M'Intosh, jeweller in Glasgow, against R. D. Waddell, sausage manufacturer there.

The pursuer averred that the defender was owner of a pony and spring van, that on 11th October 1895 the pony had bolted in Cameron Street, and dashed into the window of the pursuer's shop doing considerable damage, and that the accident was caused by the negligence of the defender's servant who was in charge of the van, and who left the pony unattended in the street, as should not have been done, especially as the pony was known by the defender to be a spirited animal.

The defender pleaded that the pursuer's averments were irrelevant.

The Sheriff-substitute (Erskine Murray) allowed a proof before answer, and on appeal the Sheriff (Berry) adhered.

The pursuer appealed for jury trial.

The defender objected, and argued;—No relevant ground of action was averred. It was not a fault in a vanman to leave his horse unattended for a few moments. He was entitled to do so for a proper reason, *e.g.* in order to deliver parcels and otherwise carry on his employer's business. Otherwise two attendants would have to be sent with every cart or van. To make his case relevant, the pursuer should have averred that the vanman had left the horse unattended for an unnecessarily long time, or for an improper purpose, such as going into a public-house.¹

Argued for the pursuer;—It was a risk to leave a horse unattended in a street, especially if it was a spirited animal, and any person who so left a horse took the risk of any damage that might follow.²

¹ Shaw v. Croall & Sons, July 1, 1885, 12 R. 1186; M'Ara v. Morison, March 6, 1896, 23 R. 564.

² Illidge v. Goodwin, 1831, 5 C. and P. 190, *per* L. J. C. Tindal, at p. 192.

If damage resulted from a servant's negligence in this respect, his employer was responsible.¹ No. 15.

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LORD PRESIDENT.—The Court think the case must go to trial.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT approved of an issue.

T. C. SMITH, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

WILLIAM FALCONER KING, Petitioner (Appellant).—*Sol.-Gen. Dickson* No. 16.
—*Cook.*

GEORGE BARNETSON, Respondent.—*W. Campbell—Craigie.*

Oct. 31, 1896.
King v.
Barnetson.

WILLIAM LAING'S TRUSTEES AND ANOTHER, Respondents.—
W. Campbell—Craigie.

Superior and Vassal—Buildings on feu—Approval of plan by superior—Servitude of light—Implied grant.—A feued a piece of ground in a street to B, the feu-contract bearing that B was "now erecting" on the ground feued "a tenement, the plan of which has been approved by" the superior's architect. A subsequently feued the adjoining ground to C, who applied to the Dean of Guild for warrant to erect upon it buildings which, if built, would have entirely excluded the light of the back windows of B's tenement.

B opposed the application on the plea that the superior, having by his architect approved of the plan of his tenement, must be held to have conferred upon him a servitude of light over the adjoining ground for the windows shewn on the plan.

The Court *repelled* the plea, *holding* that the superior's approval of the plan did not bind him to warrant the lights of all the windows shewn thereon.

Superior and Vassal—Privilege conferred on vassal to use vacant ground adjoining feu—Reservation of right to curtail vacant ground by building thereon—Extent of reserved right.—A feued a building stance to B, with the privilege of using a piece of vacant ground behind it, which was bounded on one side by certain brick buildings facing C Street belonging to A. The feu-contract contained a declaration that, "as the brick buildings are more narrow from back to front than the permanent buildings in C Street to be built upon the site of the said brick houses will be when C Street is feued, the said back ground will thus be curtailed," and that B should have no claim against A for this restriction.

A subsequently feued the back ground and the ground on which the brick buildings stood to C, who applied to the Dean of Guild for warrant to pull down the existing buildings and erect in their place permanent buildings of considerably greater depth than the original buildings. The plans shewed that the proposed new buildings would materially injure the lights and ventilation of the buildings on B's feu.

B opposed the application on the plea that the proposed buildings would be an unreasonable encroachment on his rights in the back ground.

The Court *repelled* the plea on the ground that B's title imposed no limitation on the depth of the permanent buildings, the erection of which it contemplated.

WILLIAM FALCONER KING, proprietor of certain subjects in Commercial Street and Prince Regent Street, Leith, presented a petition
1ST DIVISION.
Dean of Guild
Court of Leith.

¹ Fairweather v. Blacklock, Nov. 26, 1861, 24 D. 90; Baird v. Hamilton, July 4, 1826, 4 S. 790.

No. 16. to the Dean of Guild Court for a warrant to take down the existing buildings thereon, and to erect a tenement of dwelling-houses in their place, partly facing Commercial Street and partly facing Prince Regent Street.

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The application was opposed by the proprietors of adjoining properties, viz., (1) by George Barnetson, and (2) by the widow and trustees of the deceased William Laing.

I. *Barnetson's case*.—Barnetson's title was founded on a feu-contract dated in 1851 between John Archibald Campbell and George Green, the predecessor of the respondent, by which the former feued to the latter a piece of ground at the corner of Admiralty Street and Commercial Street, "on which ground or stance the said George Green is now erecting a tenement, the plan of which has been approved of by Patrick Wilson, architect in Edinburgh." The above title was prior in date to that of the petitioner, who acquired by feu-contract from the same superior in 1873.

The respondent Barnetson stated, *inter alia*;—(Stat. 4) "It was a condition of the contract between the respondent's author, the said George Green, and the petitioner's author, the said John Archibald Campbell, that in order to admit of light and air being introduced into the back rooms of said tenement the said George Green should be entitled to form windows in the back wall of his tenement overlooking the ground then belonging to the said John Archibald Campbell, upon which the petitioner now proposes to erect his new buildings. . . . The plan of said tenement shewing said windows was duly submitted to and approved of by the petitioner's author, the said John Archibald Campbell, and in order that said condition and agreement might be observed in all time coming, the said plan is specially referred to in said feu-contract. The respondent's author thereby acquired for himself and the proprietors of said tenement for the time being a servitude of light and air over said back ground now belonging to the petitioner. . . ." (Stat. 5) "Notwithstanding said agreement and the constitution of said servitude rights, as set forth in the preceding article, the petitioner now proposes to erect a tenement upon a portion of said back ground, one of the gables whereof is to be built close up against the back wall of the respondent's tenement, and will block up two windows on each flat. . . . The result would be to deprive eight rooms in the respondent's tenement of light and ventilation, . . . thereby reducing the value of his property to a very considerable extent."

The respondent Barnetson pleaded, *inter alia*;—(1) The respondent, having under his titles, and particularly under the feu-contract before mentioned and plan therein referred to, a servitude of light and air over the petitioner's back ground, . . . is entitled to prohibit the petitioner from erecting his proposed buildings in so far as they would interfere therewith.

II. *Laing's case*.—In 1863 Mr Campbell, in a feu-contract, disposed to William Laing a piece of ground on the north-west side of Admiralty Street, "bounded on the north and north-east partly by the ground belonging to the said John Archibald Campbell, lying behind the said piece of ground hereby disposed, to the use of which back ground the feuars and tenants of the said John Archibald Campbell in Admiralty Street, Commercial Street, Cromwell Street, and Prince Regent Street, have a mutual privilege, . . . together with a privilege in favour of the said William Laing and his foresaids,

in common with the said other feuars of the said John Archibald Campbell's property in Admiralty Street, Cromwell Street, Commercial Street, and Prince Regent Street, to use the said back ground." After referring, *inter alia*, to certain brick houses in Commercial Street belonging to the said John Archibald Campbell, the feu-contract declared, "that as the said brick houses are only constructed for temporary purposes, and are more narrow from back to front than the permanent buildings in Commercial Street to be built upon the site of the said brick houses will be when Commercial Street is feued, the said back ground will thus be further curtailed, for both of which restrictions it is hereby declared that the said William Laing and his foresaids shall have no claim against the said John Archibald Campbell and his foresaids." It was provided that the houses to be built on the ground disposed to Laing should not exceed 36 feet or thereby from front to back.

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The feu acquired by the petitioner's author in 1873 included the brick houses in Commercial Street and the back ground referred to in Laing's feu-contract.

The respondents Laing's trustees stated, *inter alia*;—(Stat. 4) "The temporary brick houses referred to in said feu-contract front Commercial Street, and are the buildings facing that street for the removal of which warrant is craved by the petitioner. These temporary buildings are of the width of about 27 feet, and on the ground occupied by them, and on a strip of ground behind the same of the width of 10 feet or thereby, being part of the ground to which the said William Laing acquired a mutual right under said feu-contract, the petitioner asks warrant for the erection of a tenement of dwelling-houses of five storeys in height. Access to the dwelling-houses in said tenement is to be obtained by a passage through said tenement and a wide staircase behind it, with balconies connected with the staircase on each storey. Said staircase occupies a space of about 15 feet square behind said tenement, and the same and said balconies still further curtail said mutual back ground." (Stat. 6) "On a fair construction of the clause in the feu-contract in favour of the said William Laing, the petitioner, as the owner of the ground on which said brick houses fronting Commercial Street stand, is not entitled, in erecting permanent buildings on the site thereof, to encroach upon said mutual back ground to an extent greater than is required for the erection of a tenement of equal depth with the tenement belonging to the present respondents and to other adjoining feuars of the said John Archibald Campbell, or his successors, and he is not entitled in any event to erect a tenement of greater depth than is customary in tenements of that description. Nevertheless, the tenement proposed to be erected by the petitioner, including the staircase behind the same, is of the depth of 52 feet or thereby, being 16 feet in excess of the depth of the tenement belonging to the present respondents and to adjoining feuars, and greatly exceeds the depth of an ordinary tenement. Said tenement and staircase greatly curtail the said mutual back ground for the purposes for which it was intended, viz., light and ventilation of and back greens for the tenements to be erected by the feuars having right thereto. Further, said tenement and staircase will greatly damage the value of the said respondents' property, and in so far as they exceed in depth the respondents' and said other adjoining tenements, or at all events in so far as they exceed the depth of an ordinary tenement, they are

No. 16. an unwarrantable encroachment upon the respondents' rights as proprietors *pro indiviso* of said mutual back ground. . . .
 Oct. 31, 1896. The respondents Laing's Trustees pleaded, *inter alia*;—(1) Petitioner's said tenement being, to the extent condescended on, an unwarrantable encroachment upon the respondents' rights as proprietors *pro indiviso* of said mutual back ground, the warrant craved should be refused.
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On 8th July the Dean of Guild Court pronounced the following interlocutor:—"Having visited the premises in the presence of the agents of the parties, and heard them upon, and having considered, the whole cause—Finds (1) as regards the respondent Barnetson, that the petitioner's intended buildings will close up or otherwise prejudicially interfere with eight windows in said respondent's property—two of which windows, being those of sitting-rooms in a public-house on the ground floor, and four, being the sole means of light to as many living rooms of dwelling-houses above, will be entirely blocked up,—the remaining two windows, being those of the attic flat, being but two feet back from the intended gable; and that, as the Court further finds, contrary to the legal rights of the said respondent: (2) As regards the respondent Laing, that on a fair construction of the titles the petitioner is only authorised to encroach with his tenement upon the back ground mentioned therein to the extent of admitting of his having a tenement of a reasonable width from the building line of Commercial Street: Finds that, in the circumstances, instead of a total width of 52 feet . . . a total width of 39 feet is fair and ample, and the utmost that can be allowed, without material prejudice to the lights of this respondent . . . Therefore refuses warrant *in hoc statu*, but allows the petitioner, if so advised, to amend his plans so as to shew the lights of Barnetson's tenement reasonably preserved, and the width of tenement restricted as aforesaid, and for this purpose continues the cause."

The petitioner having declined to amend his plans, the Dean of Guild Court, on the same date, refused the prayer of the petition.

The petitioner appealed, and argued;—(1) *Barnetson's case*.—The servitude claimed was a negative servitude, and such a servitude could only be constituted by express grant.¹ Here there was no express grant, nor was any grant necessarily to be implied from the superior's approval of the plan. (2) *Case of Laing's Trustees*.—The privilege conferred upon William Laing by the feu-contract in his favour was expressly made subject to the restriction which was to follow when permanent buildings were erected on the adjoining ground. The title imposed no limit on the extent to which the depth of the buildings might be increased, and the superior was therefore left with a free hand in this respect. A burden on property must be clearly expressed, and was to be strictly construed.² The burden here alleged was so ambiguous as to be incapable of enforcement.

Argued for the respondents;—(1) *Barnetson's case*.—A servitude of light could be conferred by implied grant, and such a servitude must, in the circumstances of this case, be held to have been conferred upon the respondents.³ The terms of the feu-contract established an agreement on the part of the superior to the vassal building according

¹ Dundas v. Blair, March 12, 1886, 13 R. 759.

² Hood v. Traill, Dec. 18, 1884, 12 R. 362.

³ Heron v. Gray, Nov. 27, 1880, 8 R. 155.

to a particular plan. The plan was not extant, but it was to be presumed that it shewed the windows of the tenement which was being built at the date of the feu-contract. The case was a strong one for holding that a servitude had impliedly been conferred, for the findings of the Dean of Guild Court shewed that the buildings proposed by the petitioner would practically destroy the value of part of the respondents' building as a heritable subject. (2) *Case of Laing's Trustees*.—There was here a grant by a superior, coupled with a reservation in the superior's favour. The grant must in such a case be construed reasonably, and the reservation strictly. The respondents' right in the back ground was one of common interest, and they had a title therefore to object to the reserved right being exercised unreasonably to their injury.¹ The respondents themselves were restricted in regard to the depth of the buildings to be erected on their feu to 36 feet, and a similar restriction was reasonably to be inferred as to the reserved right.

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At advising,—

LORD PRESIDENT.—It is convenient to consider the position of each respondent separately, in the order observed in the judgment of the Dean of Guild Court.

I do not doubt that, as is said in the interlocutor, the light of Barnetson's property will be prejudicially interfered with by the proposed building; but the question is, whether this interference is, as the Court below has found, contrary to Barnetson's legal rights? Now, the title of Barnetson's author confers no right of any kind in the back ground. Accordingly, what is said for Barnetson is that his title shewed that the plan of the house which was then being erected had been approved by the superior's architect, and that the plan not being extant, it must be presumed to have exhibited those windows, the light of which will be prejudicially affected by the petitioner's buildings. Now, even if all this could be taken for granted, I am afraid it cannot be held that such approval by the superior's architect committed him to warranting the lights of all the windows exhibited on the plan. Accordingly, I cannot find legal grounds for holding that (as it is expressed in the note to the judgment under review) the common author "practically conferred" a servitude of lights. I do not think that this results either from the terms of the title or from the title taken along with the actual existence of the windows.

The respondents Laing's trustees and Mrs Laing are able to point to a clause in their title giving them a privilege, in common with the other feuars (in the streets surrounding it), to use the back ground, which is also described as bounding Laing's property. Now, although it is rather vague, I do not think that this right is illusory, or that the back ground could be encroached on by the superior *ad libitum*. But then the title goes on to give fair notice that, to some extent, the existing back ground will be encroached on by the superior. The existing brick houses, the title says, are only temporary, and are more narrow than the permanent buildings in Commercial Street which will be built on their site when Commercial Street is feued, and, says the title, the back ground will be thus further encroached on, but for such curtailment the feuar shall have no claim.

¹ Johnston v. White, May 18, 1877, 4 R. 721.

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Barnetson.

Now, the events here contemplated,—the feuing of Commercial Street and the putting up permanent buildings,—did not come about so soon as seems to have been expected, but they have come now, and the buildings now in question are the permanent buildings in Commercial Street contemplated in Laing's title. That being so, I am unable to find any further limitation on the right to encroach which was stipulated for by the superior as a condition of the vassal's title. It is not said against the proposed buildings that they are not *bona fide* in Commercial Street, and I cannot assent to the setting up some arbitrary rule as to their width, the parties to the title when treating on this subject having laid down no such limitation. Accordingly, I consider the Laings' case also to fail.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT recalled both the interlocutors of the Dean of Guild Court dated 8th July, repelled the first plea of both respondents, and remitted to the Dean of Guild Court to proceed as should be just.

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—JAMES PHILIP, S.S.C.—
MILLER & MURRAY, S.S.C.—Agents.

No. 17.
Nov. 4, 1896.
Grigor v.
Maclean.

JESSIE OR JANET GRIGOR AND ANOTHER, Pursuers (Appellants).—
Jameson—C. D. Murray.
THOMAS MACLEAN, Defender (Respondent).—*C. J. Guthrie—M'Lennan.*

Property—Road—Servitude—Grant of access by passage within burgh—Right of owner of passage to diminish its breadth.—From 1728 onwards the titles of a house situated in a close or passage in Elgin contained the following clause, “with free egress and regress by the front passage from the High Street.” In 1896 this close was a *cul-de-sac*, entirely surrounded by walls, and of irregular breadth, varying from 6 feet 10 inches at the entrance from the street up to 9 feet 4 inches. The owner of the *solum* of the close having in that year proposed to diminish the width of the close for some distance from the entrance to 3 feet 9 inches, the owners of the house brought an action of declarator against him. It was proved that from time immemorial the close had been of the dimensions and character specified.

Held that the right of the pursuers was a right of egress and regress by the close, as it had existed from time immemorial, and therefore that the defender was not entitled to diminish its width.

2D DIVISION,
Sheriff of
Inverness,
Elgin, and
Nairn.

In July 1896 Jessie or Janet Grigor and Mrs Elizabeth Grigor or Shiach, who were proprietors each of a one-fourth *pro indiviso* share of a dwelling-house in the court or close No. 179 High Street, Elgin, brought an action in the Sheriff Court at Elgin against Thomas Maclean, the proprietor of a house and shop at the entrance of that court or close, praying for declarator “that the court, passage, or entry in close No. 179 High Street, Elgin, extending between the property of the pursuers in said close and the High Street of Elgin, with the entry or passage leading thereto, is the common property of the pursuers, the defender, and others, and for their common use and enjoyment; or otherwise, that there is a right or servitude of access by, and use of, said court, close, passage, or entry, in favour of the property aforesaid, situated at No. 179 High Street, Elgin, belonging to the pursuers and others”; and for declarator that the defender is “not entitled, without the pursuers' express consent, to build on or over the said court, close,

passage, or entry, or any part thereof, or to place stones, sand, lime, or rubbish, on said court, close, passage, or entry, or to obstruct or occupy the same in any manner of way so as to defeat or impede the pursuers' right as aforesaid"; for interdict against the defender doing so, and against his interference "with the pursuers' right of servitude and right of ingress and egress to and from the High Street of Elgin and the pursuers' said dwelling-house through the said court, close, passage, or entry, as possessed and exercised by them prior to the operations of the defender complained of"; and for decree ordaining the defender to remove such erections and obstructions.

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The pursuers' titles gave them a right of "free egress and regress to and from" their house "by the front passage from the High Street down the said close." A clause in identical terms appeared in all the titles from 1728 downwards.

The pursuers ultimately did not insist in their prayer for declarator of common property, and admitted that the *solum* of the close in question belonged to the defender. On the alternative prayer for declarator of a right or servitude of access, the pursuers averred:—(Cond. 2) " . . . The pursuers have acquired a prescriptive right of servitude through or over the close, and have the right of egress and ingress thereto, as it stood prior to the operations complained of, namely, a right of way for foot passage and for the passage of carts or other similar vehicles of at least eight and a-half feet wide."

The pursuers pleaded, *inter alia*;—(1) The said close, court, passage, or entry being a public road or passage, or at least the pursuers and their predecessors having possessed and exercised a servitude of right of way over the same, of the width condescended on, for forty years and upwards, have acquired a prescriptive right thereto, and are therefore entitled to decree as craved. (2) The pursuers and their predecessors having, by their titles, a right of ingress and egress over said close or court, and having used and enjoyed the same as it stood before the operations complained of were begun for forty years and upwards, the defender is not entitled to narrow or encroach on said close.

The defender admitted that there was a servitude of foot passage to and from the pursuers' dwelling-house over the close in question, but denied that they had any higher right.

The defender pleaded;—(4) The operations condescended on being for the substantial benefit of the defender, and not interfering with the sufficient and reasonable possession by the pursuers of their servitude of access through the property of the defender, the pursuers are not entitled to declarator and interdict as craved.

A proof was allowed. The evidence was largely directed to the question whether the pursuers had acquired a prescriptive right of servitude for vehicular traffic over the close in question, but as this ground of action was abandoned by the pursuers at the hearing before the Second Division, the evidence on the point need not here be further noticed. Upon the question whether the pursuers had under their titles a right of ingress and egress over the close as it existed prior to the defender's operations, an architect, adduced as a witness by the defender, deponed that the width of the close at its entrance from the High Street was 6 feet 10½ inches, and that during its course it varied at different points from that width up to 9 feet 4½ inches. The detailed dimensions spoken to by the witness are given in the interlocutor of the Court *infra*. The close was a *cul-de-sac* entirely

No. 17. surrounded by walls, and it was built over for some distance inwards from the High Street, the height of the portion thus enclosed being 8 feet. The evidence shewed that the close had been of these dimensions from time immemorial. The effect of the defender's operations would be to reduce the width of the close at its entrance, and for some distance inward, to a width of 3 feet 6 inches.

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On 22d July 1896 the Sheriff-substitute (Rampini) assolizied the defender, proceeding on the ground that the pursuers had failed to establish their claim to a servitude of way for vehicular traffic; and therefore that the defender's operations were not an encroachment on the pursuer's rights.

On appeal, the Sheriff (Ivory), on 15th September, adhered.

The pursuers appealed, and argued;—The question here was not as to the acquisition of a prescriptive right of servitude, but as to the construction of an express grant. The purpose of the proof was to identify the subject of the grant, not to prove the constitution of the right. If the passage as it existed before the defender's operations was the same as "the front passage," as it existed in 1728, then the pursuers were entitled to the use of the whole passage, because their titles gave them that right. Upon that question the proof was all one way. The pursuers did not dispute the doctrine that the owner of a servient tenement was entitled to require the servitude to be exercised in the way least burdensome to him; and had the passage here been over a field or unenclosed ground, the doctrine would have applied, but it had no application to the case of a grant of passage over a defined close within burgh.¹

Argued for the defender;—This was not a grant of the close in property. Had it been so, the pursuers' line of argument—that the evidence identified the subject of the grant—would have been legitimate. But it was a grant of a right of passage merely, and the only question was what did that right imply, looking to the prior use and to the whole circumstances. It was clear on the evidence, and was now admitted by the pursuers, that the only description of traffic for which this close was fitted was foot traffic. The pursuers' right, therefore, was a right of foot passage only, and defender was bound to leave a sufficient width of close for the exercise of that right. *Quoad ultra*, he might deal with the close as he pleased, in accordance with the ordinary rule, to which closes within burgh were no exception.² *Ferrier v. Walker*,¹ founded on by the pursuers, was only a possessory judgment.

LORD JUSTICE-CLERK.—The facts in this case are these:—The pursuers have a title to a *pro indiviso* share of a property which is approached down a passage off the High Street of the burgh of Elgin. Their title gives them "free egress and regress to and from the same (*i.e.*, their property) by the front passage from the High Street down the said close." Now, it is not disputed, and cannot be disputed, that, for a very considerable time prior to the operations complained of, the passage in question was a passage of a certain breadth. When we come to read the clause I have quoted from the

¹ *Ferrier v. Walker*, Feb. 11, 1832, 10 S. 317, *per* Lord President Hope, at p. 318, and Lord Gillies, at p. 319.

² *Bruce v. Wardlaw*, 1748, M. 14,524; *Wood v. Robertson*, March 9, 1809, F. C.; *Allans v. Magistrates of Rutherglen*, Dec. 18, 1801, 4 Pat. App. 269; *Thomson v. Murdoch*, May 21, 1862, 24 D. 975, 34 Scot. Jur. 482.

title, we must take it that "the front passage," to free egress and regress by which the pursuers are entitled, means the passage which existed at the date when the title was granted. A right of access to a property is one thing, a right of access to a property by a certain passage is another. ^{No. 17.} ^{Nov. 4, 1896.} ^{Grigor v. Maclean.} Of course a right of access to a property may be over vacant ground, and it is clear that such ground may be enclosed by the owner of it, and the road by which access is given may be altered and diverted so long as he leaves an access by some way equally convenient. This is not such a case as that. This is a right of access by a particular passage defined by the line of buildings bounding it, which have been there for a very long time, indeed from time immemorial. The proprietor of the *solum* of that passage is not entitled, without making arrangements with the proprietors who have a right of access by it, to encroach upon it. It is not necessary to enter upon the question whether this passage has been used for carts or only for foot traffic. For foot traffic even a passage of 3 feet 6 inches wide is more inconvenient than one of 6 or 7 feet. It cannot be doubted that a purchaser would not give the same price for a property with an access 3 feet 6 inches wide as for one which has an access 6 feet wide. That such narrowing of the passage would hamper the pursuers in their right of access in many ways there can be no doubt. I think we should reverse the judgments of the Sheriffs, and find in accordance with the views I have expressed.

LORD YOUNG.—I am of the same opinion. It will be necessary to negative that part of the prayer which asks for a declarator of a right of common property in the passage. I think we should find that the pursuers have a right of access. I would not use the word servitude. It does not occur in the title. The expression used there is "free egress and regress to and from the same by the front passage from the High Street." That may be a servitude. It is certainly not a right of common property. But I am not inclined to use the word servitude when there is an express grant of a right of access to property by a particular existing passage. In one sense it is a servitude, because it is a right to make use of land which is feudally the property of another. That is the case with many of our public roads. The *solum* of the road may be private property, belonging feudally to an adjacent proprietor, but there is a right in the public to use the road sometimes by grant and sometimes by statute. Here there is a right by title to use the passage for access to the pursuers' property. I think we must find that from time immemorial the passage has been of a certain width (taking the exact dimensions from the evidence of the architect), that the defender proposes to reduce the width of the passage to 3 feet 6 inches, and in law that in so doing he is violating the pursuers' rights.

LORD MONCREIFF.—I am of the same opinion. There was here an express grant of a right of egress and regress by a particular passage from the High Street to the pursuers' property. The proof is only of value for the purpose of identifying the "front passage" referred to in the title, and defining its width. From the proof it clearly appears that from time immemorial the "front passage" has been of an average width of 6 feet 10 inches, and that it has been used in various ways. It also appears that by the operations of the defender it will be diminished in width by one half.

No. 17. This is clearly an encroachment upon the rights of the pursuers. I think the Sheriffs have taken a wrong view of the case, and have misapprehended the purpose of the proof led by the pursuers. They seem to have thought it was led in order to establish a right of way, whereas the object in view was to identify the passage referred to in the title, and to establish that it had been of a certain width from time immemorial.

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LORD TRAYNER was absent.

THE COURT pronounced the following interlocutor:—"Having heard counsel for the parties on the appeal, sustain the same, and recall the interlocutors appealed against: Find that the pursuers are not entitled to a finding and declarator to the effect that the court, passage, or entry in the close No. 179 High Street, Elgin, extending between the property of the pursuers in said close and the High Street, is the common property of the pursuers, the defender Thomas Maclean, and others: Find that the defender is heritable proprietor of certain subjects at 179 High Street, Elgin, aforesaid, and that the pursuers are *pro indiviso* proprietors of subjects situated to the north of the defender's said property: Find that the pursuers, as proprietors *pro indiviso* foresaid, have a right of free egress and regress from their said property through the said property of the defender by the front passage from the High Street down the said close: Find that from time immemorial, and until the proceedings of the defender complained of, the said passage was of the following dimensions, viz., at the entrance from the High Street of said passage 6 feet 10½ inches in width, which width continues for a distance of 17 feet 3 inches, the height of the enclosed part of the said passage being 8 feet; that at a point 29 feet down the said passage it is 7 feet 9 inches in width; and at a point 58 feet down it is 8 feet 2½ inches in width; that at the south end of the pursuers' property it is 9 feet 4½ inches in width; that after continuing for a few yards said passage narrows to 8 feet 10 inches, and remains at this width *ex adverso* of the pursuers' property, and that at the foot of the close the said passage narrows to a width of 7 feet 1 inch: Find that the defender, by the operations complained of, has narrowed, or proposes to narrow, the said passage at its entrance, and for some distance down said passage to a width of 3 feet 6 inches: Find in law that the operations complained of are an encroachment upon and in violation of the said right of the pursuers: Therefore interdict the defender from erecting any building on or over the said passage or any part thereof, or in any way encroaching upon or narrowing the said passage or any part thereof, from obstructing or occupying the same in any way so as to defeat or impede the pursuers' right as aforesaid, and from interfering in any way with the pursuers' said right of free egress and regress by the said passage to and from the High Street of Elgin and pursuers' said property, as possessed and exercised by them prior to the operations of the defender complained of, and decern: *Quoad ultra* continue the cause: Find the pursuer entitled to expenses," &c.

ROBERT STEWART, S.S.C.—PHILIP, LAING, & Co., S.S.C.—Agents.

SIBSON & KERR AND MANDATARIES, Pursuers (Respondents).—

No. 18.

Ure—Aitken.

SHIP "BARCRAIG" COMPANY, LIMITED, Defenders (Appellants).—

Sol.-Gen. Dickson—Salvesen.

Nov. 4, 1896.
Sibson & Kerr
v. Ship "Bar-
craig" Co.,
Limited.

Ship—Charter-party—Construction—Commission—Commission on freight payable to charterers.—By charter-party the owner agreed "on the chartering to arrive of" a vessel then on a voyage from New York to Shanghai for a voyage as follows:—"The said vessel shall after discharge of inward cargo or ballast be made ready, and shall receive on board at Portland, Oregon, and/or other loading-places as hereinafter provided, a full and complete cargo. . . . Should the vessel fail to arrive at Portland, Oregon, at or before 6 o'clock P.M. on or before 31st January 1896, charterers to have the option of cancelling or maintaining this charter on the arrival of vessel." The concluding clause of the charter-party was as follows:—

"A commission of three and three-quarters per cent shall be paid to charterers on the estimated gross freight in U. S. gold coin . . . on the completion of loading, or should vessel be lost."

The vessel was lost on the voyage from New York to Shanghai.

Founding on the last clause above quoted, the charterers raised an action against the shipowners for the amount of the commission on the estimated gross freight.

Held that it was a condition precedent of the whole contract that the vessel should arrive at the port of loading, and that as that condition had not been purified the defenders fell to be assoilized.

IN May 1896 Sibson & Kerr, merchants, Portland, Oregon, U. S. A.,^{2D DIVISION.} and Dewar & Webb, commission agents, London, their mandataries, brought an action in the Sheriff Court at Greenock against The Ship "Barcraig" Company, Limited, Glasgow, and Thomas Wyllie Hamilton, shipowner, Port-Glasgow, liquidator of that company, praying for decree for £239, 1s. 1d. in name of commission alleged to be due to the pursuers under a charter-party dated London, 14th May 1895, and of which the following were the material terms, the portions printed in italics being in manuscript in the charter-party:—

"This charter-party this day made and concluded upon between *Messrs Hamilton, Harvey, & Co.,* owners of the '*Barcraig*,' steel, of *Glasgow*, of the measurement of 2061 tons register, or thereabouts, now on passage *New York to Shanghai, and with liberty to take not exceeding 1500 tons cargo thence to loading port for owner's benefit,* of the first part, and *Messrs Sibson & Kerr,* of Portland, Oregon, of the second part.

"Witnesseth, that the party of the first part agrees on the chartering to arrive of the whole of the said vessel (with the exception of the deck, cabin, and the necessary room for the crew and the stowage of provisions, sails, and cables), or sufficient room for the cargo hereinafter mentioned, unto the said parties of the second part, for a voyage as follows:—The said vessel being tight, staunch, strong, and in every way fitted and provided for said voyage, shall, after discharge of inward cargo or ballast, be made ready, and shall receive on board at Portland, Oregon, and/or other loading-places, as hereinafter provided, a full and complete cargo of wheat, in sacks . . . which the said parties of the second part bind themselves to ship, and being so loaded shall, upon receiving orders from the charterers therewith proceed to Queenstown or Falmouth, for orders to discharge at a safe port (as instructed by charterers' agents) in the United Kingdom or on the Continent, between *Havre* and *Hamburg*,

No. 18. both included, and there deliver the same as hereinafter provided, on being paid freight.

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"If discharged at a port in the United Kingdom, as above, or at Havre, Antwerp, or Dunkirk, at the rate of *35s. say thirty-five shillings* sterling.

"If discharged at a port on the Continent, as above, other than Havre, Antwerp, or Dunkirk, at the rate of *40s. say forty shillings* sterling.

"If discharged at Hamburg, at the rate of *37s. say thirty-seven shillings*.

"Freight payable in cash without discount, on true and faithful delivery of cargo at port of discharge (if on the Continent, at current rates of exchange on London) per ton of 2240 lbs., English gross weight, delivered.

"Charterers to have the option of ordering vessel from port of loading, direct to any safe port in the United Kingdom or on the Continent, as above, in which case freight to be *one shilling and threepence less* per like ton.

"The act of God, perils of the sea, &c., excepted. . . .

"Vessel to be properly stowed and dunnaged; and certificate thereof, and of good general condition, draft of water, and ventilation, to be furnished to charterers from *charterers' competent* surveyor," with power to submit to arbiters. "Should the vessel fail to pass a satisfactory preliminary survey, or in case of submission to arbitration, should the decision be against the vessel, or should she be detained more than ten days for repairs, this charter to be void at charterers' option; such option to be declared at the expiry of said ten days. . . .

"After discharge of inward cargo and/or ballast has been finally completed, vessel to proceed to such usual loading-place, as may be ordered by charterers, at Portland and/or Astoria and/or loading-places in the Columbia and/or Willamette rivers, and there receive the cargo in manner customary, alongside afloat and/or from wharf. Charterers to have the privilege of additional moves, they paying towage. Bills of lading to be duly and promptly signed when required by charterers, at any rate of freight, without prejudice to this charter-party, but at not less than chartered rate, unless any difference in freight be satisfactorily adjusted before signing.

"Charterers' liability to cease on completion of loading; owners to have a lien on the cargo for all freight, dead freight, and demurrage under this charter-party. Sibson & Kerr, or their agents, to do ship's inward and outward business at port of loading on current terms. Vessel to be cleared at custom-house at Portland and/or Astoria in the name of charterers. . . .

"Loading days not to commence before *1st December 1895*, except at charterers' option. Should the vessel fail to arrive at Portland, Oregon, at or before six o'clock P.M. on or before *31st January 1896*, charterers to have the option of cancelling or maintaining this charter on arrival of vessel. . . .

"A commission of *three and three-quarters* per cent shall be paid to *charterers* on the estimated gross freight, in U. S. gold coin (at the exchange of 48 pence) on the completion of loading, or should vessel be lost."

The pursuers set forth the clause last above quoted, and averred;—(Cond. 3) "The vessel was lost before reaching the port of loading, and a commission accordingly became due to pursuers under the above narrated provisions of the charter-party."

The defenders answered:—(Ans. 3) "Admitted that the 'Barcraig'

was lost on the passage from New York to Shanghai, never having been heard of after leaving New York. *Quoad ultra* denied, and explained that the vessel having been lost as aforesaid, the said commission sued for is not due." No. 18.

The pursuers pleaded;—Defenders being due and owing to pursuers the sum sued for as commission in terms of charter-party as condescended on, pursuers are entitled to decree as craved. Nov. 4, 1896. Sibson & Kerr v. Ship "Barcraig" Co., Limited.

The defenders pleaded;—(1) The loss of the vessel having rendered fulfilment of the charter-party by either of the parties thereto impossible, its whole provisions were cancelled, and no commission is due to the pursuers. (2) The "Barcraig" having been lost before arrival at the loading port, no commission is in any case due to the pursuers under said charter-party.

On 19th June 1896 the Sheriff-substitute (Begg) pronounced this interlocutor:—"Finds in fact (1) that by the said charter-party the defenders' company agreed 'on the chartering to arrive' of their vessel, the 'Barcraig,' therein described as then 'on passage New York to Shanghai' unto the pursuers, for a voyage as follows, viz., that the said vessel should, after discharge of inward cargo or ballast, be made ready and receive on board at Portland, Oregon, or other loading-place in the United States as therein provided, a cargo of wheat, and there-with proceed to Queenstown or Falmouth for orders to discharge at a safe port in the United Kingdom, or otherwise as therein expressed, and there deliver the said cargo on being paid freight, and, *inter alia*, to pay a commission of three and three-quarters per cent to the pursuers on the estimated gross freight in U. S. gold coin (at the exchange of 48 pence) 'on the completion of loading or should vessel be lost,' and (2) that the said vessel never reached her port of loading, having been lost on her said passage from New York to Shanghai: Finds in law that, on a sound construction of the said charter-party, the defenders are not in these circumstances bound to pay the said commission to the pursuers: Therefore assoilzies the defenders from the prayer of the petition: Finds them entitled to the expenses of process," &c.*

* "NOTE.—The preliminary words 'on the chartering to arrive' seem to me to constitute a condition precedent to the whole obligations contained in the charter-party. The chartering which the parties thus referred to had not arrived at the execution of the document, but was 'to arrive' at some future time. At the date of execution the vessel was on a voyage from New York to Shanghai, so that necessarily a considerable time must elapse before she could be placed in any way at the disposal of the charterers at Portland or other loading-place in the United States. It thus seems clear enough that the chartering was not 'to arrive' till the vessel should be so placed at the disposal of the charterers, and in point of fact it never did arrive on account of the loss of the vessel on her voyage from New York to Shanghai. In these circumstances it is indisputable that the ordinary obligations contained in the charter-party are inoperative. The pursuers, however, maintain that an exception must be made of the clause on which they found their present claim, seeing that it specially provides for the case of the vessel being lost. Now, I quite agree that effect must be given to the words 'or should vessel be lost,' and that, having regard to the collocation in which they occur, they must refer to the loss of the vessel in some period of time before the completion of loading. But the clause is silent as to the length backwards of such period of time, so that the question comes to be which of two possible constructions is to be adopted, viz., the pursuers' construction that the period referred to runs from the date of the execution of the contract, or the defenders' construction that it runs from

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On appeal the Sheriff (Cheyne), on 11th July, pronounced this interlocutor:—"Recalls the interlocutor of the Sheriff-substitute of date 19th June last: Finds that on a sound construction of the charter-party founded on, and the vessel therein mentioned having admittedly been lost after the date of the execution thereof, the defenders are bound to pay to the pursuers a commission of three and three-quarters per cent on the estimated gross freight that would have been payable had the contract been performed, and parties being at issue as to the amount of said commission, remits the cause to the Sheriff-substitute with a view to this being ascertained, and for such further procedure as may be necessary."*

Thereafter the parties lodged a joint minute by which they agreed to admit,—“Second, That if the pursuers were entitled to commission under the charter the amount of said commission was reasonably estimated at £225, 16s., and had the vessel been loaded under said charter-party in ordinary course the loading would have been completed by 13th February 1896.

the date when the vessel should be placed at the charterers' disposal. Now, after giving this question careful consideration, I prefer the defenders' construction as most consonant with the meaning of the contract as a whole, while giving sufficient meaning and effect to the words, 'or should vessel be lost.' Besides, if the clause is ambiguous it should be read *contra proferentem*.

“Further, I fail to see why the parties should have intended this single clause to be operative in the circumstances which have actually occurred. The commission referred to is not a brokerage payable to an intermediary for introducing the parties to each other, or for procuring the contract, nor is it liquidate damages for failure to supply a vessel to the charterers. From the mode in which the amount falls to be calculated, the commission seems to be of the nature of a discount or deduction from freight, though not contingent on the freight being payable. But in whatever light it may be regarded, I do not see that, in the circumstances which have occurred, the pursuers have done anything to earn it.

“There seem to be no decisions directly in point, but some light is thrown on the construction to be put on the words, 'on chartering to arrive,' by the cases with reference to the sale of goods 'on arrival,' mentioned in Benjamin on Sale, 4th edition, pp. 565 and 566, Bell's Com. (N. E.) i. 470, and Bell's Prin. sec. 108.”

* “NOTE.—The construction of the clause in question which the Sheriff-substitute has adopted, though unquestionably a possible one, strikes me as being a forced and unnatural one. It is no doubt true that under the terms of the charter-party the non-arrival of the vessel at Portland by a certain date relieved the charterers (in their option) from the obligation to supply a cargo, but it does not follow that her arrival at Portland was a condition precedent of the whole stipulations of the charter-party, and in my opinion the particular stipulation on which the pursuers found is an independent and separable covenant. The commission there referred to is plainly in lieu of brokerage; the consideration for it was the execution of the contract; and this being its nature, I find it more natural and reasonable to suppose that, while the parties saw fit to stipulate that except in the case of an earlier loss of the vessel it should not be payable till the completion of loading, they contemplated and meant to provide for its payment in any event, than to suppose that they meant the defenders' liability for it to depend on the arrival of the vessel at Portland, and intended by the adjection of the words 'or should vessel be lost' to provide only for the contingency—which is hardly likely to have been in their view—of the vessel's loss in port between the time she was ready to receive cargo and the time when the loading was finished.”

"Third, That the ship 'Barcraig' was at the time of making said charter-party on a passage from New York to Shanghai (from which latter port she was to proceed to the loading-place as provided in said charter-party), and that she was lost during said passage, never having been heard of after leaving New York on or about 25th April 1895. The ship's voyage would in ordinary course be *via* the Cape of Good Hope, and she would in ordinary course have arrived at Shanghai in or about September 1895.

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"In respect of which admissions they farther agreed to renounce probation."

On 23d September 1896 the Sheriff-substitute in respect of the foregoing minute of admissions and of the Sheriff's interlocutor of 11th July granted decree for £225, 16s.

The defenders appealed, and argued ;—The charter-party contained a single contract, and was to be construed as a whole. It did not contain two contracts—one of brokerage and the other of affreightment—with different incidents and conditions. That being so, if the vessel, which was the subject of the contract, was not in existence when the contract was concluded, the whole contract fell.¹ In the admitted circumstances it lay on the pursuers, who were founding on the contract, to shew that the vessel was lost after its date. This they had failed to do. Again the words "chartering to arrive of the whole of the said vessel" imported a condition precedent, not a warranty.² The exceptions of the act of God, perils of the sea, &c., were exceptions which being purified voided the whole. It was true that some meaning ought to be given to the words "or should the vessel be lost," but the construction adopted by the Sheriff-substitute was an intelligible one, and ought to be adopted. No freight having been earned, the amount of commission could not be determined; the admission on that point was merely an admission to save the expense of a proof.

Argued for the pursuers;—The clause relating to commission constituted a separate contract from the contract of affreightment constituted by the remainder of the charter-party. Had the commission been payable to third parties as brokers, that would have been clear, and it could make no difference that the commission was payable to the charterers. "Commission" might not be a very happy expression when used with reference to a payment to the charterers, but the meaning of the parties was simply this,—that as soon as the charter-party was signed a sum in name of commission became due by the shipowners to the charterers, which was not payable until the ship was loaded, if she ever was loaded, but payment of which, on the other hand, was not contingent on the risk of the vessel being lost. The expression "or should the vessel be lost" was to be construed in its widest sense, and as meaning "if the vessel was lost at any time before arrival at the port of discharge." It was the same as the clause "lost or not lost" in a policy of marine insurance. The clause did not constitute a condition precedent *quoad* the contract of brokerage. As to the amount due in name of commission, if in fact no freight was earned, that was a jury question.³ In any case the parties were here agreed as to the amount due.

¹ Couturier v. Hastie, 1856, 5 H. L. C. 673; Emerson's case, 1866, L. R., 1 Ch. 433; Paine v. Hutchinson, 1868, L. R., 3 Ch. 388.

² Johnson v. Macdonald, 1842, 9 M. & W. 600.

³ Hill v. Kitching, 1846, 3 C. B. 299; MacLachlan on Shipping (4th ed.), 198.

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here is somewhat extraordinary in its terms. It is difficult to read it in any intelligible sense. It says,—“A commission of three and three-quarters per cent shall be paid to charterers on the estimated gross freight in U. S. gold coin (at the exchange of 48 pence) on the completion of loading, or should vessel be lost.” Under the charter-party it was agreed between the parties that “should the vessel fail to arrive at Portland, Oregon, at or before six o'clock P.M. on or before 31st January 1896, charterers” were “to have the option of cancelling or maintaining this charter on arrival of vessel.” The fact is that the vessel was lost on the way to Portland, and never came to any port of loading at all. But it is maintained on the part of the charterers that as the transaction did not take place through a broker, and a commission of three and three-quarters per cent was to be paid to the charterers, on completion of loading, or should the vessel be lost, commission at that rate is now due, although no vessel ever appeared or was tendered at the port of loading. Their argument is, that this was just brokerage for arranging the charter, and that a broker would have got his commission whether the vessel arrived or not. Now, this is certainly not the case of a broker who gets his commission for introducing the parties and bringing them together. This is a special stipulation that on the completion of loading or should the vessel be lost the charterers are to receive a certain percentage on the gross freight. It was pointed out that the amount of the estimated gross freight would have come to depend on what was done when the ship came in, for the rate of freight provided for by the charter-party was different according to the port at which the vessel was ordered to discharge.

Without definitely giving any opinion about the meaning of the words “to arrive” in the first part of the charter-party, I am of opinion that the Sheriff-substitute was right, and that his judgment ought not to have been reversed by the Sheriff. The clause which we have to construe may mean that the three and three-quarters per cent commission is to be payable if the vessel was lost between the time of her arrival and the completion of loading. This is a possible and reasonable reading of the clause. The Sheriff concurs in that view. Now, if there is a possible and reasonable way of reading this clause which is favourable to the opposite party, I think, as it was drawn up by the party who is now claiming under it, and as it must be construed *contra proferentem*, that reading is the one we must adopt. I am of opinion that the Sheriff-substitute's conclusion was the sound one, and that we should reverse the Sheriff's decision, and revert to the judgment of the Sheriff-substitute.

LORD YOUNG.—I am of the same opinion. The clause founded upon by the pursuers is remarkable. It is difficult to comprehend the idea of a commission being paid by a shipowner to the charterer of his vessel. The word “commission” is plainly inapplicable. It was suggested that “brokerage” would have expressed what was meant better; but I have difficulty in following the idea that the word “brokerage,” which signifies remuneration for services rendered by a person carrying on a particular and well-known trade, could be applicable to such a thing, or to understand why

a commission or a sum of money should be paid by a shipowner to a merchant who has chartered his vessel. But there is an obligation to pay a certain sum—it is called commission—to the shipowner on the completion of the loading of the vessel. Well, on the completion of the loading of the vessel you can estimate the gross freight for which the charterer of the vessel will then have incurred liability. But I do not understand the idea of a percentage being paid beforehand upon the freight to a person who is under no liability for freight at all. Therefore I should say that this clause in the charter-party assumes, to begin with, or as the condition of its application, that the merchant who is to be paid a certain percentage on the estimated gross freight is liable for that gross freight; and he is to be paid beforehand, curiously enough, something which will render his liability for freight upon the terms of the charter-party practically less. He will have eventually to pay the whole freight stipulated in the charter-party for which he has incurred liability so soon as the vessel is completely loaded; but then so much money—a percentage upon the estimated amount—is put into his pocket beforehand, so that it comes to be a reduction of the amount of his liability. I am therefore of opinion that one condition—the primary condition—of this singular clause being operative is, that there shall be liability for the freight, a percentage upon which is to be paid beforehand to the person liable in order to reduce the amount of his liability. Now, I think the condition of any liability on the part of the charterer of the vessel for freight is that the vessel shall arrive. That is the Sheriff-substitute's view. The words in the charter-party are "to arrive," which Mr Aitken very properly said he felt himself bound to concur in reading as the defenders here read them—on the arrival of the ship at the port of loading, or at the port to which it is under obligation to go in order to receive cargo. That is the primary condition of the charter-party coming into operation—that the ship shall arrive. Now, it never arrived, and consequently there never was an obligation upon the charterers to pay freight. It cannot be maintained that they ever were under liability to pay freight; and it is made more clear, if it is capable of being made more clear, by the two clauses in the charter-party to which I called attention during the debate. The first of them is, that upon the arrival of the vessel it shall be certified as in good seagoing condition to perform the obligations on the ship by the charter-party; and the charterers must be satisfied that it is. If they are not, and if it is not decided against them that they ought to be satisfied, the charter-party is void, and they are under no obligation at all. I do not need to read the words again—I read them while the case was in course of being argued. If the vessel does not arrive it cannot be certified as in a proper condition to fulfil the owner's obligations under the charter-party; and unless it is so certified and the charterers are satisfied with the certification to that effect, the charter-party is at an end, and there can be no obligation to pay freight. Then the other clause is, that if from any cause whatever—and the most obvious cause is the loss of the vessel—it does not arrive on or before the 31st January 1896, again the charter-party is at an end, unless the merchant, upon its subsequent arrival within a reasonable time thereafter, elect to go on although under no obligation to do so. Now, that could not be either. It did not arrive on or before the 31st of January, being at the

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bottom of the sea. Thus the charterers are under no obligation to pay freight, and for the reasons which I have already explained, I think this clause, which is the foundation of the action, is not applicable where they are under no liability to pay freight. Against this the only argument is upon these words,—“Or should vessel be lost.” Now, I cannot in a clause so altogether novel as to be unprecedented read these words as meaning that if the vessel is lost and never arrives at the port of loading, there shall be this obligation on the part of the owners, that they shall be bound to pay to the charterers a certain percentage upon the freight. In the circumstances as they admittedly exist there is no obligation here upon either party under this charter-party. I therefore agree with your Lordship that the judgment of the Sheriff-substitute ought in effect to be returned to, and that of the Sheriff recalled.

LORD MONCREIFF.—I also agree that we should revert to the judgment of the Sheriff-substitute. The clause upon which the pursuers rely is admittedly one of a novel and unusual character. I think it clearly lay upon them to shew that that clause will bear the construction which they seek to put upon it. The strength of their case is that it contains a provision that commission is to be paid in the event of the vessel being lost. We certainly are bound to give some effect to these words, but I think it lies upon the pursuers to shew very clearly that, whereas all the other conditions of the contract are dependent upon the arrival of the vessel at Portland, this condition is not, but applies to the case of the vessel never arriving at Portland at all. Now, I quite follow and appreciate the argument which Mr Aitken addressed to us that this was a separable contract for what was substantially brokerage—brokerage to be paid independently of the contract being carried out, upon the completion of the contract. But that is a very unusual kind of stipulation when made in favour of the charterers, and I think it lies upon the pursuers to shew distinctly that the words upon which they found entitle them to payment of this commission although the vessel never reached the port at all. I do not think they have succeeded in doing that; on the other hand, I think that the owners have suggested an intelligible explanation of these words which is consistent with their referring to a time subsequent to arrival in port. We see from the contract that although the vessel was to come to Portland in the first instance, the charterers had it in their power to order her to proceed to various other ports. And therefore after arrival she might have been lost on the way to one or other of those ports to which she might be destined by the charterers. That construction squares with the collocation of the words “or should vessel be lost” after the words “on completion of loading,” and therefore they may refer to the case of the vessel being partially loaded at one port and proceeding towards another, and being lost on the way.

On the whole matter I think the Sheriff-substitute has taken the sound view of the case, and that we should revert to his judgment.

LORD YOUNG.—Perhaps I should say that I rather approve of the view which was urged upon us in argument, leading to the same results as the view we have adopted—I mean the view that there being nothing to shew that the vessel was in existence at the date of this contract, but everything

to suggest the reverse, the contract consequently was void altogether from the beginning, and never came into operation at all. **No. 18.**

LORD TRAYNER was absent.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against: Find in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-substitute dated 19th June 1896: Therefore of new assoilzie the defenders from the prayer of the petition: Find them entitled to expenses in this and in the inferior Court," &c.

J. & J. Ross, W.S.—WILLIAM B. RAINNIE, S.S.C.—Agents.

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ALEXANDER KIDD AND OTHERS (William Kidd's Trustees),
Defenders (Appellants).—*Shaw—A. S. D. Thomson.*

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Reparation—Negligence—Defective floor in granary—Duty of inspection—Latent Defect.—A plumber employed by a farmer sustained injuries while crossing the floor of a granary, which at a particular spot gave way beneath him. In an action of damages by him against the farmer it was proved that the floor had been overhauled two years before the accident by a competent tradesman, and that it had been ever since in daily use by the defender and his servants, who were in the habit of crossing it with heavy weights, and that there was no reason to suppose it was in a dangerous condition.

Held that the pursuer had failed to prove that the accident was due to the fault of the defender.

Dolan v. Burnet, March 4, 1896, 23 R. 550, *distinguished*.

IN March 1896 Alexander S. Paterson, plumber, Musselburgh, raised an action in the Sheriff Court at Edinburgh, against the trustees of the late William Kidd, farmer, Pinkiehill, Musselburgh, concluding for £500 in name of damages. 1st Division. Sheriff of the Lothians and Peebles.

The pursuer averred that James Henderson, plumber, Fisherrow, in whose employment he was, had received orders from one of the defenders, who were carrying on the farm occupied by the late Mr Kidd, to fit a new kitchen boiler in the farm-house, and that the pursuer had been sent to do the work.

(Cond. 5) "While carrying out these instructions he entered a loft adjoining said farm-house and tenanted by the defenders for the purpose of shutting off the water supply, to enable a new kitchen boiler to be fitted in, and when walking over the flooring to that part of the loft where the water cistern therein was situated, the floor suddenly and without warning gave way. This was in consequence of its rotten state and want of timeous attention and repair on the part of the defenders, although it was in a sound and proper state when the subjects were let to them and the said deceased William Kidd. The pursuer had no warning of any danger, and relied, as he was entitled to do, upon the floor being in a sufficient condition to bear his weight. The defenders knew, or ought to have known, of the defective condition of said floor. In his endeavour to save himself, the pursuer instinctively threw out his hands, when his left hand came against a sharp hook, which was hanging near the place, with the result that his hand was severely lacerated, and one finger had to be amputated.

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It was the duty of the defenders to have seen that the said flooring was in good order and repair."

The pursuer pleaded;—1. The pursuer having suffered loss, injury, and damage through the fault or negligence of the defenders, or others for whom they are responsible or represent, the pursuer is entitled to reparation as concluded for.

The defenders denied that they had failed in any duty to the pursuer, and they pleaded;—1. The averments of the pursuer are not relevant or sufficient to support the prayer of the petition. 3. The defenders not having failed in any duty to the pursuer, are not liable as sued for. 5. (1) The injury to the pursuer having been accidental, the defenders are not liable for the consequences thereof.

A proof was allowed. It was proved that the pursuer had been injured in the manner stated on record. It was also proved that two years before the accident the late Mr Kidd had employed a joiner named Sandilands,* to overhaul the floor of the granary, and to do any repairs which he considered necessary; that the granary had been used constantly ever since by one of the defenders,† who managed the farm, and by his servants, who were in the habit of walking across it almost every day, carrying heavy bags of oats and beans, &c., and that there was no reason to suppose that the floor was in a dangerous condition.

On 2d July the Sheriff-substitute (Hamilton) pronounced this interlocutor:—"Finds in fact, that the defenders, as representing the late William Kidd, are tenants of Pinkiehill Farm, near Musselburgh; that on 22d November last the pursuer, who was then in the employment of James Henderson, plumber, Fisherrow, was sent by his master to said farmhouse to put in a new kitchen boiler; that in connection with said work it was necessary to shut off the water from the cistern; that for that purpose the pursuer went up to the loft where the cistern was situated, and that, as he was walking towards the

* Thomas Sandilands deponed,—“I am a master joiner at Inveresk. About two years ago the late Mr Kidd employed me to do certain work in connection with the cistern in the granary at Pinkiehill. I was to strengthen the parts where the cistern was standing, and to repair the cistern as the plumber required, and I was to look over the floors and do any repairs that I considered were wanted. I thoroughly examined the floor then, and made repairs where I considered these were necessary. I renewed pieces of it here and there. It was a general repair. I know where the accident happened to the pursuer, near the water tank. It was where I joined the new wood to the old. I did the work on the flooring in a thoroughly tradesmanlike manner. I looked at it after it was executed. I was paid for my work by the late Mr Kidd.”

† Alexander Kidd deponed,—“I have occasion to be in the granary once a week, and sometimes oftener. I am almost daily in the coach-house. . . . I never saw anything the matter with the floor, from above or below. Roughly speaking, we have over twenty servants about the farm. No complaint was ever made to me by any one of them as to the condition of that floor. I never heard of any complaint being made by any one. I had no reason to suppose that floor was in a dangerous condition. The farm people would use the granary nearly every day, and not less than four times a week. It is a place where we have sometimes fifty or sixty bags of oats stored. We take three or four bags at a time down to the stables. There are also beans kept there. A bag of oats weighs 12 stones, and a bag of beans 20 stones, and men carry those over the floor in question regularly, certainly not less than four times a week.”

watercock, his foot suddenly went through the floor, which was rotten at that part; that in the endeavour to save himself from falling, he instinctively threw out his arms, when his left hand came upon a reaping hook which was hanging near the place, with the result that his hand was badly cut, rendering it necessary to amputate the second finger, while the power of moving the third finger has been almost entirely lost; that the said accident was caused by the rotten and unsafe condition of part of the said floor, which condition was due to the fault of the defenders or of the said William Kidd: Finds in law, that the defenders are responsible for said accident, and are liable in damages to the pursuer; therefore ordains the defenders to make payment to the pursuer of the sum of £200 sterling." *

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The defenders appealed, and argued;—*Dolan v. Burnet*¹ was decided on specialties which did not exist here. In that case the general public were invited to the shop, while here they had no right of access to the granary. Then again the premises in that case were very old, and the portion of the floor which gave way had been repeatedly patched, and the defect could have been discovered by anyone going into the cellar below. In any view the case, and the other cases cited by the pursuer, were not authorities for the proposition that the tenant was necessarily liable for an accident happening in such circumstances. The measure of diligence required by the law on the part of the defenders was just the reasonable care which a prudent man should exercise in the use of his own property. *Moffat & Company v. Park*² was decided expressly upon the ground that the jury had affirmatively found that there was fault on the part of the defender. In *Caledonian Railway Company v. Greenock Sacking Company*,³ it was held that looking to the nature of the premises the defenders were guilty of recklessly overloading their store and bringing down the building. In *Brady v. Parker*,⁴ the Court held that the exercise of reasonable care would have convinced the tenant that the hoist should have been fenced and not left open. *Francis v. Cockrell*⁵ was decided on the footing that there was unusual risk incurred by anyone setting up such a grand stand. The pursuer must establish that there was negligence on the defenders' part in the sense of failure to use reasonable precautions. Now, here, there had been no complaint made of the condition of the floor by those who were daily going across it with heavy weights, and only two years prior to the accident it had been overhauled by a competent tradesman.

Argued for the pursuer;—He was entitled to have an interlocutor

* "NOTE.—The Sheriff-substitute is unable to distinguish this case from the recent case of *Dolan v. Burnet*, as yet reported only in the Scottish Law Reporter, vol. 33, p. 397. If there is any difference between them the proof of fault on the part of the defenders is even stronger than it was in *Dolan's* case.

"As regards the sum decerned for, it is to be observed that the pursuer is now unable to work as a plumber, and that, after sixteen years' experience in that trade—he is now a man of thirty-four—he has to look out for other means of earning a livelihood."

¹ *Dolan v. Burnet*, March 4, 1896, 23 R. 550.

² *Moffat & Co. v. Park*, Oct. 16, 1877, 5 R. 13.

³ *Caledonian Railway Co. v. Greenock Sacking Co. and Others*, May 13, 1875, 2 R. 671.

⁴ *Brady v. Parker*, June 7, 1887, 14 R. 783.

⁵ *Francis v. Cockrell*, 1870, L. R., 5 Q. B. 501.

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containing similar findings to those in *Dolan v. Burnet*,¹ which was really a stronger case than the present; for the danger was latent there, while here it could have been detected if the defenders had duly fulfilled their duty of inspection. The proprietor of a house was at common law held to guarantee all persons whom he invited to enter it against anything of the nature of a concealed danger.² The defenders had failed to displace their liability by shewing that no reasonable inspection could have disclosed the rottenness of the floor. They were accordingly liable in damages.

LORD PRESIDENT.—The Sheriff-substitute has found that the accident "was caused by the rotten and unsafe condition of the floor, which condition was due to the fault of the defenders or of the said William Kidd." He has given a very brief statement of the grounds of his judgment, and he appears to have gone to a large extent on a consideration of the case of *Dolan v. Burnet*.¹

Now, when I look at the interlocutor in that case, I find that the judgment rests upon a finding of fault in the circumstances of that case, and therefore the decision cannot possibly absolve us from the duty of ascertaining whether there has been fault on the part of the present defenders in the circumstances of the present case.

The fault alleged is negligence,—the statement against the defender being that whereas the event proved that the floor of the granary in a particular spot was rotten, this ought to have been within the knowledge of the defenders, and should have been provided against by them by mending or removing the bad part.

We have to attend to the special circumstances of this case, and I must say that I am unable to come to the conclusion that the defenders are chargeable with fault. If the question be, in agreement with *Dolan's*¹ case, whether there was fault attributable to the defenders, then we must know specifically what fault they were guilty of.

Now, this building was a granary in constant use, and, if we take as the test what a prudent man would do for his own safety, it appears that Alexander Kidd, one of the trustees who lived on the farm, was constantly in the building walking across the floor just as the plumber did. But there is more than that—more also than the constant and unsuspecting use of it by other persons in his employment—because it appears that two years ago there had been occasion to employ tradesmen to overhaul the building, and we have the evidence of Sandilands, a master joiner, who went over the premises and made general repairs wherever necessary, reporting his work to Mr Kidd. Accordingly, if there is a duty of inspection of all premises,

¹ 23 R. 550.

² *Baillie v. Shearer's Judicial Factor*, Feb. 1, 1894, 21 R. 498, *per* Lord Young, 507; *Campbell v. Kennedy*, Nov. 25, 1864, 3 Macph. 121, 37 Scot. Jur. 62; *Moffat & Co. v. Park*, Oct. 16, 1877, 5 R. 13; *Caledonian Railway Co. v. Greenock Sacking Co. and Others*, May 13, 1875, 2 R. 671; *Brady v. Parker*, June 7, 1887, 14 R. 783; *Beven on Negligence*, vol. 1, p. 500; *Indemaur v. Daines*, 1866, L. R., 1 C. P. 274, *per* Justice Willes, 287; *Francis v. Cockrell*, 1870, L. R., 5 Q. B. 501; *Smith v. London and St Katherine Docks Co.*, 1868, L. R., 3 C. P. 326.

then this duty was fulfilled, for it can hardly be said that in the case of a granary in constant use there ought to be a skilled inspection more often than once in two years. Without laying down any general rule on the subject, the fact is that the building was overhauled by competent tradesmen, and from that time down to the occasion of the accident the occupiers of the premises shewed their belief in its sufficiency by using it. I cannot say that I think that any deliberating and well-thinking jury would find as fault that there was negligence attributable to these defenders, and, accordingly, where I differ from the Sheriff-substitute is, that I think he has been moved, by a construction of *Dolan's*¹ case which I cannot think well founded, to take a somewhat short cut to a conclusion of negligence on the defenders' part.

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I desire to say that I quite understand that, according to the nature of the defect, there may arise presumptions one way or the other, *e.g.*, an occupier will have to account for ignorance of something apparent and obvious. But on the other hand where it is not obvious, and where we have a careful overhaul two years previously, and constant use thereafter, I cannot, as a jurymen, affirm that negligence has been proved.

LORD ADAM.—The pursuer, who was temporarily employed by the defenders as plumber, had occasion to cross the floor of a granary in their occupation, and in doing so met with the accident for which he now claims compensation from them. Now, this is an action for damages in which fault must be proved, and I observe that the only plea set out on record is that the accident was due to the fault or negligence of the defenders, and that accordingly must form the issue which the pursuers are bound to prove.

I am not of opinion that there is any legal obligation on an owner or occupier towards a third person to guarantee that such person shall under all circumstances be kept free from accident. If an accident does happen, the question then arises whether there has been any fault or negligence on the part of the owner or occupier.

Now, there is no doubt that the fact of an accident having occurred may create a presumption of fault which, if not explained away, may cause liability. It is accordingly the duty of the defenders to take such reasonable and ordinary precautions as would any prudent man to provide for the safety of himself, his family, and his servants.

In the case of buildings, it may be the proprietor's duty to see that they are originally constructed in a safe manner, while, if they have been a long time built, there arises a duty of inspection.

The real question here seems to be, whether the defenders failed to use proper inspection to see if the floor was safe and fit for use. I think the evidence clearly proves the contrary. It was said by the pursuer that the floor was obviously rotten, but that is not borne out by the evidence. We have a skilled tradesman who testifies that two years before the accident he was employed to put the floor into a fit condition, and that having done so he informed the defenders, who were naturally satisfied. There may not

No. 19. have been sufficient inspection by him, but the defenders are not responsible for that, having employed a competent man to do the work ; and accordingly, up to that date, they are absolved from the charge of negligence. If that be so the question is, whether there is anything to shew subsequent neglect on their part, or that the state of the floor became so much worse during these two years as to be obviously dangerous. It was in daily use by the defenders and their men, and I agree with your Lordship that the pursuer has failed to prove any negligence on the part of the defenders.

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LORD M'LAREN.—I think that it is an old and sound rule of law that when two people are brought into contact under an ordinary contractual relation, and one owes to the other a certain measure of care and diligence, the standard of diligence is that middle degree which would be exercised by a prudent man in the conduct of his own affairs. That rule seems to me to be particularly applicable to the circumstances here, where a workman, temporarily employed in executing repairs, is entitled, in going about the premises, to find such provisions for his safety as a prudent householder would make for that of himself and his family and servants. These provisions would be different according to the nature of the occupation of the householder. Thus, in a private house, one would expect to find substantial floors and a well-guarded staircase, while in an engineer's shop there might be planks leading from one gallery to another and temporary ladders. The floor in question was one built to carry heavy weights, such as sacks of corn and beans. I agree that, if it can be shewn that the tenants—the defenders—had good reason to think that it was in a sufficient state of repair for the occupation of themselves and their servants, they had fulfilled their obligation to the plumber. On the facts there is no reason to doubt this, because the floor was put in repair by a competent tradesman—on whose skill no imputation is cast—only two years before the accident, and it is impossible to maintain, in the absence of any suspicion of its soundness, that there was a duty of further inspection within so short a period. If the defenders had noticed that the floor was becoming unsound, then it would have been their duty to see the hole mended or fenced off, and workmen casually employed by them would be entitled to get warning of the danger, or to obtain pecuniary indemnity in respect of an accident caused by neglect of such precautions. But there is no evidence to support any suggestion of fault in that sense, viz., that Mr Kidd knew or ought to have known of the fact that part of the floor was unsound.

Accordingly, the case is one of pure misfortune, and however much we may deplore the accident, we cannot hold that it gives any ground for compensation from the pursuer's employers. I have only to add, that as regards the case of *Dolan*,¹ I find in it nothing inconsistent with the view stated by me as to the criterion of responsibility in actions of this kind. We are not concerned with the application of the principle to the facts of that case. We should have to know more of those facts before we could usefully discuss the case as a judgment on the question of fact.

LORD KINNAR concurred.

¹ 23 R. 550.

THE COURT pronounced this interlocutor:—"Find in fact that the pursuer has failed to prove that the accident causing him injury was due to the fault of the defenders, and in law that no liability attached to them: Recall the interlocutor of the Sheriff-substitute dated 2d July 1896: Assoilzie the defenders from the conclusions of the action," &c.

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Nov. 5, 1896.
Paterson v.
Kidd's
Trustees.

MARCUS J. BROWN, S.S.C.—FINLAY & WILSON, S.S.C.—Agents.

WILLIAM ALEXANDER WOOD (Smith's Judicial Factor), Pursuer
(Reclaiming).—*Jameson—Macphail.*

No. 20.

DAVID HUNTER AND OTHERS (Neill's Trustees).—*John Wilson—Clyde.*

Nov. 6, 1896.
Wood v.
Neill's
Trustees.

Succession—Vesting—Clause of survivorship.—A testator, by trust-disposition and settlement, directed his trustees "at the first term of Whitsunday or Martinmas making twelve months after my death, or as soon thereafter and from time to time as the same may be realised, to divide and pay over the residue of my estate equally amongst all my four children above named, their heirs or assignees respectively," and further provided,—“In the event of any of my said children dying leaving lawful issue, the provisions hereby made in their favour shall fall to such issue . . . and in like manner, should any of my said children die without being married or leaving lawful issue, then the provisions hereby made in their favours shall fall to and be divisible amongst my other surviving children, including the issue of anyone who may have died, such issue always coming in their parents' room.”

Held, on a construction of the deed as a whole (*rev. judgment of Lord Kyllachy*), that the presumption that a clause of survivorship referred to the period of distribution had been excluded by evidence of a contrary intention in the deed, and that the children's shares of residue vested in them *a morte testatoris*.

Young v. Robertson, Feb. 14, 1862, 4 Macq. 314, *distinguished*.

DAVID NEILL, farmer, Mains of Ardestie, Fifeshire, died in 1847, leaving a trust-disposition and settlement, dated 5th September 1839, by which he conveyed his whole estates, heritable and moveable, to trustees, for the purposes therein set forth.

2D DIVISION.
Ld. Kyllachy.

By the third purpose he appointed his trustees "to lay out and invest a sum of £4000 on good heritable or personal security, or set aside funds or property out of my estate to that amount, or as nearly, less or more, as may be, and to continue the full controul and management of said fund ay and until my youngest daughter reach the age of twenty-one years, or if dead before that time, then at the period at which she would, if alive, have reached that age, on which event, or at all events at the first term of Whitsunday or Martinmas thereafter, I appoint my said trustees to apportion the said fund as follows, viz.:—To pay my son William £500, Robert £800, and my said daughter Margaret, but subject to the directions after mentioned, £1000, or the heirs and assignees of my said sons and daughter respectively; which legacies are granted in order to equalise the provisions of my said children with those already made to my daughter Susan through her mother's relations and me, and to complete the education of Margaret, and the balance thereof shall be equally divided amongst all my children, the said William and Robert Neill, my said daughter Susan, spouse of the said Peter Ballingall, and Margaret aforesaid, their respective heirs or assignees; and until the period of said division arrives, I appoint my said trustees to pay over

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the annual interest or proceeds of the fund so to be invested to my said four children and their foresaids in the same proportions as the said capital sum is to be divided, each child drawing interest or proceeds according to the amount of his or her legacy and shares respectively."

The fourth purpose was as follows:—"Fourth, At the first term of Whitsunday or Martinmas making twelve months after my death, or as soon thereafter and from time to time as the same may be realised, to divide and pay over the residue of my estate equally amongst all my four children above named, their heirs or assignees respectively, the share of my daughter Margaret, including her share and interest in the fund to be set aside under the preceding article, to be subject to the conditions after mentioned."

The fifth purpose was in these terms:—"Fifth, I appoint the whole provisions above mentioned in favour of my said daughter Margaret to be retained and managed by my said trustees, and lent out and invested, so far as not invested under article third, in their names on good heritable or personal security for her behoof until her marriage or attaining the age of thirty-two years complete; meantime to apply the annual proceeds thereof for her maintenance, and in particular to the completion of her education, for which purpose I have given her a larger legacy under article third, and therefore with power to encroach on her capital for that purpose to an extent not exceeding £200, with power to my trustees on the marriage of my said daughter (should that occur prior to her reaching the said age of thirty-two years), and after advancing her a reasonable outfit, to settle and secure the whole of her means and estate then remaining in their hands by contract of marriage or otherwise on herself and the heirs of the body; whom failing, her own nearest heirs or assignees, but expressly secluding the *jus mariti* of any husband she may marry, and declaring that the same shall not be subject to his debts or deeds; with power nevertheless to my said trustees, should they deem it expedient or the party be deserving, to lend to any husband she may marry any sum not exceeding one-third part of her free capital, taking security for the amount by life insurance or otherwise, as they may see fit; and with power also to my said trustees, if thought expedient, to create a trust under such contract of marriage, and to denude of my said daughter's funds under the directions above mentioned in favour of the trustees therein appointed; but in the event of my daughter Margaret not being married by the time she reached the foresaid age of thirty-two, then I direct my said trustees, should they deem it advisable and conducive to my daughter's comfort, to lay out a sum, not exceeding one-half of her free capital, in purchasing an annuity on her own life, and then to pay over to her the balance or the whole of her funds then in their hands, as the case may be."

The settlement provided lastly, as follows:—"Lastly, In the event of any of my said children dying leaving lawful issue, the provisions hereby made in their favour shall fall to such issue respectively in such shares as their parents may have appointed by any writing under their hands, which failing, equally among them; and in like manner, should any of my said children die without being married or leaving lawful issue, then the provisions hereby made in their favours shall fall to and be divisible amongst my other surviving children, including the issue of any one who may have died, such issue always coming in their parents' room."

The foregoing provisions were declared to be in full of the children's legal rights, with a clause of forfeiture in the event of repudiation of the settlement. No. 20.

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The testator's daughter Margaret was married to John Smith, farmer, Haughs of Kinnaird, in 1848, and by contract of marriage between her and her husband, to which her father's trustees were parties, these trustees, on the narrative of the powers conferred by the trust-disposition and settlement, conveyed to the marriage-contract trustees the whole fortune and provisions to which she was then or might thereafter become entitled under the trust-disposition and settlement, under deduction of such sums as should be advanced or allowed to her by them in name of outfit, with full power to the marriage-contract trustees to uplift, sue for, and discharge the same; and the testamentary trustees, as consenters to the marriage-contract, thereby bound themselves to pay over and transfer the whole funds and property falling to her under the trust-disposition and settlement to her trustees from time to time, as the same were realised.

In December 1895 William A. Wood, C.A., Edinburgh, judicial factor on Mrs Smith's marriage-contract trust-estate, brought an action, which raised the question of the period of vesting of the residue under David Neill's settlement, but which related only to a piece of ground with a house thereon, which Neill had purchased in 1847, taking the title as follows:—"To and in favour of Mrs Susan Laird Neill or Ballingall, residing at Bridge of Allan, widow of Peter Ballingall, farmer, Ayton, and Margaret Brand Neill, residing at Bridge of Allan, both daughters of the said David Neill, and the survivor of them, in liferent for their and her liferent use allenary, and declaring that the said Susan Laird Neill or Ballingall shall be entitled to the exclusive liferent use and enjoyment of the said piece of ground and others hereby disposed during the whole period of her lifetime, and to and in favour of the said David Neill, his heirs and assignees whomsoever, in fee."

The state of the testator's family was as follows:—He was survived by two sons William and Robert, and by two daughters Susan (Mrs Ballingall) and Margaret (Mrs Smith). All the children were dead at the date of the action, Margaret, the last survivor, having died on 9th September 1895. She and her two brothers left issue, who were alive at the date of the action, but Mrs Ballingall died without issue.

The action, to which the testamentary trustees and the other persons interested were called as defenders, concluded for declarator that the pursuer, as judicial factor foresaid, had right to one-fourth *pro indiviso* of the subjects purchased by the testator in 1847, or, alternatively, had right to one-fourth of the price of the said subjects in the event of the same being sold by the trustees, and for decree ordaining the said trustees to convey, or alternatively, to make payment accordingly.

The testamentary trustees lodged defences, in which they maintained "that on a sound construction of the trust-disposition and settlement of the deceased David Neill, read in the light of the destination in the said disposition of the heritable property in question, and especially in view of the survivorship clause contained in the said trust-disposition and settlement, vesting was postponed until the date of the death of the liferentrix, Mrs M. Neill or Smith, on 9th September 1895, and that in consequence of the testator's children having all predeceased Mrs Smith, the last liferentrix, the succession thereto has devolved on their issue *per stirpes* as conditional institutes.

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The pursuer pleaded, *inter alia*;—(2) The said Margaret Brand Neill or Smith having had right, as one of the four children of her said father, to one-fourth of the residue of his estate, the pursuer, as her assignee, in the circumstances condescended on, is entitled to decree in terms of the conclusions of the summons.

The defenders pleaded, *inter alia*;—(1) Vesting having been postponed as stated in the defences, the pursuer never acquired any interest in the property in question.

On 4th July 1896 the Lord Ordinary (Kyllachy) pronounced an interlocutor sustaining the first plea in law for the defenders and assailing them from the conclusions of the summons.*

* “OPINION.—This case raises a question under the settlement of the late David Neill, who died so far back as the year 1847. The question is as to the date at which vesting took place in a certain part of his succession, viz., a house which he had bought at the Bridge of Allan. There is no doubt that, although subject to a liferent created by the deceased himself, that house formed part of the residue of his estate, and with respect to that residue, his settlement, which we have here to construe, contains the following provision:—His trustees are directed, ‘at the first term of Whitsunday or Martinmas making twelve months after my death, or as soon thereafter and from time to time as the same may be realised, to divide and pay over the residue of my estate equally amongst all my four children above named, their heirs or assignees respectively.’ Now, here it will be observed that there is, on the one hand, no gift of any share in the residue until the period of realisation. On the other hand, there is a destination-over, or what is called a destination-over, ‘to heirs and assignees,’ and therefore if this clause had stood alone there would have been room to argue, on the one hand, that there was vesting *a morte*—heirs and assignees being merely called as substitutes after vesting. There might, on the other hand, have been room to argue that the ‘heirs’ at all events were conditional institutes, and that therefore there was postponement of vesting until the period of realisation. How that question should have been decided had the clause in question stood alone, I do not think it necessary to inquire, because the settlement contains in its last purpose a further provision in these terms—(His Lordship quoted the clause). There is here, it will be noted, first a destination-over to issue, and then failing issue a clause of survivorship among the original legatees.

“Now, the question is, whether this destination-over and clause of survivorship can be read as referring to the event of predecease of the testator, or must, according to the general rule of construction, be read as referring to predecease of the period of distribution,—that is to say, in the case of this residue to the period of realisation.

“I am of opinion that there is nothing in this present case to take it out of the general rule—the general rule which I take to have been settled as far back as the case of *Young v. Robertson*. And the fact which I have pointed out, that there is here no gift prior to the period of realisation appears to me to create a special difficulty in the way of holding that vesting to this residue took place *a morte testatoris*.

“The pursuer no doubt founds on the third purpose of the settlement, which deals with the sum of £4000, as to which the direction is that the sum is to be set aside until the youngest daughter reaches the age of twenty-one, and then divided in certain proportions amongst the sons and daughters or their ‘heirs and assignees.’ It seemed to be argued that in this third purpose vesting was plainly *a morte*, and that the presumption is against

The pursuer reclaimed. The arguments of the parties sufficiently appear from the opinions of the Lord Ordinary and the Court.¹ No. 20.

At advising,—

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LORD JUSTICE-CLERK.—The testator's deed in this case is framed with a view to the division of the residue of his estate in equal proportions among his family, there being a separate provision for an unequal division of a special sum of £4000, this unequal division being declared to be for the purpose of equalising the provisions to the children, 'one daughter Susan having before his death received certain advantages, and one daughter Margaret requiring to have her education completed. The trustees were directed to retain this sum till the time when this latter daughter should, or would if alive, have attained majority, and then to apportion it in a certain manner. It was also directed that during the period they retained the capital they were to pay the interest to the children in the same proportions as those in which the capital sum was to be divided.

As regards the residue, the trustees were directed by the fourth purpose

different periods of vesting as applicable to different parts of the fund. All I can say is, that it does not appear to me to be by any means clear that vesting under this clause was *a morte*. On the contrary, I think the question is practically the same question which arises with respect to the residue, and I see no more reason for holding that vesting took place under this clause before the period of distribution than I see reason for holding that the residue vested before distribution.

"The pursuer, however, also founds on the special provision in the fifth purpose of the settlement, which deals with the whole provisions (residue included) in favour of Margaret Neill, whose share, as it happens, is that specially in question. It is certainly true that the trustees are here directed to retain and manage the whole of Margaret Neill's provisions until she attains the age of thirty-two years or is married; and in the event of her marriage before she reaches thirty-two, to settle the whole of her means and estate then remaining in their hands by contract of marriage on herself and the heirs of her body. That is quite true, and, but for the provision in the last purpose of the settlement to which I have referred, I do not doubt that the result would have been to make Margaret's provisions vest at latest at the date of her marriage. But then I cannot leave the last clause out of view in construing this clause, any more than I can leave it out of view in construing the other clauses, and the scheme of the settlement being for vesting at the period of distribution, I am not able to hold that Margaret's provisions formed an exception. It is true that her whole means were directed to be settled at her marriage by marriage-contract, but I apprehend that there may quite well be a conveyance, by marriage-contract or otherwise, of unvested and contingent rights—a conveyance quite as effectual (or which may be quite as effectual) as a conveyance of absolute rights. Therefore I am not prepared to hold that the provisions with respect to the share of Margaret derogate from the general scheme of the settlement as expressed in the last purpose. I think that vesting took place only at the period of distribution, and that being so, I suppose what happens is that I assolzie the defenders from the conclusions of the summons."

¹ *Pursuer's Authorities.*—*Ferrier v. Ferrier*, May 18, 1872, 10 Macph. 711, 44 Scot. Jur. 390; *Scott v. Scott's Executrix*, Jan. 27, 1877, 4 R. 384.

Defenders' Authorities.—*Young v. Robertson*, Feb. 14, 1862, 4 Macq. 314, 34 Scot. Jur. 270; *Howat's Trustees v. Howat*, Dec. 17, 1869, 8 Macph. 337, 42 Scot. Jur. 116; *Bryson's Trustee v. Clark*, Nov. 26, 1880, 8 R. 142; *Marshall v. King*, Oct. 30, 1888, 16 R. 40; *Macdougall v. Macfarlane's Trustees*, May 16, 1880, 17 R. 761.

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—(His Lordship read the fourth purpose); and by the fifth purpose certain directions were given as to Margaret's share, in view of education and marriage, which is there described as "her capital" and "her means and estate," and "her funds."

The last clause states—(His Lordship read the clause "Lastly"), and then followed a clause of forfeiture in the event of any of the children repudiating the settlement.

The question is whether the survivorship clause in the last clause is to be read as relating to any beneficiary predeceasing the testator or to any beneficiary predeceasing the period of distribution. It appears to me that the deed in its whole scope is against the idea of intention on the part of the testator to postpone vesting to some indefinite period occurring at an interval after his death. I cannot read the words of the fourth purpose as fixing a time for vesting by stating a time for division. They are a reasonable provision for giving a time to the trustees for realisation, quite common in such cases as this, and do not indicate an intention to postpone vesting. They do not make it necessary to read in the last clause such words as "before receiving payment," words which have occurred in testamentary writings, and to which effect has been given. The provisions relating to the disposal of the £4000 are, I think, not indicative of an intention to postpone vesting, for he speaks of the proportions payable respectively as "their shares," and appoints the interest to be paid pending the arrival of the period of payment. And if this provision thus vested *a morte*, it is difficult to see how there should be a different period of vesting for the residue, in regard to which the apportionment of this £4000 was to act as an equalising of provisions.

This view is confirmed by the fifth purpose, which relates to the share of the youngest daughter, Margaret. Many of the expressions point to a gift to her, to be held by the trustees "as her means and estate," "her free capital," and "her funds"—indeed it is treated as belonging to her, and they are empowered to secure it, and that at once, as being "her means and estate," she being entitled to receive the interest as her own. And if Margaret marries they are to secure to herself and the heirs of her body. That does not point to the security of a mere expectancy. It points distinctly to a provision made, to be secured on marriage to her.

Taking all these indications of intention along with the clause of declaration as regards legitim, and of forfeiture against repudiating children, I feel justified in holding the testator's intention to have been vesting *a morte*, and that the pursuer is entitled to prevail in regard to the property which forms the subject of the present litigation.

LORD YOUNG.—I am of the same opinion. From the first I had no doubt that under the provisions of this settlement there was vesting *a morte testatoris*. No reasonable argument against that view has occurred to me. It would be sufficient if it were shewn that this was so with reference to Margaret's provisions, but I think it is also true with regard to the provisions of all the children that vesting took place *a morte testatoris*. The question here is limited to a house purchased by the testator shortly before his death. The title is in the name of the trustees, and the property vested

in them in trust at the testator's death. It seems to have been argued in the Outer-House—and the Lord Ordinary was apparently impressed with the argument—that as there is a direction to pay only twelve months after the testator's death, and a destination-over to the issue of children, and, further, a clause of survivorship in similar terms to that found in the case of *Robertson*,¹ vesting must be taken to be postponed till the period of distribution. The expression used in the deed is as follows:—"At the first term of Whitsunday or Martinmas, making twelve months after my death, or as soon thereafter and from time to time as the same may be realised, to divide and pay over the residue of my estate equally amongst all my four children above named, their heirs or assignees respectively." That is just the provision found in most wills, that trustees are to pay and divide as soon after the testator's death as the estate can be realised. It cannot well be paid and divided sooner. The law allows executors time for that purpose. The usual rule is that they have six months after the testator's death to realise, and that is also the usual provision in wills. The trustees are usually directed to divide at the first term of Whitsunday or Martinmas, making six months after the testator's death, or as soon thereafter as the same may be realised. But it is a new idea to me that such a clause could postpone vesting. It is a novelty to me that the period allowed for distribution should be supposed to have anything to do with vesting. To postpone the period of distribution for twelve months would not postpone vesting, and neither would the postponement of distribution till the estate can be realised. With regard to the house, as to which the question in this case arises, there can be no difficulty as to realisation or distribution. It has stood on the same title since shortly after the testator's death. It was not turned into money. Neither is money in bank. But it was as much realised as anything else. The estate must be vested in something. This house as it stood, without being turned into money at all, was just as completely vested in the beneficiaries as anything could be. The proposition that vesting was to take place from time to time as it was found convenient to turn the various investments into money is extravagant. The intention of the testator as gathered from the deed,—and that is the only source from which we can ascertain his intention,—is perfectly clear. (His Lordship then quoted the fifth purpose above set forth.) In face of that language to express even a doubt that her share was vested in her and liable for her debts and deeds appears to me entirely without foundation. I think, therefore, that the Lord Ordinary's interlocutor must be reversed, and that we must give decree in favour of the pursuer, and find and declare accordingly, in terms of the alternative conclusions of the summons.

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LORD TRAYNER.—I am of the same opinion. The Lord Ordinary has held that this case is ruled by the case of *Young v. Robertson*.¹ In that view I cannot concur. In that case the truster conveyed his whole estate to trustees, directing them to pay the income to his wife if she should survive him (as was the case), and to account for, pay, and divide, or convey the residue after the death of the last liver of himself and his wife to certain

¹ 4 Macq. 314.

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persons named, with a clause of survivorship; and it was held that under that destination no right vested in the beneficiaries until the period of distribution arrived, that is, until the death of the liferentrix. Now, if in this case, as is maintained by the respondents, and as the Lord Ordinary thinks, nothing vested till the estate was realised and payment of the shares actually made, the case of *Robertson*¹ would probably be in point. But the whole scope of the trust-deed before us is adverse to such a contention, and it is to the whole scope of the trust-deed that we must look for the truster's intention. There was here no liferent to be protected. The only interest to be protected by the creation of a trust was that of the persons to whom the fee was given. Not that a liferent would prevent vesting *a morte testatoris*, but it is a consideration to be taken account of in deciding questions of vesting. The trust here had nothing to protect but the interests directly conferred on the children. As regards the sum of £4000 dealt with in the third trust purpose, I think that it vested *a morte testatoris*. The legal presumption is in favour of vesting at that date. Moreover, here it is provided that during the whole period during which the £4000 is to be retained by the trustees, the whole income is to be paid to the children. Those who are to receive the revenue of a fund may generally be taken, in the absence of any provision to the contrary, to be the persons entitled to the capital from which the revenue arises. As regards the fourth purpose, I concur in what Lord Young has said as to the meaning, effect, and purpose of that clause, and have little, if anything, to add. Payment and division may be postponed without postponing vesting, and we are entitled to assume that it was so here. But that no postponement of vesting was intended may fairly be gathered from the terms of the fifth purpose, and with it we are now more immediately concerned. We find there a provision that the trustees are to retain and manage Margaret's share, and to invest it in their names for her behoof until her marriage, or attaining the age of thirty-two years, and meantime to apply the whole income for her maintenance and education. As she was to get the whole income, and no one else had anything to do with it, this indicates that she was then the proprietor of what was yielding the income. If she married before she was thirty-two—and she might very well marry long before that—what was to be done with the capital? The trustees are to settle it by contract of marriage or otherwise on herself and the heirs of her body, whom failing, her own nearest heirs and assignees, but expressly secluding the *jus mariti* of any husband she might marry. Did the truster mean that his trustees were by marriage-contract to settle upon his daughter and her heirs, and to protect from her husband, a mere expectancy? That is the view of the respondents, but I cannot think it was what the truster meant. His idea rather seems to be that his trustees were, on his daughter's marriage, to deal with Margaret's share (then in their hands) as her property. Whenever she married, however soon, the share was to be handed over for her behoof, under settlement, as being her estate. It is so described,—“the whole of her means and estate then remaining in their hands.” I cannot suppose that the testator meant by

¹ 4 Macq. 314.

such language to describe a mere expectancy. The last trust purpose, on which the Lord Ordinary principally founds, provides,—“In the event of any of my said children dying leaving lawful issue, the provisions hereby made in their favour shall fall to such issue respectively in such shares as their parents may have appointed by any writing under their hands, which failing, equally among them; and in like manner, should any of my said children die without being married or leaving lawful issue, then the provisions hereby made in their favour shall fall to and be divisible amongst my other surviving children, including the issue of any one who may have died, such issue always coming in their parents' room.” That I take to be a declaration, that if any of the truster's children predeceased him, the legacy or provision in favour of that child should not lapse but descend to issue of the predeceaser, and failing such issue, then to the surviving children of the truster. On the whole matter, I concur in the result at which your Lordships have arrived.

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LORD MONCREIFF.—As a general rule of construction, in the absence of a fixed period of vesting, a survivorship clause in a family settlement, when payment is postponed, is held to relate to the period of payment or distribution. Such a clause is usually not required if it is intended that the bequest shall vest *a morte testatoris*.

But this presumption may be rebutted by evidence of contrary intention.

The property in question in the present case is part of the residue of David Neill's estate, the title to the subjects having been taken by him to his daughters in liferent, and himself, his heirs and assignees, in fee. Now, the directions as to the disposal of the residue of his estate in his settlement are—(His Lordship read the fourth purpose). In connection with this, we must consider the following provisions of the trust—(His Lordship read the clause “Lastly”).

The question we have to decide is whether in the clause last quoted after the word “dying” there are to be read in the words “before me,” or the words “before receiving payment.”

The question is a somewhat narrow one, on account of the presumption which I have mentioned. On the one hand there is the survivorship clause coupled with the fact that partly from express directions, and partly from the way in which the testator's funds were invested, realisation, division, and payment of the whole of the estate could not, in all probability, take place for some time after the testator's death.

But on the other hand, the settlement contains many indications that it was not the testator's intention to postpone vesting. It is to be observed that in the clause “lastly,” which I have quoted, the words “before receiving payment” do not occur, as was the case in *Howat's Trustees v. Howat*.¹ I would also observe that in the fourth purpose the language used may quite well be read as simply meaning that the trustees are to have a reasonable time for realising and making payment of the children's shares. We are therefore not hampered by considerations which influenced the Court in *Howat's Trustees*¹ and similar cases.

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We proceed now to the evidence of intention. As regards the third purpose, I think it sufficiently appears from the terms of that clause, that although payment of the proportions of the sum of £4000 is postponed until the youngest daughter should reach the age of twenty-one years, it was not the truster's intention that vesting should be postponed. He makes the shares payable to the children or their heirs and assignees; he appoints the interest of the shares to be paid to the children, and speaks of the shares as being their shares, "his or her legacy and shares."

Now, if this provision vested *a morte*, it is improbable that there should be two periods of vesting, in the absence of exceptional reasons.

But further, the whole of the fifth purpose is in favour of immediate vesting. That purpose relates to the whole provisions "above mentioned in favour of my daughter Margaret." Now, these provisions were (1) her share of the £4000 under the third purpose; and (2) her share of residue, including her share of the property in the present case. Without examining the fifth purpose in detail, I may say that the whole of the language used is indicative of immediate vesting. The provisions are spoken of as Margaret's capital, and power is given to the trustees to make advances from this capital for certain purposes. Towards the close of the purpose it is provided that in the event of her reaching the age of thirty-two without being married, the trustees are to denude of her share in the way there described. The trustees are directed "to lay out a sum not exceeding one-half of her free capital in purchasing an annuity on her own life, and then to pay over to her the balance, or the whole of her funds then in their hands as the case may be."

One or two other points may be mentioned. If, as regards the property in question, vesting was postponed until the termination of the liferents, no right to the fee or capital could possibly vest in Margaret.

Lastly, the provisions are declared to be in full of legitim, which is an element in favour of immediate vesting in determining such questions.

On the whole matter I think the pursuer is entitled to declarator and decree in terms of one or other of the alternative branches of the summons.

THE COURT pronounced the following interlocutor:—"Having heard counsel for parties in the reclaiming note for the pursuer against Lord Kyllachy's interlocutor dated 4th July 1896, recall said interlocutor: Find and declare in terms of the alternative * conclusions of the summons, and decern: Find no expenses due to or by either party."

MELVILLE & LINDSAY, W.S.—MITCHELL & BAXTER, W.S.—Agents.

No. 21.

JOHN DAVIS MILLER AND OTHERS (Miller's Trustees), First Parties.—*W. Campbell—Hunter.*

Nov. 6, 1896.
Miller's
Trustees v.
Findlay.

JAMES FINDLAY AND OTHERS, Second Parties.—*Shaw—J. Thomson.*

Succession—Liferent and Fee—Power—Conveyance to liferentrix with power of disposal "during her life."—Certain heritable property was conveyed to M. for her liferent use only, and to her children in fee, with the declaration that "it shall be lawful to and in the power of the said M. by

* The subjects in question were sold on 17th January 1896.

herself alone, during her life, to sell, burden, or otherwise dispose, onerously or gratuitously, of the said subjects as she may think proper." No. 21.

Held that the power did not entitle her to dispose of the subjects by a *novis causa deed*. Nov. 6, 1896.
Miller's
Trustees v.
Findlay.

In July 1851 Henry M'Dougall, portioner in Calton of Glasgow, executed a disposition of certain heritable subjects bearing to be granted in consideration of a price paid by Alexander Smith. The disposition further bore,—“And whereas the said Alexander Smith has requested me to grant these presents in the terms of the dispositive clause after mentioned: Therefore . . . I . . . have sold and disposed, as I do hereby . . . with consent of the said Alexander Smith, in token of his acquiescence in the destination herein contained . . . dispose . . . to and in favour of the said Alexander Smith in liferent, for his liferent use only, and after his death to and in favour of the said Mrs Isabella Parlan or Miller in liferent, for her liferent use only, and to Jean Smith Miller, John Davis Miller, and Robert Lockhart Miller, her children, equally among them, and failing any of them without lawful issue, then to the survivors or survivor of them, and their, his, or her heirs heritably and irredeemably in fee, All and Whole that piece of ground, &c., and I, . . . with consent foresaid, oblige myself to infest the said Alexander Smith in liferent, and after his death the said Mrs Isabella Parlan or Miller, also in liferent as aforesaid, for their liferent uses allenarly, and the said Jean S. say Jean Smith Miller, John Davis Miller, and Robert Lockhart Miller, her children, and their foresaids in fee . . . and I resign the said lands and . . . Moreover I, . . . with consent foresaid, desire any notary-public to whom these presents may be presented to give to the said Alexander Smith sasine in liferent, and after his death to the said Isabella Parlan or Miller also sasine in liferent, for their liferent uses allenarly as aforesaid, and to the saids Jean Smith Miller, John Davis Miller, and Robert Lockhart Miller, her children, and their foresaids, sasine in fee, of the lands and others above disposed under the reservation before referred to: But declaring, however, as it is hereby expressly provided and declared, that it shall be lawful to and in the power of the said Alexander Smith by himself alone during his life, notwithstanding of the above destination, to sell, burden, or otherwise dispose of the said subjects either onerously or gratuitously as he may think proper; and also declaring that, in the event of the said Alexander Smith not exercising the above faculty, it shall be lawful to and in the power of the said Isabella Parlan or Miller by herself alone in like manner during her life to sell, burden, or otherwise dispose, onerously or gratuitously, of the said subjects as she may think proper.”

The said Alexander Smith died intestate, and without having exercised the power of disposal conferred upon him by the disposition. He was survived by Mrs Miller.

Mrs Miller died on the 1st day of June 1896, leaving a trust-disposition and settlement executed by her of date 1st April 1895, whereby she conveyed to John Davis Miller and others, as trustees, her whole means and estate, heritable and moveable, which should belong to her at her death or of which she might then have the power of disposal in any manner of way. This trust-disposition and settlement did not specially mention the heritable subjects conveyed by the disposition of 1851.

A question arose as to whether Mrs Miller by her settlement

No. 21. validly exercised the power of disposal conferred upon her by the terms of the disposition of M'Dougall; and this special case was brought by (1) Mrs Miller's trustees; and (2) John Davis Miller and Robert Lockhart Miller, her surviving children, and James Findlay, the eldest son of her deceased daughter, Jean Smith Miller.

Nov. 6, 1896.
Miller's
Trustees v.
Findlay.

The questions of law were:—"1. Whether the said Mrs Isabella Parlane or Miller by her said trust-disposition and settlement validly exercised the power of disposal conferred upon her by the said disposition, and thereby conveyed the said heritable subjects to her testamentary trustees? Or 2. Whether said heritable subjects now belong to the second parties in virtue of the destination thereof contained in said disposition?"

Argued for the first parties;—Mrs Miller was fiae under M'Dougall's deed, and her deed disposed of the property. Alexander Smith was clearly intended to have power to dispose of the subjects during his lifetime and by *mortis causa* deed, and Mrs Miller was in the same position under the disposition. A liferent with reserved power to dispose at pleasure amounted to a fee.¹ (2) Even if the testatrix was only a liferentrix her deed was valid. A power of disposal was not inconsistent with the liferent in her and the fee in another.² An *inter vivos* deed was not essential; a *mortis causa* deed was a valid exercise.³ At the last moment of her life Mrs Miller might have gifted the entire estate. If so, it was too extreme a view that she could not execute a deed which would regulate the succession to it the moment after her death. [LORD MONCREIFF.—Are the words "during her life" mere surplusage, or do they mean that any deed of disposal is to be executed and take effect during her life? Are these not the only two possible views? Could the construction be supported—"disposal by deed to be executed during her life, but to take effect after her death"? Might not Smith have been willing that Mrs Miller should have power to gratify any desire as to the ownership of the property during her life, and yet not have wished that she should control the destination after her death?] Too much weight should not be placed on the words "during her life." They were not used to limit Mrs Miller's power; they applied to the date of the dispositive act.⁴ She must execute the power during her life. She could not hand it on to another. The law of deathbed still existed in 1851, and the words might be used to prevent objection on that ground.⁵

Argued for the second parties;—The case of *Bailie*⁶ was distinguishable; (1) Mrs Miller was not liferentrix by reservation; (2) her power of disposal was limited. She must execute it during her life. It was not enough to execute the deed. The power must be

¹ *Bailie v. Clark*, Feb. 23, 1809, F. C.; M'Laren on Wills, 3d ed. ii. 1088 and 2013.

² *Stair*, ii. 11, 7, iii. 2, 9; *Bell's Prin.* sec. 929.

³ *Creditors of Mouswell and his Children*, Jan. 6, 1677, M. 4102, Dec. 16, 1679, M. 4104; *Anderson v. Young & Trotter*, Dec. 24, 1784, M. 4128; *Pringle v. Pringle*, July 18, 1890, 17 R. 1229, *per* Lord Rutherford Clark, 1238; *Sugden on Powers*, 8th ed. 216, 217; *Edwards v. Edwards*, 1818, 3 Maddox, 197, later 1821, *Jacob's Chancery Reports*, 335.

⁴ *Bucknell v. Blenkhorn*, 1845, 5 Hare, 131.

⁵ *Morris v. Tennant*, June 7, 1853, 25 Scot. Jur. 432, aff. H. L. July 6, 1855, 27 Scot. Jur. 546.

⁶ *Bailie v. Clark*, Feb. 23, 1809, F. C.

fulfilled during her life.¹ She was limited to *inter vivos* deeds. A No. 21.
mortis causa deed was *ultra vires*.²

At advising,—

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LORD YOUNG.—The only question in this case is whether under the declaration in the disposition that it should be in the power of Mrs Miller during her life to sell, burden, or otherwise dispose, onerously or gratuitously, of the subjects as she might think proper, she had a right to deal with those subjects in her testamentary trust-disposition. I am of opinion that the power given to Mrs Miller (assuming that any power or faculty was legally given to her at all) was only given to her to be executed and acted upon during her life. It is clear enough that if she had during her life sold, burdened, or otherwise disposed of the subjects, they could not have been affected by her trust-settlement. She made a will with the apparent intention to substitute her will for the destination in the disposition of Alexander Smith. This I am of opinion she could not do. I propose, therefore, that we should answer the first question of law in the negative and the second in the affirmative.

I desire to avoid expressing any opinion except so far as is necessary for the decision of the case. But if it was Mr Smith's intention that he should have power given him in the deed to dispose of the subjects during his lifetime, and also by *mortis causa* deed, and that failing his exercising it Mrs Miller should have the same, that could have been very simply carried out by conveying the subjects to Mr Smith, whom failing to Mrs Miller, whom failing to the three children. This not having been done, I assume that he had no such intention, and that his intention was that Mrs Miller should only have power of disposing of the subjects by deeds operating during her life.

LORD TRAYNER.—I am of the same opinion. My view is that Mrs Miller had a *lifereit* with a limited power of disposal, and that she never exercised this power.

LORD MONCREIFF.—The questions put to us in this special case depend upon whether the power of disposal conferred upon Mrs Miller was qualified or absolute. If it was absolute—if the words “during her life” are mere surplusage—she has effectually disposed of the subjects by her will. If on the other hand the true meaning of the words “during her life” is that she is only empowered to dispose of them by conveyance *inter vivos*, I do not think that there is room for contending that she was at any time *fear* of the subjects. The power conferred upon her was a power by constitution, not by reservation, and falls to be construed less liberally than a reserved power. It may be that during Mrs Miller's lifetime her creditors could have insisted on her exercising the power in their favour; but there being no question with creditors, I apprehend that the donee of the power could only exercise it according to its terms.—Bell's Prin. sec. 925.

As to the construction of the power, although the question is not free from difficulty, I am of opinion that the power conferred is limited to the

¹ Sugden on Powers, 8th ed. 209, 210.

² Ramsay v. Cowan, July 11, 1833, 11 S. 967, 5 Scot. Jur. 561; Sprot v. Pennycook, June 12, 1855, 17 D. 840, 27 Scot. Jur. 432.

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disposing of the subjects by *inter vivos* conveyance. I think that it was intended that if Mrs Miller desired or required to alienate or burden the subjects, either in order to relieve her own necessities or to please herself during her lifetime, she should be at liberty to do so, but that if she did not divest herself during her lifetime the subjects should go according to the destination named in the disposition. I therefore think that it was not open to her to dispose of the subjects by *mortis causa* deed, and as she did not validly exercise the power, the subjects fall to the second parties in virtue of the destination.

The LORD JUSTICE-CLERK concurred.

THE COURT answered the first question in the negative and the second in the affirmative.

J. & J. GALLETTY, S.S.C.—ALEXANDER WYLIE, S.S.C.—Agents.

No. 22.
 Nov. 7, 1896.
 Russell v.
 Macknight.

MRS JESSIE RUSSELL, Pursuer.—*Comrie Thomson—A. M. Anderson.*
 A. E. MACKNIGHT, Defender.—*Dewar—Grainger Stewart.*

Reparation—Landlord and Tenant—Defect in house accepted without complaint by tenant.—A tenant took a house entering from a common stair fenced by two walls, but having no hand-rail. He did not complain to the landlord of the want of a rail either when he took the house or subsequently. The tenant having fallen upon the stair and received injuries which resulted in his death, his widow raised an action of damages against the landlord, on the ground that the accident was due to his fault in not having provided a hand-rail. *Held* that, as the tenant had taken the house without objection, and had never afterwards complained to the landlord, there was no fault on the landlord's part in a question with the pursuer.

1ST DIVISION. ON 6th February 1896 Mrs Jessie Morison or Russell raised an action against Mr A. E. Macknight, Edinburgh, for payment of £1000 as damages for the death of her husband, John Russell, who had been tenant of a house in South Queensferry, belonging to the defender.

The pursuer averred that her husband had fallen on the common stair leading to his house, and had sustained injuries which resulted in his death, and that the accident had been caused by the defender's fault in not having the stair, which had a wall on each side, fitted with a hand-rail.

There was also an averment that the landlord was in fault in not having the stair lighted, and in not having a defect, caused by a knot in the wood, at the edge of the landing repaired.

The pursuer obtained an issue whether "the husband of the pursuer received injuries from which he died through the fault of the defender, to the loss, injury, and damage of the pursuer," and the cause was tried before Lord McLaren and a jury on 20th July.

It was proved that the stair upon which the accident happened was a straight stair between two walls, and consisted of nineteen stone steps, and that there was no hand-rail on either side. There was a conflict of evidence on the part of skilled witnesses as to whether a hand-rail was necessary.

It was proved that the stair had been in the same condition when the house was taken by the pursuer for her husband as it was at the time of the accident, and that no complaint had been made to the factor of the want of a hand-rail.

It is not necessary to refer to the other allegations, as the pursuer's counsel admitted that the landlord was not responsible for the lighting of the stair, and as it was proved that the accident happened below the place where the defect in the landing was said to exist. No. 22.
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The jury returned a verdict for the pursuer, and assessed the damages at £120.

The defender asked and obtained a rule on the pursuer to shew cause why a new trial should not be granted, on the ground that the verdict was contrary to the evidence.

Argued for the pursuer;—The tenant was entitled to expect a safe house to live in. There was evidence that the stair was not safe without a hand-rail, and the jury had taken that view. In the absence of a bill of exceptions by the defender, the verdict must stand. If this defect in the stair was patent to both landlord and tenant, then it was unnecessary for the latter to complain. The landlord ought *proprio motu* to have remedied it.

Argued for the defender;—No liability could attach to him, as the pursuer had accepted the defect in the stair when he entered into possession, and he had never complained to the defender. A tenant must give his landlord notice of a defect in his house, and if the landlord failed within reasonable time to remedy it, the tenant must leave the house or remain at his own risk.¹ The defender had stated this objection on record, and Lord M'Laren had directed the jury that failure on the part of the pursuer to complain must negative liability on the defender's part. The verdict must be set aside.

LORD PRESIDENT.—Now that this case has been explained to us, it really comes to a short point.

The facts fail the pursuer in his attack on the staircase, so far as the knot is concerned, because the pursuer's evidence shewed that the knot in the stair had not been reached by the deceased when he fell. The alleged deficiency of light is out of the case in consequence of Mr Thomson's admission, and therefore the only point remaining is the absence of a railing on the stair.

I could understand that there might have been a case for the tenant if, from complaint or remonstrances with the landlord against the continuance of the stair without a railing, it might have been matter of inference that the house was not accepted in its existing condition, but, as the facts came out, it appeared that no complaint had ever been made on this head. The house was taken by the deceased himself without any railing on the stair, and there is no evidence that it was any worse at the date of the accident than when he entered into the contract.

Therefore, when no evidence was offered on this head, I think that when the evidence was closed the case was one of which the jury could only dispose in one way.

Lord M'Laren, who tried the case, stated the point to the jury, and pointed out to them the condition of the evidence. It may be that his Lordship was entitled to go further and to give them a pointed direction on this head, but he placed the evidence before them, and it admitted of only one verdict—for the defender.

We are therefore in a position to judge that this verdict was contrary to the evidence.

¹ Webster v. Brown, May 12, 1892, 19 R. 765.

No. 22.

Nov. 7, 1896.
Russell v.
Macknight.

LORD ADAM.—I am of the same opinion. This is not a case of an accident happening to a third person—an ordinary member of the public—but to the tenant of a house, and it is necessary to consider the evidence, keeping that in view.

Now, with regard to the knot, the evidence is to the effect that the deceased never reached within five or six steps of it, and accordingly if the jury took it into consideration, their verdict is clearly contrary to the evidence.

As regards the want of a hand-rail, as I understand, there is no universal obligation upon a landlord to put up such a rail, and accordingly his liability must depend upon the circumstances of the case. The deceased man became tenant of the house, and must have been satisfied at that time with the condition of the stair. There has been no alteration in it from that time, and accordingly I agree that it was his duty to complain to the landlord, and insist upon the rail being put in. There is no evidence that he did so complain, and I am therefore of opinion that the verdict of the jury, finding the defender liable, was contrary to the weight of the evidence.

LORD M'LAREN.—If the only point in this case had been the want of a hand-rail on the staircase, then, supposing the demand had been made at the end of the pursuer's case, I might have directed a verdict for the defender on the ground that there was no evidence of fault to go to the jury. The contract between the defender and the deceased was a contract to hire a house with no rail on the staircase. There was no illegality in making such a contract, and if a tenant hires a defective house he is in the same position as a workman, in the analogous contract of the hiring of labour, who accepts a known danger.

There were, however, other elements which did not amount to much. The lighting was plainly enough not the landlord's fault, because the lamp must be kept lighted by the tenant. There was, however, the point about the stair being out of repair, and no doubt it was the landlord's duty to repair it if he was made aware of a defect in it.

There was, therefore, a difficulty in withholding the case from the jury. But assuming that I gave the jury the proper direction—and I have no very distinct recollection as to what passed—I think that the jury ought to have found for the defender, because the case as to the condition of the stair failed, and the want of a hand-rail was according to the contract of the parties. I therefore agree that the verdict is contrary to the evidence.

LORD KINNEAR concurred.

THE COURT made the rule absolute, and granted a new trial.

D. HOWARD SMITH, Solicitor—HUGH MARTIN, S.S.C.—Agents.

No. 23. ANDREW ROBERTSON, Complainer (Reclaiming).—*Sol.-Gen. Dickson—M'Lennan.*

Nov. 10, 1896. JAMES WALKER (Alexander Buchanan Hall's Trustee), Respondent.—*Robertson v. Hall's Trustees. Lees—Cullen.*

Sale—Right in Security—Sale or Security—Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), sec. 61, subsec. 4.—In August 1894 Hall, who had a few

days before purchased an engineer's business and plant for £2100, to be paid by instalments, obtained £400 to meet the first instalment from Robertson, a money-lender, Robertson and Hall at the same time executing the following deeds :—(a) A disposition by which Hall in consideration of the sum of £400 sold the plant, &c., as per inventory, with power to Robertson “to take possession thereof at any time he may think proper,” and also with power to him to sell the plant at such prices as he could procure, Hall admitting that the subjects were the property of Robertson, and “in my possession only on loan”; and (b) a back-letter by Robertson to Hall, setting forth that Robertson undertook to resell the subjects to Hall on being paid the price of £400, and any interest in the way of hire due as after mentioned; that so long as Hall delayed repurchasing he should pay Robertson, “by way of hire therefor,” interest on the £400 or such part thereof as remained unpaid, at the rate of 20 per cent per annum; that Hall should pay Robertson £60 every six months until the whole £400 should be repaid; that failure to make said payments should entitle Robertson to enforce the disposition, all prior payments being forfeited; and lastly, that any other sums advanced by Robertson to Hall should be repaid by Hall within a month, otherwise Robertson was to be entitled to enforce the disposition and treat all prior payments as forfeited.

No. 23.

Nov. 10, 1896.
Robertson v.
Hall's Trustee.

Hall's estates were sequestrated on 31st November 1895. He had not made any payments to Robertson in terms of the back-letter, but Robertson had not entered into possession of the subjects.

In a competition between Hall's trustee and Robertson, who maintained that the plant, &c. had been sold to him by Hall, *held (diss. Lord Young, aff. judgment of Lord Kincairney)* that the terms of the deeds and the whole circumstances shewed that the parties intended the transaction to operate as a security, and not as a sale, and therefore that the claim of Robertson fell to be repelled.

Observations per Lord Moncreiff on the effect of the Sale of Goods Act, 1893, sec. 61, subsec. 4, on the authority of *M'Bain v. Wallace*, Jan. 7, 1881, 8 R. (H. L.) 106.

By offer and acceptance, dated respectively 30th May and 4th June 1894, it was agreed between Alexander Buchanan Hall, engineer, Edinburgh, and James Carrick & Sons, engineers and crane-makers, Dalry Iron Works, Edinburgh, that Hall should purchase the business carried on by Carrick & Sons at the Dalry Iron Works, with the goodwill of the business, and fixed and other plant in the premises, at a price to be ascertained by valuation, and to be paid £300 on 18th June and the rest by equal instalments, for which bills were to be granted; and it was also agreed that Hall should get a lease of the premises, which belonged to Carrick & Sons, for ten years at a rent of £100 a year.

2D DIVISION.
Lord Kin-
cairney.

As Hall had not £300 available, he entered into negotiations with Andrew Robertson, money-lender in Edinburgh, who agreed to pay him £400 on the footing of the transaction after mentioned. On 21st August Hall received £400 from Robertson—that is to say he actually received only £360—the difference being retained by Robertson (according to his evidence in the action subsequently raised) as the first half year's hire in terms of the back-letter to be quoted immediately. Out of the £360 so received, Hall paid £300 to Carrick & Sons, and afterwards took possession of the business.

The following deeds were executed as embodying the transaction between Hall and Robertson :—

On 29th August 1894 Hall executed a disposition in favour of Robertson, in these terms :—

“I, Alexander Buchanan Hall . . . in consideration of the

No. 23. sum of £400 sterling, paid to me by Andrew Robertson . . . the receipt of which I hereby acknowledge, do hereby sell, assign, convey, dispose, and make over to and in favour of the said Andrew Robertson, his executors or assignees whomsoever, All and Whole the fixed plant and articles enumerated in the inventory and valuation thereof, and situated in Dalry Engine Works, Edinburgh, which, with the receipt thereto annexed for the price of the same, paid by me to Messrs James Carrick & Sons, from whom I have purchased the same, is here referred to, and held as repeated *brevitatis causa*, and is herewith delivered up and signed by me as relative hereto; surrogating and substituting the said Andrew Robertson and his foresaids in my full right and place in said fixed plant and whole articles, with power to him or his foresaids to take possession thereof at any time he or they may think proper, and that without any warrant or authority other than these presents: Also with power to sell, use, and dispose of said fixed plant and whole articles, in such portions, and at such prices as he can procure, and give delivery thereof to the purchaser or purchasers, to receive and discharge the price or prices, with the application whereof the purchasers shall have no concern: And I bind myself during the period I may be permitted to retain possession of said fixed plant and articles, to take proper care thereof in every respect, and, on the said Andrew Robertson or his foresaids demanding delivery, I bind myself to give him delivery, otherwise he shall be entitled to take delivery as above stated: And so long as said fixed plant and articles remain in my possession, I hereby recognise and admit that they are the property of the said Andrew Robertson, and that they are in my possession only on loan: In witness whereof," &c.

The value of the plant, &c., set forth in the inventory annexed was £2112, 14s. 8d.

On 1st September 1894 Robertson sent the following back-letter to Hall:—

"Dear Sir,—With reference to the disposition granted by you to me, on the 29th ult., of the fixed plant and articles situated in Dalry Engine Works, Edinburgh, as per inventory and valuation thereof, referred to in, and subscribed as relative to, said disposition, for the sum of £400 sterling, it is covenanted and agreed on between us as follows:—

"1st. That I resell you said plant and articles at the price of £400, and I undertake to do so on being paid that sum, and any interest in the way of hire due, at the rate after mentioned.

"2nd. That till repaid said sum and interest as hire, you are to retain possession of said plant and articles, but that only on loan.

"3rd. That, so long as you delay re-purchasing said plant and articles, you are to pay me, by way of hire therefor, interest on said sum, or whatever part thereof may be unpaid, at the rate of £20 per centum per annum.

"4th. That you pay me £60 every six months, commencing the first payment on 29th February 1895, and continuing the payments till said £400 be fully paid.

"5th. That you shall pay me, every six months, the hire above stipulated for, calculated on whatever part of the £400 may remain unpaid.

"6th. Failure to make said payments shall entitle me to enforce said disposition, and should I have to do so, all payments made shall be forfeited as if they had not been made.

"7th. Any other sums I may advance you are to be repaid within a

month after the advance, otherwise the condition in article 6th hereof shall be enforceable by me.—I am," &c. **No. 23.**

Hall never made any payments to Robertson in terms of the back-letter, but Robertson did not enter into the subjects, although he threatened to do so. Nov. 10, 1896.
Robertson v.
Hall's Trustees.

On 31st November 1895 Hall's estates were sequestrated, and on 13th December James Walker, C.A., was appointed trustee.

On 23d December Robertson presented a note of suspension and interdict to have Walker interdicted from working, selling, or removing the plant, &c. within the Dalry Engine Works.

The complainer stated,—(Stat. 2) "On 21st August 1894, the said Alexander Buchanan Hall sold to the complainer, in consideration of the price of £400, then paid by the complainer to him, the whole fixed plant and articles then situated within the said Dalry Iron Works, which are particularly enumerated in the prayer of the note of suspension and interdict. In implement of an obligation undertaken by him prior to said date the said Alexander Buchanan Hall executed and delivered to the complainer, on 29th August 1894, a disposition and conveyance in the complainer's favour of the said fixed plant and articles, . . ." (Stat. 3) "After purchasing the said fixed plant and articles as above mentioned, the complainer agreed with Hall, to give him the use of these upon a hiring agreement, with the option of purchasing them on refunding the purchase price, and any other sums which he might be due to the complainer. The terms of the said agreement are embodied in a letter adopted as holograph, delivered by the complainer to Hall. . . . The said agreement constituted the sole title upon which the said Alexander Buchanan Hall has had possession of the said fixed plant and articles, or any of them, since the complainer's purchase. The complainer has truly had possession of the said plant and articles since 21st August 1894."

The respondent answered,—(Ans. 2) " . . . Denied that there was any *bona fide* sale to the complainer of the machinery and other articles in said inventory, the value of which is stated in the inventory at £2112, 14s. 8d. Explained and averred that the sum of £400 mentioned was a loan. Only £360 was, in point of fact, paid over to the bankrupt, the remaining £40 being retained by the complainer in payment of six months' interest in advance. . . . Explained and averred that said back-letter does not represent the true relation between the complainer and the bankrupt in regard to the possession had by the bankrupt of the articles purported to be lent to him."

The complainer pleaded;—(1) The plant and other articles enumerated in the prayer of the note, being the property of the complainer, and the respondent having unwarrantably interfered therewith, and having threatened to dispose thereof, interdict should be granted as craved.

The respondent pleaded;—(5) The transaction between the complainer and the bankrupt not having been a *bona fide* sale, but a device to create a security over moveables which remained the property and in the possession of the bankrupt, is ineffectual to create any right in the complainer in competition with the respondent. (6) In respect the complainer never obtained delivery or possession of the machinery and other articles in question, the property thereof remained in the bankrupt, and is now vested in the respondent as trustee on his sequestrated estate.

A proof was allowed. The import of the evidence sufficiently appears from the opinions of the Lord Ordinary and the Court.

No. 23. On 14th July 1896 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds (1) That the fixtures and other plant, the sale of which the complainer seeks to interdict, belonged to the bankrupt at the date of sequestration, and passed to the respondent, as trustee on the sequestered estate: (2) That the complainer's title thereto was a title in security only: (3) That it was not completed by possession, actual or constructive, or by intimation, and is insufficient to exclude the title of the respondent as trustee foresaid: Therefore refuses the prayer of the note, and decerns: Finds the respondent entitled to expenses," &c.*

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* "OPINION.—This action, involving questions of law which I have found to be of very great difficulty, regards the effect of a transaction consisting of the advance of money by Robertson, the complainer, to Hall, now represented by the respondent, his trustee in bankruptcy, and the disposition by Hall to Robertson of fixed and other plant on the premises in which Hall at the date of his bankruptcy carried on the business of an engineer and crane-maker, under the name of James Carrick & Son, accompanied by a back-letter by Robertson. It is a case about a security over moveables *retenta possessione*. I speak throughout for convenience of Hall as the bankrupt, it not being material that the business was carried on in the name of Carrick & Son.

"The question is raised in the form of a note by Robertson, craving interdict against the sale by Hall's trustee of the fixed and other plant on the premises. The crave in the petition has been limited by a minute, and I consider that it has been ascertained that all the articles against the sale of which interdict is now asked can be identified as having been included in the disposition by Hall to Robertson.

"The opinion which I have ultimately formed is in favour of the trustee, although I cannot say that I entertain it with much confidence. Whatever difficulty there may be as to the law, there is little, if there be any, as to the facts, which are as follows:—

"Hall was desirous of acquiring the business of James Carrick & Son, carried on by them at Dalry Iron Works, of which they were proprietors; and, by offer dated 30th May 1894, addressed to them, and acceptance by them, dated 4th June 1894, it was agreed that Hall should purchase from Carrick & Son, at a price to be ascertained by valuers, and to be paid by instalments, the business carried on by Carrick & Son at Dalry Iron Works, with the goodwill of the business, and the fixed and other plant on the premises, and also that Carrick & Son should grant to Hall a lease of the premises for ten years at the rent of £100. The contract between them rested on this letter and acceptance.

"There seems some variance in the evidence about the date when Hall took possession, but he did take possession, and carried on business on the premises, continuing the name of James Carrick & Son until his bankruptcy on 15th November 1895.

"Hall had no money, and was unable to pay any part of the price. He required (apparently before he could get possession) to pay Carrick & Son £300, and accordingly he applied, through his agent, to several people, and ultimately to the complainer Robertson for a loan. Robertson, who carries on the business of a money-lender, made the necessary advance. Hall thereupon executed a disposition in favour of Robertson, which is dated 29th August 1894. That deed bears that Hall, in consideration of £400 paid to him by Robertson as the price of the subjects, sold and disposed to Robertson 'the fixed plant and articles enumerated in the inventory and valuation thereof, and situated in Dalry Engine Works.' In the inventory and valuation the articles are valued at £2112, 14s. 8½d., said to be 'based as a going concern.' The disposition is absolute in its terms, and confers power on Robertson to take possession at any time he might think proper,

Low Young
[Handwritten notes and signatures in the left margin]

The complainer reclaimed.¹

At advising,—

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LORD JUSTICE-CLERK.—The complainer is a money-lender in Edinburgh, and entered into a transaction with one Alexander Buchanan Hall in the following circumstances. Hall was desirous to purchase a crane-making business, with the machinery, plant, and stock of materials belonging to Messrs Carrick & Son, crane-makers in Edinburgh. He had no capital, and Messrs Carrick were willing to take a sum of a few hundred pounds down, and Hall's acceptances for the remainder, the price of the whole being £2100. Hall agreed with Messrs Carrick to purchase at that price, and applied to his agent Mr Broatch to endeavour to raise the cash required, and Mr Broatch applied to Mr Robertson, who was also a client of his. Mr Broatch advised that the transaction must be by a sale by Hall to Robertson of the whole subjects, the price being the amount of the cash which he was to receive from Robertson for payment of the money instalment to Messrs

'and that without any warrant or authority other than these presents,' and also power to sell. Further, Hall admits by the deed that, 'so long as said fixed plant and articles remain in my possession, they are the property of the said Andrew Robertson, and that they are in my possession only on loan.'

"Nevertheless, the difference between the price, £400, and the value in the valuation embodied by reference in the disposition—£2112, 14s. 8½d.—requires special attention. The deed really says that £400 is the price paid and accepted for articles worth more than £2000. Further, the disposition discloses that delivery was not contemplated, and also that it was contemplated that the subjects of the sale were to be used by the seller, and that some of them were, as shewn by the inventory, of the nature of fungibles necessarily exhausted by use.

"The complainer Robertson granted a back-letter dated 1st September 1894, which is printed in the record. By this back-letter he agrees to resell the articles to Hall for £400, with interest,—and it is to be noted that the words 'hire' and 'interest' are used as synonymous,—that no term is expressed for the endurance of the contract of hiring,—that the interest or hire is not to be proportionate to the subjects hired, but is to be twenty per cent on the £400, or on the portion of it unpaid. There is an obligation in article 4 to pay £60 every six months until the sum of £400 was fully repaid, which seems susceptible of direct enforcement, but there is no other obligation to pay the £400. Then there is the curious but significant clause, viz, clause 7, to the effect that any other sums advanced by Robertson should be repaid within a month, otherwise he should be entitled to enforce the disposition, which certainly suggests that £400 was not the true price.

"It is not pretended that Robertson ever took actual physical possession of the articles. These remained in the possession of Hall, and were used by him in his business.

"Now, in cases of this kind, and they have been not infrequent, the

¹ *Authorities cited.*—Sym v. Grant, June 3, 1862, 24 D. 1033; M'Bain v. Wallace, Jan. 7, 1881, 8 R. 360, aff. July 27, 1888, 8 R. (H. L.) 106; Robertson v. M'Intyre, March 17, 1882, 9 R. 772; Allan & Co.'s Trustee v. Gunn & Co., June 20, 1883, 10 R. 997; Darling v. Wilson's Trustee, Dec. 16, 1887, 15 R. 180; Liquidator of West Lothian Oil Co. v. Mair, Nov. 18, 1892, 20 R. 64; Liddell's Trustees v. Warr & Co., July 18, 1893, 20 R. 989; Pattison's Trustees v. Liston, June 7, 1892, 20 R. 806.

No. 23. Carrick, and that Robertson was to grant a back-letter undertaking to hire the subjects of the sale to Mr Hall, and to reconvey on getting repayment of the price. This transaction was accordingly carried through. Hall granted a disposition, and Robertson granted a back-letter, the disposition bearing that Hall recognised and admitted that the machinery, plant, &c., were the property of Robertson and that "they are in my possession only on loan," and Robertson in the back-letter stating that Hall was to retain possession, but only on loan, and undertook to resell at the same sum on receiving that sum and "any interest in the way of hire due," at the rate of £20 per cent per annum. There was a stipulation in the back-letter that £60 was to be paid every six months, until the whole sum was paid up, and the hire to be paid proportionally on the balance, failure in making the payments to entitle Robertson to "enforce the disposition" and forfeit all previous instalments. And lastly, the back-letter declared that "any other sums I may advance you are to be repaid within a month after the advance,

principal question which has hitherto arisen has been whether the deed in favour of the lender was a true deed of sale, effectual without delivery, in respect of the provision of the first section of the Mercantile Law Amendment Act, or only a disposition in security, ineffectual without delivery—and to that question a large part of the discussion in this case was directed—although, since the repeal of the first section of the Mercantile Law Amendment Act, that question has lost much of its importance. But in all, or almost all of the cases of this class, there has been inquiry by parole about the true character of the transaction, as to which the deeds have never been held to be conclusive, and accordingly a proof has been led in this case which leaves very little room for doubt about the facts. The transactions between Hall and Carrick & Son and Hall and Robertson may be regarded as really simultaneous, although some time, it is true, elapsed between the dates of the contract with Carrick & Son and of the disposition to Robertson. They were carried out at the same time. There is no doubt that Hall desired to acquire and also to retain the property of the articles. He wished to carry on a business with them and to use them, and in some cases use them up in his business. It is at least difficult to hold that he contemplated the acquisition of them for his business and the sale of them by simultaneous transactions. His need of a loan initiated the whole affair. Robertson, again, who advanced the money, desired to obtain security for repayment with interest, which, although high, may not have been exorbitant, or otherwise than commensurate with the risk he ran. It was a transaction in the ordinary course of his business as a money-lender. He depones, frankly and honestly, that if he should sell the articles and obtain more than £400 with the stipulated interest he would pay the balance to the trustee. He did not admit that he was under any obligation to do this, but I must believe that there was an understanding between the parties to that effect, and I cannot hold that Robertson meant that he would make this payment out of pure charity or goodwill for Hall. I cannot doubt that the motive and object of the disposition and back-letter were that repayment of the advance should be sufficiently secured to Robertson, while at the same time Hall should retain the possession and use of the articles. They were advised by their common agent to carry out the transaction in that fashion. In short, these two deeds constituted a device by which it was thought that Robertson might obtain a security which he could not obtain by a bond with an assignation of the plant without delivery.

"When I use the word 'device' I do not use it in any invidious sense. I do not suggest that the transaction was tainted by any fraud, dishonesty,

otherwise the condition " as to enforcing the disposition and the forfeiture No. 23.
was to come into operation.

Following on this arrangement £400 was found by Mr Robertson and paid to Messrs Carrick. Hall got, and retained, possession of the whole subjects, the fixed machinery remaining *in situ*, and the materials being used up by him as necessary for the conduct of the business. There was no delivery either actual or by formality to Robertson, and no intimation of an assignation of any right to sever the fixed machinery. Subsequently Hall became bankrupt, and the trustee appointed entered into possession under section 102 of the Bankruptcy Act. Robertson now desires by suspension to restrain the trustee from dealing with the subjects of the transaction between Hall and him as falling under the bankruptcy.

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It is plain from the whole history of the case that what Hall required was a loan of money. He desired to become the owner of certain property

or undue concealment. I see no reason to think that it was. The whole transaction seems to have been quite fair and above board. Parties endeavoured to get over a difficulty created by the law. What they intended and attempted to effect was that Robertson should be duly secured. There is nothing to be condemned in such an intention and attempt, and I confess that my inclination would be to sustain this transaction according to its true intent if the law would permit that result.

"There have been a considerable number of cases of this class, all of them of the nature of attempts to effect a security over moveables without delivery. In some of these cases the attempt has been successful—the legal writs devised have been held sufficient for that effect—among which I may quote as probably the most important cases:—*M'Bain v. Wallace*, 7th January 1881, 8 R. (H. L.) 106; *Robertson v. M'Intyre*, 17th March 1882, 9 R. 772; *Liquidators of West Lothian Oil Company v. Mair*, 8th November 1892, 20 R. 64; and *Liddell's Trustees v. Warr & Company*, 18th July 1893, 20 R. 989. In other cases, which may no doubt be distinguished from them, although the distinction is narrow, the attempt has been unsuccessful, and of these *The Heritable Securities Company v. Wingate*, 1880, 7 R. 1094, and *Puterson's Trustees v. Liston*, 14th June 1893, 20 R. 806, are probably among the most notable recent examples. I am disposed to think that a conveyance of moveables has been sustained to the effect of constituting a security for an advance where the transaction has been in reality a pure sale, although the whole object of it has been to effect a security, and although there may be an understanding that the ownership shall revert to the borrower when that purpose has been served, and it seems to me that the rule of law that an assignation of moveables without delivery is totally ineffectual has not as yet been relaxed by decisions to any greater extent. That seems to have been the express ground of judgment in *M'Bain* and in *Liddell*. It appears to me that Lord Young in several opinions has gone further, and has been disposed to sustain a conveyance of moveables as a security wherever the form adopted has been an absolute disposition or a contract of sale, where the lender, as in one case he expresses it, has received a proprietary title. But I think there is as yet no decision going that length. Following the judgments, as I understand them, I think the question here is whether there was any true sale in this case or any true contract of hiring; and I, although with much hesitation, answer that question in the negative. It was argued that *Liddell's Trustees* was in point and ruled this case, and I admit the similarity of that case. At the same time the circumstances were different. Counsel for the respondent pressed, *inter alia*, two distinctions,—first, the great dis-

No. 23. that he might carry on a manufacturing business, and it was for the purpose of getting such a loan that he applied to Mr Broatch for assistance. But Nov. 10, 1896. Robertson v. Hall's Trustees. the question is whether by the form in which the transaction was put Robertson was placed in a better position than that of a lender of money who does not obtain delivery of the property constituting the security for the loan, and is now proprietor of the articles and in such a position in law in regard to them that he can prevent their being realised as part of the bankrupt's estate for the benefit of all the creditors.

In considering the question it is necessary to keep in view that the first clause of the Mercantile Law Amendment Act has been repealed by the Sale of Goods Act of 1893, and that accordingly a party who has by purchase a right to goods, but has not received delivery, actual or constructive, is no longer in a position to vindicate his right as against other creditors of the sellers, as he might have done previously, unless he can do so under the Act

crepancy between the sum advanced and the value, a feature which did not exist in *Liddell's* case; and, secondly, the fact that some of the subjects said to be sold in this case were fungibles to be used in the borrower's business. I am especially impressed by the first of these distinctions, and think it hardly possible that an absolute sale for £400 of subjects valued above £2000—although no doubt not as at a break-up value—was really contemplated; and I think that the evidence of Robertson was almost tantamount to an admission to that effect. I keep in view that the mere circumstance that there was an understanding that any surplus on a sale should be paid to the borrower, although material, cannot be regarded as in itself conclusive, bearing in mind that that specialty, or something like it, occurred in *M'Bain v. Wallace*. I think the whole history of the transaction is also against the view that there was a real sale or a true contract of hiring, and that the provisions of the back-letter to which I have referred can hardly be reconciled with any definite contract of hiring. I think that the whole transaction of the parties was in truth a loan, with an ineffectual attempt to create a security over moveables without delivery.

"As I have indicated, I am not certain that it is of much importance whether the transaction be regarded as importing an absolute conveyance of moveables or only a disposition in security. It was of vital consequence in the cases referred to. But between their dates and the date of the transaction under consideration the first section of the Mercantile Law Amendment Act has been repealed by sec. 60 of the Sale of Goods Act, 1893, 56 and 57 Vict. cap. 71; and at common law an absolute sale of moveables without delivery is just as ineffectual as a disposition of moveables in security. It is true that under sec. 17 of the Sale of Goods Act delivery is not essential to the passing of property in moveables under a sale in the sense of that Act. But then subsection 4 of sec. 61 provides that 'the provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security'; and I cannot doubt that the disposition by Hall, if it imports a sale, falls clearly within these words, and therefore was not a sale falling under the Sale of Goods Act.

"Be it, then, that this disposition expressed an absolute sale of these moveables, it would be ineffectual unless it could be shewn that possession had followed on it. Actual physical possession did not follow. Robertson threatened, indeed, to enter on possession, but admittedly he never did so, unless it could be held that he was constructively in possession, in virtue of the possession of Hall, under the contract of hiring said to be expressed in the back-letter.

"On this question of constructive possession there are not many authori-

of 1893. The provisions of that Act, however, relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of security.

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Now, the conduct of the parties here seems to me to be most correctly described by the Lord Ordinary when he says that the form of the transaction "constituted a device by which it was thought that Robertson might obtain a security which he could not obtain by a bond with an assignation of the plant without delivery." Mr Broatch, the agent who advised the form of the transaction, is constrained to admit that it was just a money-lending transaction. A loan was its sole intent, and the form it took was only a straining after a mode of securing the loan, the actual circumstances making the ordinary mode of security practically impossible. The whole transaction was for an inadequate price, and with the intention, not that the complainer should receive the thing purchased, but that the seller should remain in possession, and even use up that considerable part of the subject of the transaction which consisted of materials, being under no obligation to replace them. In the original back-letter there was a simple stipulation for interest on the sum handed by Robertson to Hall—a stipulation quite inconsistent with the idea of a true sale—and the effort was made to get rid of this difficulty by interpolating the words "by way of hire therefor." Then by the fifth article it is made plain that what is called "hire" is just instalments of repayment, for the hire is to be paid on whatever part of the £400 shall remain unpaid. And lastly, there is a stipulation as to "any other sums to be advanced," thus making the subject which the complainer professed to have bought a security to him for future advances.

Taking into consideration the conduct of the parties, and the whole circumstances of the case, I feel it impossible to arrive at any other conclusion than that to which the Lord Ordinary has come, and I would move your Lordships therefore to affirm his judgment.

ties, for so long as (in respect of the first section of the Mercantile Law Amendment Act) possession by a buyer was not necessary at all, it was needless to raise the question of constructive possession, and the Court has generally proceeded on the former ground. The leading case on this point is, I think, still *Orr's Trustees v. Tullis*, 2d July 1870, 8 Macph. 936. It has, however, been followed in *Robertson v. M'Intyre*, 17th March 1882, 9 R. 772; *Darling v. Wilson's Trustees*, 16th December 1887, 15 R. 180; and in the recent case of *Mitchell's Trustees*, 27th February 1894, 21 R. 567. I am of opinion that these cases do not apply. They cannot apply if the true right of Robertson was merely that of a security holder. In that point of view Hall's possession is to be attributed to his proprietary title, and not to any subordinate title, and his possession must be regarded as his own possession, not Robertson's. But even if Robertson's title were that of owner, I doubt whether these cases could be held applicable. The circumstances in all of them were materially different. When these cases are examined they appear to be special, and to amount to this, that in the particular circumstances the possession of one person was attributed to another who authorised the possession. They were all cases in which it was held that the only intention was to confer a proprietary title, and that all the possession followed which was possible in the circumstances, or at least which could reasonably be expected. The rule has never been applied where the whole object of the transaction was only to secure a loan. . . . "

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LORD YOUNG.—I am of opinion that the disposition of 29th August 1894 being delivered by Hall to Robertson in return for the sum of £400, constituted a contract of sale of the property specified in the prayer of this suspension, and must have effect accordingly. The legal capacity of the parties to contract is not in question, and on the evidence, documentary and parole, I see no reason to doubt that they intended a contract of sale on the terms specified, intelligibly enough, although inartistically or even clumsily, in the disposition. Nor is there a suggestion or ground for suspicion of unfairness by either party to the other, or that either was ignorant of anything material to the contract, known to the other. Then if sale was the contract intended, it follows that the relation intended to be thereby constituted between the parties was that of buyer and seller, and that the title of the buyer to the subject sold was a title of property. That sale was the contract intended I should have held on the terms of the disposition, which I think admits of no other construction. But it is on the parole evidence too distinctly proved to admit of dispute that Mr Hall was distinctly informed, and quite understood, that he could not have the money he desired from the complainer on a contract of loan, or otherwise than on a contract of sale, whereby he should as buyer become owner of the inventoried property. The complainer's reason for declining to pay his money on any other terms is good, and certainly intelligible, and that Mr Hall understood it and so agreed to the terms and took the money upon them is, as I have said, not doubtful as matter of fact.

The complainer being thus the owner of the goods on a valid property title was in a position to contract with respect to them as he did by the back-letter of 1st September 1894. And if what I have said of the contract of sale effected by the disposition be well founded, this letter was thereafter Hall's title of possession. He had no other. What was its character? I think clearly enough a contract of hire on specified terms, unless and until he should avail himself of an option thereby given him to repurchase the goods within a specified time and on specified terms. I did not understand it to be maintained that this was an unlawful contract for the owner of property to make with anyone who was willing to agree to it, or that there was any exceptional ground to hinder him making it with the former firm when he had himself purchased it.

I think this case is governed by the judgment of the House of Lords, affirming that of this Court, in the case of *M'Bain v. Wallace*,¹ and by that of this Court in the subsequent case of *Liddell's Trustees v. Warr & Co.*² The judgments of the noble and learned Lords in the case of *M'Bain v. Wallace*¹ deal with the subject exhaustively. Nor do I think that the authority or application of these decisions is affected by the repeal of sec. 1 of the Mercantile Law Amendment Act, or by sec. 61, subsection 4, of the Sale of Goods Act, 1893. It is in my judgment clear, that as a matter of fact it was absolutely contrary, not merely to the understanding but to the distinctly expressed intention of both parties, to make a contract of loan and to create between them the relation of lender and borrower—making the complainer the holder of a “mortgage, pledge, charge, or other security.”

¹ 8 R. (H. L.) 106.

² 20 R. 989.

It is certain that as a mortgagee, pledgee, or security holder, or, indeed, otherwise than as proprietor, he could not have made the contract expressed in the back-letter of 1st September, and equally so that this was known and understood by both parties. They both knew thoroughly well what they were doing, and in my opinion what they did was lawful and ought to have effect.

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LORD TRAYNER.—The material question of fact in this case is, whether the transaction between the complainer and Mr Hall was a sale or a security. I am of opinion with the Lord Ordinary that the transaction was not a sale, and that, notwithstanding the form which it took, it was intended to operate as a security and nothing else. The circumstances were, shortly, these: Mr Hall purchased from Messrs Carrick & Sons the business then carried on by them as engineers and crane-makers, with their machinery, stock, and plant, at a price of something over £2000. Of this sum, according to their bargain, Mr Hall was to pay to Messrs Carrick £300 in cash, and the remainder by bills. Mr Hall had no money whatever, and to enable him to pay the £300, payable at once in cash, he went to his law-agent, to whom “he mentioned that he wanted a loan of money.” This agent applied to another of his clients, the complainer, who agreed to give the money (I refrain from saying at present to lend the money) on certain conditions, which I shall immediately notice. Mr Hall having got £400 from the complainer settled the transaction with Messrs Carrick, and got possession of their works, machinery, stock, &c. Thereafter the transaction between the complainer and Mr Hall took this form. Mr Hall executed a disposition by which, in consideration of the payment of £400 to him by the complainer, he sold and assigned to the complainer the whole machinery, plant, and stock which he had purchased from the Messrs Carrick. This disposition, although not signed for a few days after the settlement with the Carricks, by which Hall became proprietor of their works, was intended to be signed the same day, and was practically executed *simul et semel*. A back-letter was granted by the complainer on 1st September and delivered to Hall. The form of the transaction therefore was a sale by Hall to the complainer. The reason why the transaction took this form is clear from the evidence of the law-agent, who acted for both the parties. He says—“When he (Hall) came first, he mentioned that he wanted a loan of money. I asked him what was his security, and he told me that he had none. He said that he was going to make this purchase (i.e., from the Carricks), and I told him that the only way in which he could form a security was by his purchasing the stock and then reselling it to Mr Robertson.” Accordingly, what was wanted was a security, and the law-agent thought and advised that this could be done in the way he describes. I do not leave out of view that the complainer denies that he gave the money to Hall on loan, and repeats “that it was an out-and-out transaction of sale.” But the complainer is, to say the least, an interested witness. I prefer to consider the documents which were exchanged at the time as shewing what was the real character of the transaction; the evidence they afford is, in my opinion, the best we have.

Before considering these documents, however, I may advert for a moment

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to certain circumstances which appear to me to make it very improbable that the transaction which we are considering was one of sale. The complainant did not want to buy the business nor the stock and machinery necessary for the business of an engineer and crane-maker. What he did want was a security that the money he was advancing to Hall to enable him to make such a purchase would be duly repaid. Nor is it probable that Hall, after all the trouble he had taken to acquire the business, should be disposed to sell it to another the very day or two or three days after he had bought it. Still less likely is it that Hall should sell for £400 what he had just bought at a price of over £2000. Mere inadequacy of price, I need not say, would be far from conclusive against such a transaction being a sale, but it does forcibly suggest that the transaction was something else, and something short of sale. Another extraordinary feature in this transaction is this:—Hall, the supposed seller, not only remains in full possession of the whole subject of sale, but was entitled to use the stock for his own purposes and his own profit without being under any obligation to pay for or replace the same. In short, the seller was entitled to use what he had sold as if it had not been sold but remained his own property. The statement of the complainant, therefore, that the transaction was one of "out-and-out sale" appears to me to be a very improbable story. But turning now to the documents, the disposition and back-letter, I think it is made clear that this story, antecedently improbable, is not correct in point of fact. Keeping in view the circumstances, as I have stated them, under which this deed was granted, it is curious to find in a deed which purports to be a conveyance to a purchaser, the provision that he should have power to take possession of the subject sold "at any time he may think proper, and that without any warrant or authority other than these presents." If the complainant bought the things specified, he could take possession (having already paid the price) without any such "power" being granted by the seller. The clause is quite inappropriate to a conveyance in pursuance of a sale. Its value and significance are apparent if the transaction was not sale but security. Again, the deed under consideration authorises the complainant to "sell, use, and dispose" of the plant and other articles conveyed "in such portions and at such prices as he can procure, and give delivery thereof to the purchaser, to receive the price and discharge the same, with the application whereof the purchaser shall have no concern"—authority to sell what he had bought—that is, authority to sell what was his own—and the purchaser to have no concern with what he did with the price paid to him. This is mere nonsense in a contract of sale, but a provision familiar enough and appropriate enough in deeds conveying subjects, heritable or moveable, in security. Turning now to the back-letter, I find in it also evidence of the real character of the transaction. I do not go over all its articles, but notice (first) that it contains an obligation on Hall to repay the £400 he had received from the complainant by instalments of £60 every six months—quite an intelligible obligation if the £400 was a loan to be repaid, but absurd if the £400 was the price paid for goods sold and delivered; (second) interest at the rate of 20 per cent was to be paid by Hall to the complainant on the sum of £400 or "whatever part thereof may be unpaid." This also shews that the £400 was a loan, for interest could

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not be exacted and would not be paid as a price for which goods had been sold. No doubt the words are introduced "by way of hire." But these words cannot conceal what was the true nature of the transaction, nor even divert attention from it. I venture to think that while 20 per cent on £400 may be regarded as a very good return by way of interest, the complainer would hesitate considerably before he let out subjects belonging to him which would necessarily deteriorate and be to some extent consumed in the use, and which cost over £2000, for £80 a year "by way of hire." Lastly, the concluding article of the back-letter indicates that the conveyance was a security, although in form an absolute conveyance, as under that article the complainer is authorised to use the conveyance practically as a security to cover future advances.

If I am right in holding, as I do without hesitation, that the transaction in question, although in the form of a contract of sale, was intended to operate as a security, and nothing but a security, then the goods over which the security was intended to be given having remained in Hall's possession, no effectual security was constituted. The provisions of the Sale of Goods Act have, in that view, no application to the case. I need not go over the authorities which were cited to us on either side of the bar. The cases are divided into two classes, one class being those cases in which it was held that a *bona fide* sale had been intended and completed (no matter what the motive which led to it), and the other class consisting of the cases where it was held that security, and not sale, was the contract or bargain. It depends, of course, on the circumstances and proof in each case to which of these classes it belongs. The case of *M'Bain v. Wallace*¹ was much referred to, but little aid is obtained from it in deciding the present case. I think it probable that the complainer, in carrying through the transaction in question, had that case before him, and perhaps had not sufficiently before him the terms of section 61, subsec. 4, of the Sale of Goods Act. But the case of *M'Bain*¹ does not aid the complainer. It did not decide that a security in the form of a sale was effectual in a competition with creditors where the subject of the security was left in the debtor's possession. The decision in that case proceeded distinctly on the ground that the transaction then before the Court was a *bona fide* sale, and Lord Watson remarked—"The Lord Ordinary" (whose judgment was reversed) "seems to have held that the agreement in reality was one for a loan upon security, and not for a sale and purchase, and if that view were well founded the judgment of the Lord Ordinary undoubtedly is equally so." If the Court of Session or the House of Lords had been of opinion that in that case the contract was not sale but security, the decision would no doubt have been other than it was.

On the whole matter I am of opinion that the interlocutor reclaimed against should be adhered to.

LORD MONCREIFF.—I am of opinion with the majority of your Lordships that the Lord Ordinary's interlocutor is right and should be affirmed. The true nature of the transaction between the bankrupt and the complainer

¹ 8 R. (H. L.) 106.

No. 23. Andrew Robertson, by which the former professed to sell to the latter the fixed plant and other articles in Dalry Engine Works, was that of a security, and not an out-and-out sale. It was a transaction in the form of a contract of sale, but it was intended to operate by way of security for an advance of £400. Admittedly there was no actual delivery of the goods to Robertson; they remained in the possession of Hall just as before. If, however, there was truly a contract of sale, and the intention of the parties—as ascertained from the terms of the contract, the conduct of parties and the circumstances of the case—was that the property should pass, the property passed to Robertson without delivery—sec. 17 (1) of the Sale of Goods Act, 1893. But sec. 61 (4) of that Act provides,—“The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.” This is in effect a statutory declaration that a pledge of or security over moveables cannot be created merely by completion of what professes to be a contract of sale. If the transaction is truly a sale, the property will pass without delivery. But the form of the contract is not conclusive. The reality of the transaction must be inquired into; and if, contrary to the form of the contract, and even the declaration of the parties, it appears from the whole circumstances that a true sale was not intended, it will be held that the property has not passed and that no effectual security has been acquired.

I gather from the cases of *Beckett v. Tower Assets Company, Limited*,¹ and *Madell v. Thomas & Company*,² that the same latitude of inquiry is permitted in England, where the question is, whether what bears to be a sale followed by a contract of hiring and purchase is not truly a bill of sale requiring for validity registration under the Bills of Sale Acts, 1878 and 1882.

The argument which was unsuccessful in those cases was precisely the argument which was addressed to us on behalf of the complainer, viz. that the intention of parties is to be ascertained by the legal effect of the instruments which have been executed; that if a transaction can be legally carried out by means which do not come within the terms of the Bills of Sale Acts, there is nothing to prevent the parties from so carrying it out, although when completed the same result would be produced as if there had been a bill of sale; and that in the absence of fraud or mistake inducing the contract, the Court is not at liberty to disregard the legal effects of the document and ascertain the intention of parties *aliunde*.

In the present case I assume that in the “disposition” executed by Hall everything was done which could be done by form of words to represent the transaction as truly a contract of sale. I agree that there is no reason to doubt the good faith of the parties. They both, no doubt, intended to take effectual steps to exclude the diligence of Hall’s creditors, and thought that they had done so. But for all that, the transaction, in substance, was not a sale. It had not the characteristics of a sale, and it had the characteristics of a security, or an attempt to create a security, not only for past, but

¹ L. R. [1891], 1 Q. B. 638, reversing *Cave, J.*, L. R. [1891], 1 Q. B. 1.

² L. R. [1891], 1 Q. B. 230.

also for future advances. The back-letter by itself, apart from the actings and admissions of parties, shews the real nature of the transaction. The sum advanced was only £400, whereas the value of the goods was above £2000. Interest was to be paid on the loan, and the capital was to be repaid by instalments; and if further advances were made, it was provided that the transaction should apply to them also. In short, the back-letter discloses, not a loan or hire of the goods, but a loan of £400 on the security of the goods, to be repaid by instalments. There was no proper loan of goods, no proper contract of hiring. Hall's position after the alleged sale was that of undivested proprietor. He was not merely left in possession of the whole of the goods, machinery, and plant, but on Robertson's own admission he was entitled, in carrying on his business, to use up the stock of timber and iron, and was under no obligation to replace it; and he was entitled to use the machinery, plant, and tools just as if they belonged to himself. He had absolute control over them.

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I do not propose to examine the series of cases, beginning with *Orr's Trustees v. Tullis*,¹ and including *M'Bain v. Wallace & Company*,² in this Court and in the House of Lords, which are referred to in the Lord Ordinary's note. On the cases alone, the decision of this case would have been more difficult. The distinction between some of them is extremely narrow; it is hard to reconcile them; and there are judicial observations, especially in *M'Bain v. Wallace & Company*,² which, taken by themselves, go far to support the complainer's argument. Notwithstanding this, I think I should have come to the same conclusion on the decided cases alone, because only in those cases was the transaction sustained to the effect of excluding the alleged seller's creditors where on the facts the Court was satisfied that a true contract of sale had been entered into. But these cases were all decided before the passing of the Sale of Goods Act, 1893, and I cannot doubt that sec. 61 (4) of that Act was enacted in view of these decisions, and, in particular, of the opinions delivered in the House of Lords in *M'Bain v. Wallace & Company*.² Without saying that the statute wholly destroys the authority of that case, it at least establishes the competency of contradicting a formal contract of sale by evidence of contrary intention whenever this is necessary to ascertain the true nature of the transaction. In the present case, as I have said, the evidence, when examined, makes it quite clear that the true intention of parties was to create a security only, although, no doubt, they intended to effect that result through the form of an out-and-out sale.

THE COURT adhered.

ROBERT BROATCH, L.A.—AULD & MACDONALD, W.S.—Agents.

LAURENCE LAURENSEN, Appellant.—*Balfour—Galloway.*
THE COMMISSIONERS OF POLICE OF LERWICK, Respondents.—
J. G. Stewart.

No. 24.

Nov. 10, 1896.
Laurenson v.
Police Commissioners of
Lerwick.

Police—Maintenance of foot-pavement—Order by Police Commissioners—Process—Appeal—Competency—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), secs. 143, 339.—Section 143 of the Burgh Police Act,

¹ 8 Macph. 936.

² 8 R. 360, and 8 R. (H. L.) 106.

No. 24. 1892, enacts that, "as regards the making, altering, paving, or causewaying, and maintaining streets and foot-pavements, it shall be lawful for any person whose property may be affected, and who thinks himself thereby aggrieved, to appeal to the Sheriff. . . ."

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Section 339 enacts that "any person liable to pay or to contribute towards the expense of any work ordered or required by the Commissioners under this Act, and any person whose property may be affected, or who thinks himself aggrieved, by any order . . . of the Commissioners made or done under any of the provisions herein contained, may, unless otherwise in this Act specially provided, appeal either to the Sheriff or the Court of Session. . . ."

Held that the right of appeal to the Sheriff given by section 143 was limited to cases where the appellant's property was affected, and therefore that it was competent for an owner of property within a burgh, who had been called upon by the Police Commissioners to repair a foot-pavement which bounded but was not upon, and did not affect, his property, to appeal to the Court of Session under section 339, in respect that, his property not being affected, he had no right of appeal under section 143.

1st Division. On 26th August 1896 the Police Commissioners of the burgh of Lerwick served a notice upon Laurence Laurenson, draper, Law Lane, Lerwick, calling upon him, in terms of section 142 of the Burgh Police (Scotland) Act, 1892, "to have the foot-pavement before your property in Law Lane . . . to a width extending outwards from the boundary of your property, half the breadth of said street . . . put in a sufficient state of repair. . . ."

Laurenson appealed under section 339 of the Burgh Police Act, 1892, against the above order as *ultra vires* of the Police Commissioners and illegal, and craved the Court to quash it.

He stated,—"(2) The said Law Lane is a public street within the meaning of the foresaid Act, and is one of the leading thoroughfares from Hillhead to Commercial Street, which is the principal street in the town of Lerwick. The foresaid lane or street, like all the old streets in Lerwick, including Commercial Street, is paved over its whole surface. It is without footpath, kerb, or gutter, and said street forms the only available way for traffic of all kinds. The said lane or street is so narrow that no proper footpaths could be constructed along its sides, and it is used for all kinds of traffic across its whole breadth. (3) The maintenance of the said lane or street as one of the public streets of the burgh is imposed on the respondents by the foresaid Act. Section 142 of the Act under which the said notice professes to be given applies only to the foot-pavements along the sides of streets, and it does not apply to carriage-ways or to such streets as Law Lane, which are used for all kinds of traffic across their whole breadth, and in which it is impossible, or at least impracticable, as in some parts of Commercial Street, to form foot-pavements along the sides. The order or requisition contained in the foresaid notice is *ultra vires* of the respondents and is illegal and oppressive. The appellant respectfully appeals against the same in virtue of the provisions of section 339 of the said Act, and craves the Court to order a copy of this appeal to be served on the clerk to the said Commissioners, and to appoint him within six days after such service to lodge answers thereto; and thereafter, on resuming consideration hereof, with or without answers, to quash the foresaid order or requisition, and to find the appellant entitled to expenses."

The Police Commissioners of Lerwick lodged answers, in which, *inter alia*, they objected to the competency of the appeal. They did

not aver that any part of Law Lane was situated on the property of the appellant. No. 24.

Argued for the respondents;—The order complained of being an order to put a foot-pavement in repair, the appellant had a right of appeal to the Sheriff under section 143 of the Act, and that special right of appeal given by that section excluded the general right given by section 339. (The sections are quoted in rubric.) Nov. 10, 1896.
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Argued for the appellant;—The primary intention of section 143 was to provide a right of appeal regarding a question of work actually proceeding, and the quality of the grievance which might be made the subject of an appeal was injury to the appellant's property. No such injury was complained of here, and accordingly the appellant's right of appeal was not under section 143, but section 339. Even assuming that the appellant might have appealed under section 143, it did not necessarily follow that he had no right of appeal under section 339, for the appeal given by the former section was nowhere said to be exclusive, and it was appropriate that the large question of liability should be capable of being taken by appeal to the Court of Session.

At advising,—

LORD ADAM.—(After stating the facts, and citing sections 143 and 339 of the Burgh Police Act, his Lordship proceeded)—The question, therefore, is whether an appeal is competent under the 143d section. That the appeal under section 143 relates to the subject-matter of this case is clear enough. But then it is necessary to see to whom appeal is given in such cases, and it will be observed that the appeal is given to "any person whose property may be affected, *and* who thinks himself thereby aggrieved," and not as in section 339, where appeal is given to any person whose property is affected, *or* who thinks himself aggrieved. Therefore, it appears to me that, for an appeal to be competent under this 143d section the appellant must be a person whose property is affected. Now, it is nowhere set out in the proceedings here that the appellant's property is affected. The notice bears that the foot-pavement which is to be repaired "extends outwards from the boundary of your property." Therefore, it is quite clear from the order in question that no part of the appellant's property is taken or affected by this order. His purse is affected undoubtedly, but not his property.

Suppose, then, that in this case the appellant had brought an appeal under the 143d section, he would be met with the plea of incompetency in respect that his property was not affected; and I confess I do not see what answer he would have had. I can quite understand that an appeal under that section would have been competent if, for example, the accesses to his property had been interfered with by altering the levels of the street, or otherwise; but I do not see in this case anything of that sort,—where the appellant's property is not touched, and all that is done is to order him to repair a foot-pavement outside his property altogether,—how it can be said in the sense of the Act that his property is thereby affected I do not see. It therefore appears to me that the appeal specially provided in section 143, and referred to in section 339, does not apply to this case, for I do not think it was an appeal open to him. Therefore, the conclusion I arrive at is that the appeal under the 339th section is right, and accordingly that the objection to the competency must be repelled.

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LORD M'LAREN.—I am always disposed to put a liberal construction on clauses in general or local Acts of Parliament giving an appeal to this Court on questions of construction. Such clauses may be liberally interpreted, because it is convenient for those who are to administer the Acts that their clauses should be interpreted by the highest authority. Coming to the consideration of this prejudicial plea with a certain bias in favour of sustaining the right of appeal, and keeping in view the peculiar character of the streets of Lerwick, I agree with Lord Adam that the objections to the competency of the appeal may be repelled. I think that in the case of the burgh of Lerwick there are grounds for the contention that this is not a mere question of fact, because the streets of Lerwick are not constructed for vehicular traffic, and there is no distinction of footway and causeway. Again, it is said that the whole streets are the property of the burgh, and that this is merely a question of assessment. At the same time I do not wish to be understood to say that in any burgh where the streets are of the ordinary character, the householder, by merely saying that the pavement is not his property, can exclude the jurisdiction of the Sheriff and obtain the benefit of the appeal to this Court. That will have to be considered if the question should arise.

LORD KINNEAR.—I agree with Lord Adam for the reason he has given. I think the 339th section provides an appeal generally to various classes of persons, persons who may be "liable to pay or to contribute towards the expense of any work ordered by the Commissioners," and persons "whose property may be affected" by the order of the Commissioners, or who may "think themselves aggrieved by such order," though not called upon to pay or contribute towards the expense. Now, I assume that if the present appeal could be shewn to fall under section 143, it would be incompetent by reason of the provision that the appeal given in section 339 shall be open only if it is not otherwise specially provided in the Act. But I agree with what Lord Adam has said that the 143d section gives an appeal, not to persons who complain of an order on the ground that they may be wrongfully called upon to contribute towards the expense of its execution, but only to persons whose property may be affected by such an order, and who think themselves thereby aggrieved. Now, the appellant does not complain upon that ground. He does not allege that the footpath to be repaired is his property, nor that the repair will in any way affect the property belonging to him, and bounded by the footpath. On the other hand, the Commissioners do not allege that the footpath is the property of the complainer, but on the contrary they call upon him to contribute to the expense of a footpath bounding his property. And therefore I cannot find anything to disclose a complaint that the order in question affects the property of the appellant. I think it is a complaint upon another ground, and therefore within the 339th section.

LORD PRESIDENT.—I do not differ.

THE COURT repelled the objection to the competency of the appeal.

CARMICHAEL & MILLER, W.S.—**IRONA, ROBERTS, & Co., S.S.C.**—**Agents.**

DISTRICT COMMITTEE OF THE MIDDLE WARD OF THE COUNTY OF No. 25.

LANARK AND OTHERS, Complainers (Respondents).—*Salvesen*—
Cook.

JAMES MARSHALL, Respondent (Reclaimer).—*C. J. Guthrie*—
Constable.

Nov. 10, 1896.
District Com-
mittee of the
Middle Ward
of Lanark v.
Marshall.

Lease—Power to resume lands—Feu of lands resumed—Liability of feuor to compensate tenant—County Council—District Committee—Hospital—Public Health (Scotland) Act, 1867 (30 and 31 Vict. cap. 101), secs. 39 and 116.—By lease of a farm dated in 1886 the landlord, *inter alia*, reserved power “to take off such part of the lands hereby let as may be considered expedient for the purpose of feuing . . . it being hereby provided that the annual value of any ground thereby taken from the said lands shall be paid to the tenants” at the rate of £4 an acre.

In 1893 the landlord resumed five acres of the farm, and by private agreement feued the land so resumed to the County Council. Thereafter the District Committee of the County Council erected a hospital on this land under the powers of section 39 of the Public Health Act, 1867.

In 1896 the tenant, who had since the resumption been receiving from the landlord an abatement of rent equal to £4 an acre for the land resumed, served a notice on the District Committee in which he claimed compensation for unexhausted manure, &c., and, founding on section 116 of the Public Health Act, 1867, took proceedings for having the amount of such compensation settled by arbitration.

In a note of suspension and interdict brought by the District Committee, *held* that the proceedings for arbitration fell to be interdicted in respect that the tenant's only right to compensation, if he had any, was against his landlord.

Question, whether the claim to compensation, assuming it to be otherwise well founded, had properly been made against the District Committee and not against the County Council.

Opinions that section 116 of the Public Health Act, 1867, did not apply.

Title to Sue—Joint Right—Lease—Assignment pendente processu.—One of two persons who *ex facie* of a lease were joint tenants of a farm sent a notice of a claim to compensation to the County Council, which had taken a feu of part of the farm, the landlord having power to resume under the lease. In a suspension of proceedings for having the claim determined by arbitration the County Council pleaded, *inter alia*, that the claimant being only a joint tenant was not *in titulo* to insist in the claim. The claimant answered that he had the whole real interest in the farm, and lodged *pendente processu* an assignation in his favour by the other tenant setting forth that fact.

Opinions (*contra* the judgment of Lord Pearson) that the claimant had a good title.

By lease, dated 5th July and 26th August 1886 between Lord 2^d Division.
Hamilton of Dalzell (then Mr Hamilton of Dalzell) on the one part, Lord Pearson.
and James Marshall and David Marshall, farmers at Airbles, on the other part, Lord Hamilton let “to the said James Marshall and David Marshall and their heirs, but expressly excluding assignees and subtenants, legal and voluntary, unless specially approved of by the landlord in writing, All and Whole the said farm of Airbles and others as recently tenanted by the heirs of the late John Marshall,” for the period of nineteen years, from Martinmas 1881 as to the arable land, and from Whitsunday 1882 as to the houses and grain, reserving to the proprietor the mines and minerals, with power to

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work, win, and carry away the same, and to sink pits, "allowance being always given to the said tenants and their foresaids for the ground so to be resumed for the above purposes, or for any surface or other damage which may be done to the said lands by the said operations at the rate of £4 sterling per imperial acre for all ground so to be resumed or damaged to the west of the Muckle Burn, and at the rate of £3 sterling per imperial acre for all ground so to be resumed or damaged to the east thereof, as also reserving to the proprietor and his foresaids full power, liberty, and privilege, at any time during the currency hereof, to take off such part of the lands hereby let as may be considered expedient for the purpose of feuing or letting out on building leases, making excambions, planting, making roads or erecting public works, straightening or making alterations of the marches of the said lands and those adjoining, or for any other purpose that may be thought proper; it being hereby provided that the annual value of any ground thereby taken from the said lands shall be paid to the tenants and their foresaids at the foresaid rates." For which causes, and on the other part, "the said James Marshall and David Marshall hereby bind and oblige themselves, their heirs, executors, and successors whomsoever, all conjunctly and severally," to pay the sum of £246, 10s. as rent.

By minute of agreement dated 9th November 1893 the County Council of Lanark agreed to feu five and a-half acres of the farm of Airbles on, *inter alia*, the following condition:—"The feuar on entry to pay to the tenant of the land for the time being such damage (if any) as the latter may sustain in consequence of the feuar taking possession, such as for loss of crop, manure, &c.," the County Council being also "bound to pay annually during the first nine years of the feu the sum of £20 as compensation to the present tenant of the farm of Airbles for the loss of the land."

Thereafter Lord Hamilton granted a feu-charter in favour of the County Council, dated 17th November 1893, and recorded in the Register of Sasines 10th July 1894, with entry at Whitsunday 1893. The feu-charter did not contain a clause binding the County Council to pay damages, or to pay £20 as compensation to the tenants of Airbles.

The County Council acquired this land in order that the District Committee of the Middle Ward of Lanarkshire might erect a hospital thereon, and the District Committee proceeded to erect a hospital accordingly.

The Marshalls, as tenants of Airbles, made no objection to their landlord resuming this five and a-half acres, and they annually received from him an abatement from their rent equal to £4 an acre for the land resumed, that being the rate specified in the lease for that part of the farm.

On 24th March 1896 James Marshall, as "the lessee and occupier of the farms and lands of Airbles," sent to the District Committee a notice setting forth that the District Committee, "in pursuance of the provisions of the Public Health (Scotland) Acts, and the Acts incorporated therewith, and the Local Government (Scotland) Act, 1889, erected a hospital on the said farm and lands of Airbles, and entered upon and took part of the same for and in connection with the erection of said hospital at or about the term of Whitsunday 1893," and claiming "compensation in respect thereof, videlicet:—For unexhausted manure and improvements on the portions of the said farm taken as

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aforesaid ; for ploughing and labour which had been incurred in connection therewith ; for severance damages and inconvenience ; for loss of crops and pasture ; reforming headriggs and loss of ground and crops,—both on the portion of ground taken from said farm and on the ground adjoining the same, the sum of £180," with interest at the rate of five per centum per annum from the term of Whitsunday 1893. The notice further bore, that in the event of the District Committee not being willing to pay the compensation claimed, the claimant desired to have the same settled by arbitration, in terms of the Lands Clauses Consolidation (Scotland) Act, 1845.*

Marshall followed up this notice by serving upon the District Committee a nomination and appointment of an arbiter, and the District Committee, under protest, made a similar nomination and appointment.

The District Committee then, with consent and concurrence of the County Council, presented a note of suspension and interdict to have Marshall and the arbiters interdicted from following out the reference.

The complainers averred :—(Stat. 3) "The said lands were feued by the County Council for the purposes foresaid, not in virtue of any compulsory or other special powers contained in the Public Health or other Act or Acts administered by them, but as a matter of private and voluntary agreement with Lord Hamilton, which he might have refused to enter into if so disposed. . . ."

The respondent Marshall answered :—(Ans. 3) "Admitted that the lands were feued by agreement. Explained further, that the said lands were feued and purchased in terms of the provisions of these Acts with respect to the purchase of lands by agreement, and that if the parties had not come to an agreement in terms of these provisions the complainers might, and would, have taken the lands compulsorily under section 90 of the Public Health Act."

The complainers further averred :—(Stat. 4) "At the time when the said feu-charter was granted the farm of Airbles was let under lease, dated in 1886, between Lord Hamilton and the said James Marshall and David Marshall, farmers, Airbles, for nineteen years from Mar-

* The Public Health (Scotland) Act, 1867 (30 and 31 Vict. c. 101), enacts, section 39,—“The Local Authority may provide within their district hospitals or temporary places for the reception of the sick for the use of the inhabitants. Such authority may build such hospitals or places of reception provided the board approve of the situation and construction thereof, or they may make contracts for the use of any existing hospital or part of an hospital, or for the temporary use of any place for the reception of the sick.” There is no provision in the Act for the compulsory acquisition of land for the purpose of building hospitals.

Section 116 enacts,—“Full compensation shall be made out of any fund or assessment applicable to the purposes of this Act to all persons sustaining any damage by reason of the exercise of any of the powers of this Act, except when otherwise specially provided ; and in case of dispute, if the sum claimed do not exceed the sum of £50 sterling, the same may be ascertained on a summary application by either party to the Sheriff, whose decision shall be final, and not subject to review, unless when pronounced by the Sheriff-substitute, in which case it may be reviewed by the Sheriff on appeal, and when the sum claimed exceeds £50 sterling such compensation shall be ascertained and disposed of in terms of the Lands Clauses Acts.”

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tinmas 1881 and Whitsunday 1882 respectively, and it is believed and averred that they are both still tenants of said farm.

The respondent denied this averment, and "explained that, though the lease purports to be granted in favour of the present respondent and his brother David Marshall, the name of David Marshall was inserted simply for family purposes. He went abroad shortly after the lease was granted, and has not resided at Airbles since. He is engaged in business in England on his own account, and neither had nor has any interest in the lease. The present respondent is the sole tenant of the farm, and has the sole interest therein."

The complainers also averred:—(Stat. 7) " . . . The tenants' rights under their lease in respect of the resumption of ground for feuing purposes are limited to £4 per acre, which has been allowed, and will doubtless continue to be allowed, by the landlord by way of abatement from the rent." To which the respondent answered:—(Ans. 7) " . . . According to the lease itself, and the intention of the parties as interpreted by their actings since the lease was granted, the said stipulation does not restrict this respondent's compensation to £4 an acre for all damage suffered. During the respondent's tenancy a large number of feus have been given off the farm by the landlord. In every case the feus were given on the same general conditions as those" in the agreement of 9th November 1896, "and in every case in accordance with said conditions, the respondent received, in addition to an abatement of rent equivalent to £4 an acre for the land taken off, compensation for such items of damage as those embraced in his present notice of claim."

The complainers pleaded, *inter alia*;—(2) The complainers are entitled to suspension and interdict as craved in respect (a) that no claim for damages to the respondent the said James Marshall in consequence of the acquisition of said feu lies against the complainers the District Committee; (b) that no claim lies against either the District Committee or the County Council in respect that they have no contract with said respondent, and that his remedy, if any, is against his landlord; (c) that as the feu was acquired by agreement and not by the exercise of the powers of acquisition conferred by the Public Health (Scotland) Act, 1867, the said respondent cannot insist upon arbitration under the Lands Clauses Act; (d) that any claim competent to the said respondent under his lease, in respect of the resumption of ground for feuing, is met by the allowance or abatement of rent made by the landlord in terms of said lease; (e) that the claim now preferred is not a proper claim for compensation within the meaning of the Lands Clauses or Public Health Acts; and (f) that any proceedings that might be competent under the Public Health Act are barred by section 118 thereof. (3) The respondent the said James Marshall, being only a joint tenant of the lands, is not *in titulo* by himself alone to make, or proceed with, said claim. (4) No question of disputed compensation having arisen between the parties, the complainers are entitled to suspension and interdict as craved.

The respondent pleaded, *inter alia*;—(2) This respondent having sustained damage by reason of the complainers' exercise of the powers of the Public Health (Scotland) Act, 1867, the complainers are bound, in terms of section 116 of the said Act, to make compensation therefor under the Lands Clauses Acts, and the note should be refused, with expenses to the respondent.

During the hearing in the Procedure Roll the respondent was allowed to lodge in process an assignation, dated 10th July 1896, whereby the respondent's brother David Marshall, on the narrative of the facts averred in answer 4, assigned to the respondent his (David's) whole interest (if any) in and to the lease, with power to uplift claims connected therewith.

On 3d August 1896 the Lord Ordinary (Pearson) granted interdict as craved.*

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* "OPINION.— . . . The tenant's claim is founded on section 116 of the Public Health Act, 1867. That section provides (*inter alia*) that 'full compensation shall be made, out of any fund or assessment applicable to the purposes of this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act.' It further provides that 'when the sum claimed exceeds £50 sterling, such compensation shall be ascertained and disposed of in terms of the Lands Clauses Acts.'

"This seems simple enough, but the tenant is met with an array of pleas, founded partly on the lease and partly on an anxious criticism of the statutory provisions, intended to shew that his claim fails for want of relevancy, and that proceedings on it should be stopped on that ground. These pleas are set forth in heads *b*, *c*, *d*, and *e* of the complainers' second plea in law. It does not appear to me that any or all of them afford sufficient ground for withdrawing this claim from arbitration on the score of irrelevancy or incompetency. Indeed, in point of law, my opinion upon all of them is against the complainers; but it is not necessary for me to deal with them, as I hold the complainers are entitled to succeed on other grounds.

"There are other three pleas stated for the complainers which deserve attention.

"One is, that the respondent, being only a joint tenant of the lands, is not *in titulo* to proceed with the claim by himself alone. The lease is taken in favour of 'James Marshall and David Marshall, both farmers at Airbles,' and their heirs, but expressly secluding assignees and subtenants, legal and voluntary, unless specially approved of by the landlord in writing; and the tenants' obligations are undertaken by James Marshall and David Marshall 'and their heirs, executors, and successors whomsoever, all jointly and severally.' There is nothing in the lease to suggest that they are not equally interested in the tenants' part of the lease. This being so, I think that, both on principle and as a matter of ordinary fairness, the Public Health Authority are not bound to have the amount of compensation settled in a proceeding to which only one of the co-tenants is a party.

"The respondent, however, avers in answer 4 that the name of his brother David was inserted simply for family purposes; that David Marshall went abroad shortly after the lease was granted, and has not resided in Airbles since; and that he is engaged in business in England on his own account, 'and neither had nor has any interest in the lease.' It was urged that these are averments of pure fact which it is for the arbiters to inquire into and dispose of. But I see no reason why the complainers should be forced into a prejudicial inquiry of this nature before the arbiters, when the difficulty can be obviated by a joint claim on the part of both tenants, in conformity with the lease which is their only title. I do not say there may not be cases where a tenant in the respondent's position would be allowed to claim alone, as (possibly) where his co-tenant has disappeared and cannot be found. But so little difficulty has the respondent on that score, that, in conformity with a request made by him during the discussion, he has been allowed to lodge an assignation (dated 10th July 1896), whereby his brother, David Marshall, on the narrative of the facts

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The respondent reclaimed, and argued;—(1) The objection to the respondent's title to insist in the present claim was ill-founded. A joint tenant, if he could shew that the whole real interest was in him, was *in titulo* to enforce such a claim, without the necessity of obtaining the concurrence of his co-tenant.¹ The assignation now produced established that the respondent had the sole real interest in the farm. It was not a case to which the rule *pendente lite nihil. innovandum* applied. The assignation was lodged not to strengthen the respondent's title, but to prove a fact. (2) The respondent did not dispute the validity of the complainers' feu-contract. It was open to the landlord to feu as much of his estate as he pleased; only, before the respondent could be dispossessed the conditions of the lease must be fulfilled, and they were not fulfilled merely by payment of £4 an acre for the ground feued. The respondent might not be entitled to found on the prior agreement of 9th November 1893 as giving him a right against the District Committee or the County Council, but it shewed very clearly that the landlord recognised that the respondent was entitled to compensation beyond £4 an acre—that the one was as much a condition of dispossessing the respondent as the other. (3) It was true that the County Council took the ground by private contract, and not compulsorily; but the right to have the amount of compensation settled by arbitration was not confined to

averred in answer 4, assigns to the respondent his whole interest (if any) in and to the lease, with power to uplift claims connected therewith. While this comes too late to be of any avail in this process, it shews that the respondent has, and has all along had, the means at hand of presenting a claim in accordance with the terms of the lease.

"The other two pleas for the complainers are not, I think, well founded. The one is, that the County Council, and not the District Committee, is the body on which the claim should have been served, and with whom issue should have been joined in the arbitration. If this be so, the correspondence which preceded this suspension, and which was carried on at intervals for nearly two years, was most misleading, for it was carried on by the District Committee through their clerk without any hint that the claim was not at their disposal. But if this should be insufficient to commit a statutory body, I may say further, that I think the Public Health Authority is the proper respondent in a claim such as this, grounded on an administrative act within the scope of their statutory powers.

"As the complainers say in statement 2, the feu was acquired by the County Council 'for the purposes of the District Committee in the administration of the Public Health Acts within their district.'

"The other plea is that, assuming the claim to be otherwise competent under the Public Health Act, the proceedings are barred by section 118 thereof. That section, under the rubric 'Local Authority or Board not liable for irregularity of their officers,' bears, *inter alia*, that 'every action or prosecution against any person acting under this Act on account of any wrong done in or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen.' But in my opinion the 'actions or prosecutions' there referred to are of a different class altogether from the claims for compensation allowed by section 116.

"I sustain the third plea in law for the complainers, and in respect thereof, grant suspension and interdict as craved, with expenses to the District Committee against the compearing respondent."

¹ Kilpatrick v. Kilpatrick, Nov. 27, 1841, 4 D. 109, 14 Scot. Jur. 46; M'Vean v. M'Vean, June 4, 1864, 2 Macph. 1150, 36 Scot. Jur. 577.

cases in which the land was taken compulsorily.¹ (4) The District Committee, not the County Council, was the proper body to be served with such a notice as the present.² The *Peterhead* case¹ was unaffected on this point by the case of *Forbes*.³

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Argued for the complainers;—(1) The Lord Ordinary's ground of judgment was well founded.⁴ (2) The respondent's right to compensation, if he had any, was a right *ex contractu*, and his claim, therefore, ought to be against his landlord, and not against the complainers, with whom the respondent had no contract. (3) Assuming that the respondent was right in bringing his claim against the complainers, it ought to have been enforced by ordinary action, not by arbitration. Section 116 of the Public Health Act, 1867, did not apply to lands taken by private bargain. (4) If the claim was otherwise unobjectionable it was the County Council, not the District Committee, which should have been served with the notice of claim.⁵

At advising,—

LORD JUSTICE-CLERK.—The Lord Ordinary in this case has sustained the third plea in law for the complainers. That is the plea which is based on the fact that the respondent is only joint tenant of the lands in regard to which he claims compensation from the complainers. The difficulty caused by this fact could have been easily got rid of, for although for family reasons, which do not appear, the name of the respondent's brother was put into the lease, the whole substantial interest was in the respondent only. But even were it otherwise I should not be inclined to decide the case upon such a narrow ground. But the respondent here, Marshall, even supposing him to be the only person interested in the lease, proposes to have an arbitration under the Lands Clauses Act as to a claim for damages caused to him by the taking of part of the lands leased to him, for the purpose of feuing it to the County Council in order that they might build a hospital. The circumstances in which that land was resumed were these: The lease contains a very distinct clause to the effect that the proprietor shall have power at any time during the currency of the lease (and curiously enough without apparently giving the tenant any notice) to take off such part of the lands let as may be considered expedient for the purpose, *inter alia*, of feuing, it being provided that the annual value of any ground taken should be paid to the tenants at certain rates, in this case £4 per acre. The County Council by private agreement with the landlord obtained a site for a hospital, which in pursuance of their powers they desired to erect. In order to carry out the agreement the landlord, in exercise of the

¹ *Peterhead Granite Polishing Co. v. Parochial Board of Peterhead*, Jan. 24, 1880, 7 R. 536; *Burgess v. Northwich Local Board*, 1880, L. R., 6 Q. B. D. 264; *Brierley Hill Local Board v. Pearsal*, 1883, L. R., 11 Q. B. D. 735, and 1884, L. R., 9 App. Cas. 595.

² *Northern District Committee of County Council of Ayr v. Knox*, March 20, 1895 (Outer-House), 2 S. L. T. 568; *Local Government Act, 1889*, secs. 11 and 17.

³ *Commissioners of Peterhead v. Forbes*, July 4, 1895, 22 R. 852.

⁴ *Hislop v. MacRitchie's Trustees*, June 23, 1881, 8 R. (H. L.) 95; *Symington v. Campbell*, Jan. 31, 1894, 21 R. 434.

⁵ *Local Government Act, 1889*, secs. 11, 17 (2) (a), and 25.

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power reserved to him by the lease, resumed five and a-half acres of the land leased to the respondent. The County Council then acquired the land by private agreement with the landlord. They had no power to acquire land compulsorily for this purpose. If they had not been able to obtain it by private agreement they would have had to adopt the procedure of obtaining a Provisional Order. Now, the compensation which was to be paid to the tenant for the loss of the land leased to him and resumed by the landlord for feuing was settled by the lease. It may be that more was due to the tenant than the £4 per acre which is expressly mentioned, but in any view the compensation is compensation due to the tenant for land resumed into the landlord's hands, by the act of the landlord, proceeding on the reserved power contained in the lease. It is compensation due by the landlord to the tenant in respect of resumption. It is difficult to see how a clause relating to compulsory purchase of land under statutory powers can be held to apply to such a case.

The respondent's counsel quoted some cases indicating that although land has been obtained by a public authority by private agreement, and not compulsorily, a claim by a party injured by their taking the land, or their operations thereon when taken, may be settled by arbitration under the Lands Clauses Act. The cases quoted are all cases where the public authority had taken something from the owner of land. The *Peterhead*¹ case is a strong instance of this. There the water, to which an inferior heritor had right, was taken away from him in consequence of the operations of the public authority on lands which they had acquired by private bargain. The lower heritor was thus injuriously affected by their proceedings. They had no agreement with him. They had no right to do what they did, nor to divert the water flowing down to him, except under their compulsory powers. These cases have no bearing upon the present.

I do not wish to give any judgment upon the question whether the claim was validly made against the District Committee of the County Council, or whether it ought to have been made against the County Council itself. That question would require careful consideration. Although the County Council has the ultimate control financially and otherwise, and is consequently the party ultimately responsible, it may still be that the District Committee can be claimed against or sued as having the direct local authority over the hospital. However, I give no opinion upon that point.

The Lord Ordinary's judgment will not be altered in the result. I arrive at the same conclusion as his Lordship, but on somewhat different grounds.

LORD YOUNG.—The facts here are simple. The lease under which the respondent possesses is in favour of himself and his brother. The brother was only put in for family purposes, and he has now left the country, and the respondent has the whole substantial interest in it.

By the lease which the respondent Marshall holds, he is tenant of his farm till the beginning of next century. The lease is for nineteen years. It contains a clause which reserves power to the landlord to resume parts of the farm for feuing at certain specified rates per acre. It is stated that at

Whitsunday 1893 the landlord exercised this power by taking $5\frac{1}{2}$ acres off No. 25. the respondent's farm. The landlord took the land for the purposes of feuing it to the Local Authority, and he did feu it to them, with entry at Whitsunday 1893. It is admitted that this was a good exercise of the power. The feu was granted, and the feuar entered into possession. I put the question "Is there any objection to the complainers' feu-charter?" and I got the answer, "No, there is none." There is no objection, then, to the complainers' title. The feu was well granted. If that be so, the tenant can have nothing to say. The Local Authority thus having obtained their feu entered on possession of the land. It does not occur to me that it can make any difference between this tenant's relation to this feuar as compared with his relation to any other feuar, that this feuar was the Local Authority. It does not signify to the tenant who the feuar is if the landlord has power to resume for the purpose of feuing. The lease provides that if land is resumed for feuing he is to be paid compensation for ground taken "at the foresaid rate." In this case "the foresaid rate" is £4 per acre, and £4 per acre has been paid to him every year since the land was taken. Thus the condition on which the landlord was entitled to resume has been fulfilled. The tenant has been paid, and till the end of his lease will be paid, all that he is entitled to under the lease. But in this year 1896 he makes a claim for £180 and interest, mainly for unexhausted manure and improvements, and the claim is made not against the landlord but against the feuar, and he wishes to have that claim settled by arbitration under the Lands Clauses Act. Now, neither the County Council Act nor the Lands Clauses Act nor the Public Health Act have anything to do with the case, any more than they would have to do with a similar claim against any other feuar. There is no relation between the landlord and the tenant except the lease, nor between the landlord and the feuar except the feu-charter. There is nothing in either of these deeds about the three Acts mentioned. It was suggested in the course of the argument that it would be open to any member of the public to object to anything which was proposed to be done at variance with the statutory powers conferred upon the County Council or the Local Authority. It was not suggested that it was beyond their power to take this feu. I am very clearly of opinion that so long as the landlord observes the conditions of the lease, and the landlord and the feuar observe the conditions of the feu, there can be no claim by this tenant against anyone. But apart from that, I think there can be no doubt that if the tenant has a claim against anyone it must be against his landlord, with whom alone he has any contract. On the merits of the case, apart from the complainers' third plea, I think the case is too clear for argument.

With respect to the question whether the District Committee or the County Council itself should have been claimed against, I think it is too trifling for serious consideration. If there had been any real claim, and a mistake had been made as to the proper party to be claimed against (although I do not say that a mistake was made here), we would have aided the tenant to bring the whole County Council forward. On the whole matter, I think the suspension was well founded, the respondent's claim being ill founded.

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LORD M'LAREN.—I am always disposed to put a liberal construction on clauses in general or local Acts of Parliament giving an appeal to this Court on questions of construction. Such clauses may be liberally interpreted, because it is convenient for those who are to administer the Acts that their clauses should be interpreted by the highest authority. Coming to the consideration of this prejudicial plea with a certain bias in favour of sustaining the right of appeal, and keeping in view the peculiar character of the streets of Lerwick, I agree with Lord Adam that the objections to the competency of the appeal may be repelled. I think that in the case of the burgh of Lerwick there are grounds for the contention that this is not a mere question of fact, because the streets of Lerwick are not constructed for vehicular traffic, and there is no distinction of footway and causeway. Again, it is said that the whole streets are the property of the burgh, and that this is merely a question of assessment. At the same time I do not wish to be understood to say that in any burgh where the streets are of the ordinary character, the householder, by merely saying that the pavement is not his property, can exclude the jurisdiction of the Sheriff and obtain the benefit of the appeal to this Court. That will have to be considered if the question should arise.

LORD KINNEAR.—I agree with Lord Adam for the reason he has given. I think the 339th section provides an appeal generally to various classes of persons, persons who may be "liable to pay or to contribute towards the expense of any work ordered by the Commissioners," and persons "whose property may be affected" by the order of the Commissioners, or who may "think themselves aggrieved by such order," though not called upon to pay or contribute towards the expense. Now, I assume that if the present appeal could be shewn to fall under section 143, it would be incompetent by reason of the provision that the appeal given in section 339 shall be open only if it is not otherwise specially provided in the Act. But I agree with what Lord Adam has said that the 143d section gives an appeal, not to persons who complain of an order on the ground that they may be wrongfully called upon to contribute towards the expense of its execution, but only to persons whose property may be affected by such an order, and who think themselves thereby aggrieved. Now, the appellant does not complain upon that ground. He does not allege that the footpath to be repaired is his property, nor that the repair will in any way affect the property belonging to him, and bounded by the footpath. On the other hand, the Commissioners do not allege that the footpath is the property of the complainer, but on the contrary they call upon him to contribute to the expense of a footpath bounding his property. And therefore I cannot find anything to disclose a complaint that the order in question affects the property of the appellant. I think it is a complaint upon another ground, and therefore within the 339th section.

LORD PRESIDENT.—I do not differ.

THE COURT repelled the objection to the competency of the appeal.

CARMICHAEL & MILLER, W.S.—IRON, ROBERTS, & Co., S.S.C.—Agents.

DISTRICT COMMITTEE OF THE MIDDLE WARD OF THE COUNTY OF LANARK AND OTHERS, Complainers (Respondents).—*Salvesen*—*Cook*. No. 25.

JAMES MARSHALL, Respondent (Reclaimer).—*C. J. Guthrie*—*Constable*.

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Lease—Power to resume lands—Feu of lands resumed—Liability of feuair to compensate tenant—County Council—District Committee—Hospital—Public Health (Scotland) Act, 1867 (30 and 31 Vict. cap. 101), secs. 39 and 116.—By lease of a farm dated in 1886 the landlord, *inter alia*, reserved power “to take off such part of the lands hereby let as may be considered expedient for the purpose of feuing . . . it being hereby provided that the annual value of any ground thereby taken from the said lands shall be paid to the tenants” at the rate of £4 an acre.

In 1893 the landlord resumed five acres of the farm, and by private agreement feued the land so resumed to the County Council. Thereafter the District Committee of the County Council erected a hospital on this land under the powers of section 39 of the Public Health Act, 1867.

In 1896 the tenant, who had since the resumption been receiving from the landlord an abatement of rent equal to £4 an acre for the land resumed, served a notice on the District Committee in which he claimed compensation for unexhausted manure, &c., and, founding on section 116 of the Public Health Act, 1867, took proceedings for having the amount of such compensation settled by arbitration.

In a note of suspension and interdict brought by the District Committee, held that the proceedings for arbitration fell to be interdicted in respect that the tenant's only right to compensation, if he had any, was against his landlord.

Question, whether the claim to compensation, assuming it to be otherwise well founded, had properly been made against the District Committee and not against the County Council.

Opinions that section 116 of the Public Health Act, 1867, did not apply.

Title to Sue—Joint Right—Lease—Assignment pendente processu.—One of two persons who *ex facie* of a lease were joint tenants of a farm sent a notice of a claim to compensation to the County Council, which had taken a feu of part of the farm, the landlord having power to resume under the lease. In a suspension of proceedings for having the claim determined by arbitration the County Council pleaded, *inter alia*, that the claimant being only a joint tenant was not *in titulo* to insist in the claim. The claimant answered that he had the whole real interest in the farm, and lodged *pendente processu* an assignation in his favour by the other tenant setting forth that fact.

Opinions (*contra* the judgment of Lord Pearson) that the claimant had a good title.

By lease, dated 5th July and 26th August 1886 between Lord Hamilton of Dalzell (then Mr Hamilton of Dalzell) on the one part, and James Marshall and David Marshall, farmers at Airbles, on the other part, Lord Hamilton let “to the said James Marshall and David Marshall and their heirs, but expressly excluding assignees and subtenants, legal and voluntary, unless specially approved of by the landlord in writing, All and Whole the said farm of Airbles and others as recently tenanted by the heirs of the late John Marshall,” for the period of nineteen years, from Martinmas 1881 as to the arable land, and from Whitsunday 1882 as to the houses and grain, reserving to the proprietor the mines and minerals, with power to

2^d DIVISION.
Lord Pearson.

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missioners of
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The pursuer reclaimed, and argued ;—He was entitled to a salary of £20. The Lord Ordinary was of opinion that the salary had been validly increased, unless the increase was conditional and the pursuer had assented to the condition. But there was no such condition. It was a simple increase of salary, and as it was legal the defenders had no right to reduce it. It was not necessary to intimate it to the pursuer. The transaction was complete by intimation and approval of the Board of Supervision, and the pursuer at once acquired a *jus quæsitum* to a salary of £20. The two resolutions of 13th August were separate and distinct, and did not stand or fall together. The pursuer's objection to Thorburn's appointment did not involve objection to the increase of salary.

Argued for the defenders ;—The alleged increase never took effect. It was part of a scheme for the reorganisation of the sanitary affairs of the burgh. It was intended that the pursuer should act as an assistant to Thorburn, with a larger salary. The two things hung or fell together. The pursuer objected to one ; he could not claim the other. The minute of meeting made no contract between the pursuer and defenders, and there was no such intimation to the pursuer as to vest in him any *jus quæsitum* for an increase of salary. An informal conversation was not equivalent to a communication from the defenders. Even if the resolution of the 13th August was valid, it was validly cancelled by the resolution of 10th September.

LORD JUSTICE-CLERK.—The question is, whether the pursuer is entitled to £20 per annum as salary instead of the £10 per annum he formerly received. It appears that the Burgh Commissioners, who are the Public

Authority did was not to reduce the inspector's salary, but to cancel a previous minute, which I think they could not have done if the previous resolution had been nothing but a resolution to increase the pursuer's salary.

"But then the resolution was not of that simple character ; for, at the same time, the Commissioners appointed Mr Thorburn to be chief sanitary inspector, and they thereby reduced the position of the pursuer to that of an assistant or subordinate. Whether they had power to do that without the consent of the Board of Supervision or Local Government Board may be open to question ; but the Board of Supervision took no exception, and by letter, dated 25th August 1894, addressed to the pursuer, the secretary of the Board of Supervision intimated that 'the Board considers the appointment of a chief sanitary inspector quite legitimate.' The additional salary, therefore, appears to have been given only on condition that the pursuer agreed to act in subordination to Mr Thorburn. It was substantially a modification of his appointment, and it appears to me that it could not be effectual without his assent. Now, it is certain that, up to the date of this action, the pursuer never admitted the position of Mr Thorburn. In his letter of 11th October, addressed to the Local Authority, he states that he holds that he is 'still the chief sanitary inspector, and entitled to be recognised as such.' Hence I consider that when the question came up for consideration on 10th September, the Local Authority was not bound by the resolution of 13th August in relation to the pursuer's salary, because the pursuer had not assented to the condition on which the addition to the salary was conceded.

"I am not considering what it would have been fair and reasonable for the Local Authority to do, but only the extent by which they are bound in law by what they have done. . . ."

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Health Local Authority of Bo'ness, passed a resolution that the pursuer was to receive a salary of £20. But this was only done as part of an arrangement which involved the appointment of a superior officer to the pursuer. The resolution came to his knowledge, but no official intimation of increase of salary was ever given to him. At the next meeting of the Commissioners the resolution was rescinded. I think this was competent, unless anything had been done giving the pursuer a *jus quæsitum* to enforce the increase of his salary. In my opinion nothing was done giving him such a right. I think the Lord Ordinary is right in holding that the pursuer is not entitled to compel the defenders to give him a salary of £20. It is very remarkable that he himself held that the meeting of the Commissioners which granted the increase was an illegal one, his reason being that it had not been formally constituted as a meeting of the Local Authority, but even if the competency of the proceedings at the meeting be assumed, I am of opinion that the pursuer has not established his right to an increase of salary.

LORD TRAYNER.—I have come to the same result. The view which the Lord Ordinary takes is a narrower ground than that now proposed as the ground of our judgment, and I am not prepared to assent to it. I think a sufficient ground of judgment is that the resolution of the Local Authority was never intimated to the pursuer. He has therefore no *jus quæsitum*. I am of opinion that the defenders must be assolizied, on the ground that the pursuer never acquired any right to an increase of salary, no increase ever having been intimated to him.

LORD MONCREIFF.—I agree in the result arrived at. I rest my opinion on the ground that the pursuer has no *jus quæsitum* to enforce a rise of salary, the resolution of the Local Authority never having been intimated to him, and having been rescinded mainly in consequence of his own objections. As at present advised, I do not agree in the grounds on which the Lord Ordinary rests his judgment, but I agree in the result at which he arrives.

LORD YOUNG was absent.

THE COURT adhered.

SIMPSON & MARWICK, W.S.—WADDELL & M'INTOSH, W.S.—Agents.

MRS JESSIE MACLEAN AND OTHERS (Macleish's Trustees), Petitioners. No. 27.

—Lorimer.

Nov. 14, 1896.
Macleish's
Trustees.

Bankruptcy—Sequestration—Recall—Declarator that sequestration at an end—Nobile Officium.—The estates of a deceased person were sequestrated, and an abbreviate of the sequestration was recorded in the Register of Inhibitions, and an abbreviate of the trustee's confirmation recorded in the Register of Sequestrations. The estates consisted in part of a heritable property burdened with a bond and disposition in security. This property was vested in the bankrupt's testamentary trustees, and they having paid to the trustee the value of the reversion obtained a discharge of all claims at his instance. The sequestrated estates were then divided and the trustee was discharged. The testamentary trustees thereafter presented a petition to the Court praying for recall of the sequestration, or otherwise for decla-

No. 27. ~~Nov. 14, 1898~~ ~~Macleish's Trustees.~~ rator that the sequestration was at an end and the trustees reinvested in the property in question, and to appoint and grant warrant authorising the judgment to be entered in the Register of Sequestrations and in the Register of Inhibitions. The Court, holding that it was inappropriate to recall a sequestration which had run its course, *granted* the alternative prayer of the petition.

1ST DIVISION. THIS was a petition by the testamentary trustees of John Meiklem Macleish for recall of the sequestration of Mr Macleish's estates, or otherwise for declarator that the sequestration was at an end.

The estates of Mr Macleish were, after his death, sequestrated on 13th August 1888, on the petition of the trustees of Mr John Shearer.

An abbreviate of the sequestration was recorded in the Register of Inhibitions.

Mr James Martin, accountant, Glasgow, having been appointed trustee, and duly confirmed on 3d September 1888, an abbreviate of his confirmation was recorded in the Register of Sequestrations.

The sequestrated estate consisted, in addition to certain sums due to Mr Macleish, of two heritable properties, one of which was mortgaged to Mr Shearer's trustees under a bond and disposition in security for £3500, and the other, a villa called Balfunning, was held by Mr Macleish's testamentary trustees, but was also burdened with a bond for £1100. Mr Shearer's trustees entered into possession of the property over which they held a bond.

The trustee in the sequestration, having realised the rest of the sequestrated estate, entered into a compromise with the bankrupt's testamentary trustees by which they, in 1889, paid to him £200, which represented the value of the reversion of the Balfunning property, in full of all claims against them, and the heirs and representatives of the bankrupt.

The only creditors who claimed in the sequestration were Mr Shearer's trustees. They were ranked for £914, and after meeting the expenses of the sequestration the trustee paid over to them in dividend the balance of the estate, amounting to £226.

Thereafter, on 6th September 1889, the trustee was discharged.

Mr Macleish's testamentary trustees subsequently sold the Balfunning property, and requiring, in order to give the purchaser a good title, to clear the record, they presented this petition stating the foregoing facts, and praying the Court, after service on Mr Martin and publication in the *Gazette*, "to pronounce judgment recalling the sequestration of the estates of the said deceased John Meiklem Macleish, or otherwise to declare the said sequestration at an end, [and the petitioners reinvested in the said villa of Balfunning, Helensburgh, described in the titles as follows . . .], and to appoint and grant warrant authorising such judgment to be entered in the Register of Sequestrations and on the margin of the Register of Inhibitions."

The petition was presented with the consent, "so far as he can do so," of Mr Hutton, C.A., Glasgow, judicial factor on Mr Shearer's estate, the trustees having resigned office.

At the hearing the petitioners were allowed to amend the prayer of the petition by the addition of the words given within brackets, *supra*.¹

¹ The petitioners referred to Anderson, March 13, 1866, 4 Macph. 577, 38 Scot. Jur. 304.

THE COURT expressed the view that, as the sequestration had run its full course, a judgment recalling the sequestration was inappropriate, and pronounced this interlocutor:—"Declare the sequestration of the estates of the deceased John Meiklem Macleish, designed in the petition, awarded by the Lord Ordinary on the Bills on 13th August 1888, at an end, and the petitioners, the trustees of the said John Meiklem Macleish, re-invested in the subjects described in the prayer of the petition: Grant warrant for recording this deliverance in the Register of Sequestrations and in the Register of Inhibitions, and decern."

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Macleish's
Trustees.

COWAN & DALMAHOY, W.S., Agents.

ANDREW GEMMELL (Cuming's Marriage-Contract Trustee), Pursuer and Real Raiser (Respondent).—*W. Campbell—Grainger Stewart.*
MRS MARY CUMING AND OTHERS, Claimants (Reclaimers).—*Johnston T. B. Morison.*

No. 28.

Nov. 14, 1896.
Cuming's
Trustees v.
Cuming.

GEORGE RONALDSON CUMING OLDEN, Claimant (Respondent).—*D. Dundas—W. E. Mackintosh.*

Marriage-contract—Vesting—Vesting of provision to children—Clause of survivorship—Power of appointment—Acceleration of vesting by deed of appointment.—By antenuptial marriage-contract an intended wife assigned the whole estate then belonging to her, or which she might acquire during the subsistence of the marriage, to trustees for the purposes after specified, viz., for payment of the interest or proceeds of the estate to the spouses and the survivor, "and after the death of the longest liver" of the spouses the trustees "shall be bound to denude of the said trust, and pay over or convey the said trust-estate . . . to the child or children of this intended marriage in such shares or proportions, if more than one child, as may be appointed by" the spouses "or the survivor of them, by any writing under their hands; and failing such writing, then the said trustees shall be bound to pay or convey the same to the said children equally, and to the issue of such child or children as may have predeceased." In case of there being no children of the marriage, or if children, in case of their predeceasing their parents, the trustees were directed to pay over or convey the estate to the wife, her heirs and assignees whomsoever.

The wife survived her husband, and executed a deed appointing two daughters of the marriage to the fund. The daughters and their mother then called upon the trustees to denude.

Held (aff. judgment of Lord Pearson) that the persons entitled under the marriage-contract to the fee of the estate conveyed by the wife, in the event of the power of appointment not being exercised, were the children alive at the death of the longest liver of the spouses, and the issue of such as might have predeceased that date; that these persons were the sole objects of the power of appointment; and therefore that the trustee under the marriage-contract was bound to hold the estate conveyed by the wife until her death.

By antenuptial contract of marriage entered into in June 1845 by George Ronaldson Cuming and Mary Skirving, the latter assigned to the trustees named in the deed "all sums and other estate, heritable and moveable, now belonging to her, or to which she may acquire right by succession, bequest, or in any other manner, during the subsistence of the intended marriage, for the purposes after specified, *videlicet*, for payment of the interest or other yearly profits or proceeds of the sums and other estate hereinbefore conveyed to them in trust to the said Mary Skirving and George Ronaldson Cuming during

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No. 28. their joint lives, and on the death of either to the survivor of them, and after the death of the longest liver of the said Mary Skirving and George Ronaldson Cuming, the said trustees shall be bound to denude of the said trust and pay over or convey the said trust-estate, with any interest or other profits thereof remaining in their hands unapplied, to the child or children of this intended marriage in such shares or proportions, if more than one child, as may be appointed by the said Mary Skirving and George Ronaldson Cuming or the survivor of them, by any writing under their hands; and failing such writing, then the said trustees shall be bound to pay or convey the same to the said children equally and to the issue of such child or children as may have predeceased, such issue having only the share to which their parents would have been entitled had they been in life, and in case of no children of the marriage, or if children, in case of their predeceasing their parents, then and in either of these events the said trustees shall be bound to pay over or convey the said trust-estate to the said Mary Skirving, her heirs and assignees whomsoever."

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The marriage was dissolved by the death of Mr Cuming in January 1890. He was survived by two daughters, Mrs White and Miss Cuming, and by a grandson, George Olden, the son of a predeceasing daughter. There were other children of the marriage, who predeceased their father.

On the 18th of January 1895 Mrs Cuming executed a deed of appointment, which bore to be in virtue of powers to that effect conferred by the marriage-contract, and by which she appointed to her daughters, Mrs White and Miss Cuming, equally between them, the whole sums or others settled by the said contract on the children of the marriage.

In virtue of this deed of appointment Mrs Cuming, Mrs White, and Miss Cuming, called upon Andrew Gemmell, the sole surviving trustee under Mr and Mrs Cuming's marriage-contract, to denude of the trust, and hand the trust-estate over to them, whereupon Andrew Gemmell raised an action of multiplepinding for the determination of the rights of parties to, *inter alia*, the whole estate which belonged to Mrs Cuming at the date of the marriage, or had been acquired by her during its subsistence.

Claims were lodged by (1) the trustee under the marriage-contract; (2) George Olden; and (3) Mrs Cuming, Mrs White, and Miss Cuming.

The trustee claimed to be preferred to the whole fund in order that he might administer it in terms of the contract.

George Olden claimed that the estate settled by Mrs Cuming should remain in the hands of the trustee until the death of Mrs Cuming.

Mrs Cuming, Mrs White, and Miss Cuming claimed to be ranked and preferred to the whole fund.

On 2d June 1896 the Lord Ordinary (Pearson) repelled the claim of Mrs Cuming and others, and *quoad ultra* ranked and preferred the claimant Andrew Gemmell as trustee foresaid, in terms of his claim.*

* "OPINION.—. . . In my opinion the settlement of the wife's estate, which follows, presents a case of suspended vesting. After the death of the surviving spouse the trustees are to denude and to pay and convey the estate

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The claimants Mrs Cuming and others reclaimed, and argued ;— The usual rule in the case of marriage-contract provisions to children was that they vested at the dissolution of the marriage,¹ and there was nothing in the destination of the wife's estate to make that rule inapplicable. If the rule applied, then the widow and surviving daughters together, having the whole interest in the liferent and fee of the provisions, were entitled to immediate payment. But even if vesting would not have taken place under the marriage-contract, in the event of no deed of appointment having been executed until the death of the longest liver of the spouses, that was not the case now that a deed of appointment had been executed, and the deed was within the power of appointment conferred by the marriage-contract. The clause of survivorship in the marriage-contract did not apply to the event of the power of appointment being exercised, and accordingly the power of appointment was not limited to the survivors of the children. Further, a power of appointment must be held to include the power of anticipating the period of vesting applicable to the event of its not being exercised, just as it included the power of selecting among the objects of the power. On either ground these claimants were entitled to prevail.

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Argued for the claimants, Andrew Gemmell and George Olden ;— (1) There was no gift to children other than the direction to convey, and that direction did not take effect until the death of the widow, who had the liferent of the fund. (2) There was a clause of survivorship referable to the period of division. (3) The power of appointment could be exercised by the survivor of the spouses. Vesting was therefore postponed until the death of the widow.² The period of vesting fixed by the contract could not be accelerated by any exercise of the power of appointment, for (a) the objects of the power were the survivors at the period of distribution, and (b) a power of appointment could not be used to accelerate the vesting of provisions to which it related—at least there was no authority for holding that it could, and the opposite view had been assumed to be the sound one in *Blackburn's Trustees v. Blackburn*.² The fund must therefore be retained and administered by the trustee until the death of the widow.

At advising,—

LORD ADAM.—With reference to the fund brought into settlement by Mrs Cuming, the trustees are directed to pay the income of it to the spouses and to the survivor, and after the death of the survivor to pay over the trust-estate to the child or children of the marriage, in such shares or proportions, if more than one child, as may be appointed by the spouses, or

to the children, and the issue of such as may have predeceased. These words are, I think, all referable to the period prescribed for denuding and payment, and their effect does not appear to me to be taken off by the words that follow, which are applicable to two events which have not happened. . . .

¹ *Romanes v. Riddell*, Jan. 13, 1865, 3 Macph. 348, 37 Scot. Jur. 167 ; *Rogerson's Trustees v. Rogersons*, March 10, 1865, 3 Macph. 684, 37 Scot. Jur. 343.

² *Blackburn's Trustees v. Blackburn*, March 20, 1896, 23 R. 698 ; *Laing v. Barclay*, July 20, 1865, 3 Macph. 1143, 38 Scot. Jur. 95 ; *Vines v. Hillou*, July 13, 1860, 22 D. 1136, 32 Scot. Jur. 666 ; *Muirhead v. Muirhead*, May 12, 1890, 17 R. (H. L.) 45, per Lord Watson, p. 49 ; *Fyfe's Trustees v. Fyfe*, Feb. 8, 1890, 17 R. 450.

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the survivor of them, by any writing under their hands, and failing such writing to pay the same to such children equally, and to the issue of such children as may have predeceased, such issue having only the share to which their parents would have been entitled had they been in life, and then there is a gift over, failing children, to Mrs Cuming, her heirs and assignees.

It appears to me that the objects of the power of appointment here specified are the children alive at the period of payment,—that is, the death of the longest liver of the spouses,—and the issue of such of the children as may have predeceased that period. Until that period shall arrive it is impossible to say who will be entitled to take, or among whom the appointment would have to be made. For example, neither of the daughters, the appointees under the present deed of appointment, may be alive and entitled to share at that period, and the deed can confer no present right upon them. I therefore agree with the Lord Ordinary that this portion of the fund must remain under the administration of the trustee.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

THE COURT adhered.

DALGLEISH & DOBBIE, W.S.—P. MORISON, S.S.C.—Agents.

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Nov. 19, 1896.
Burnet v.
Gow.

THOMAS KYLE BURNET, Pursuer (Respondent).—*Shaw—T. B. Morison.*
GEORGE GOW, Defender (Reclaimer).—*M'Lennan—F. J. Thomson.*

Reparation—Slander—Veritas—Counter Issue.—The pursuer in an action of damages for slander obtained an issue whether at a certain time and place "the defender falsely and calumniously said to . . . that the pursuer was a man of immoral character, and kept a mistress. . . ." The defender on record pleaded *veritas*, and averred that "the pursuer is a man of immoral character, and during the last two years has associated and has committed adultery with" A, but he only averred two occasions prior to the date of the alleged slander on which adultery had been committed.

Held that the defender's averments did not entitle him to the counter issue "whether, during the period of two years prior to the raising of the action, the pursuer has repeatedly committed adultery with" A.

Opinion (per Lord Kincairney) that the defender in an action of damages for slander may obtain a counter issue of *veritas* although he denies having uttered the slander complained of.

1st DIVISION.
Lord Kin-
cairney.

THIS was an action of damages for slander at the instance of Thomas Kyle Burnet, commercial traveller, Ealing, against George Gow, Scotch tweed-merchant in London and Galashiels.

The pursuer averred (cond. 2) that, "in or about the latter half of July 1895," the defender falsely, maliciously, and calumniously stated to certain parties named at places specified "that the pursuer (who is married and has a family of seven children) was a man of immoral character, that he kept a mistress; that he had on one occasion . . . lived a fortnight with this mistress, pretending to his wife that he was out of town. . . ." (Ans. 2) "Admitted that the pursuer's name was referred to, and his conduct commented on, in conversation with the parties named. *Quoad ultra* denied."

The defender, in answer 4, averred,—“The pursuer has not sus-

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tained any loss, injury, or damage for which the defender is responsible. The pursuer is a man of immoral character, and during the last two years has associated, and has committed adultery with a young woman named Miss A B, sometime residing at . . . The said woman repeatedly called for the pursuer at the business premises of George Gow, Son, & Company. On several of these occasions the pursuer went away with her, and on returning after an absence of an hour or more, informed Arthur Gibson, warehouseman in the employment of said firm, that he had had sexual intercourse with said woman. On one such occasion he also gave the same information to Archibald M'Lellan, cashier to said firm. The pursuer further committed adultery with said woman in a temperance hotel at Paddington Railway Station, London, in or about the month of March 1895, at the Stork Hotel, Birmingham, in or about the said month of March 1895, and at a hotel at Teignmouth, in or about the month of August 1895. He also committed adultery with her at his office at 14 Golden Square, London, in or about the month of April 1896, and on other occasions. Further, he has committed adultery with her in various other places and at other dates to the defender unknown."

The defender pleaded *veritas*.

The pursuer proposed two issues, of which the following may be taken as an example:—"1. Whether, in or about the latter half of July 1895, the defender falsely and calumniously said to Thomas Haig, one of the partners of Messrs Bertram & Haig, clothiers, within their shop at No. 12 Maitland Street, Edinburgh, that the pursuer was a man of immoral character, that he kept a mistress, that he had on one occasion, while in the employment of the defender or his firm, lived for some time with this mistress, pretending to his wife that he was out of town, or did use and utter words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage?"

The defender proposed the following counter issue:—"Whether, during the period of two years prior to the raising of the action, the pursuer has repeatedly committed adultery with A B?"

The Lord Ordinary (Kincairney) approved of the issues for the pursuer, and disallowed the counter issue proposed for the defender.*

* "OPINION.—There is no question in this case about the pursuer's issue. But the pursuer maintains that no counter issue of *veritas* ought to be allowed, because the defender denies on record that he uttered the slander averred. The pursuer maintains that the defender cannot both deny the slander and justify it. I am indeed of opinion that here no issue of *veritas* should be allowed, but not on that ground. As at present advised, I see no objection to such pleading. It is not inconsistent to say, I never said the words alleged, but, at anyrate, they are true; and a defender may have a legitimate interest in so providing for the possible event of the jury being of opinion, contrary to his own assertion, that he did utter the slander. I think there is no sufficient authority for the pursuer's contention. In the rubric of *Harkes v. Mouat*, 4th March 1862, 24 D. 701, the Lord Justice-Clerk (Inglist) is said to have observed,—'That in an action of damages for slander a defender cannot obtain an issue in justification without admitting the libel as alleged by the pursuer.' But, as I read the opinion of the Lord Justice-Clerk, he says nothing of the sort. What he does say is, that an issue of justification must proceed on the assumption that the defender not only used the words alleged but used them in the sense innuendoe. But that is quite different from the rubric, which appears to be entirely

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The defender reclaimed, and argued;—The defender's averment was quite specific enough to entitle him to the counter issue which he proposed. He averred in the first place that the pursuer was of immoral character, and had during the last two years associated and committed adultery with a person named, and to this general charge was added a sufficient statement of particular instances in which adultery was said to have been committed. The case was distinguished from *Milne v. Walker*,¹ because the mere statement that a man had committed adultery was a grave slander, while the charge in *Milne's*¹ case was not of that character. In similar cases counter issues had been allowed on averments no stronger than those made in this case.² At anyrate the averments were sufficient to justify a counter issue to part of the slander alleged by the pursuer, namely, that he was of immoral character, and a counter issue to that effect should be allowed.³

unauthorised. In *Fraser v. Wilson*, 18th Dec. 1850, 13 D. 289, also referred to by the pursuer it was held that a defender could not be allowed an issue of privilege, if he denied the use of the words libelled, and did not give the words used. But that is obviously a different matter. On the other hand, in *Mason v. Tait*, 10th May 1851, 13 D. 1347, an issue in justification was allowed, although the defender denied the acts of defamation libelled. As at present advised, I should not have disallowed the counter issue, if there had been no other reasons against it except the defender's denial that he had uttered the slander. In my opinion, however, the counter issue falls to be disallowed, because the record does not afford materials for an issue of *veritas*. The charge made is that the defender said of the pursuer that he was a man of immoral character, and that being a married man he kept a mistress. The defender seeks to justify this assertion, supposing it made, by alleging two acts of adultery,—and two only,—before the date of the alleged libel. But it appears to me that proof of these two acts would not justify the general accusation said to have been made; and that the counter issue, limited by the record, falls short of the pursuer's issue to a material extent.—See *Milne v. Walker*, 24th November 1893, 21 R. 155. Our practice does not allow a counter issue, which may tend to palliate, but does not justify the slander. On the record averments are made of acts of adultery after the date of the slander. But these could not justify it. Then there is an averment that the pursuer himself had said that on certain occasions he had had sexual intercourse with a woman mentioned. But then the defender would not aver (I hardly know why)—the point was pressed on his notice—that on these occasions sexual intercourse actually took place. If he had made that averment the case might have been different. As it is, the averment has no bearing whatever on the issue of *veritas*, and must be held wholly irrelevant. I do not object to the general terms in which the proposed counter issue is couched. That appears to be quite right, and to follow the recent case of *Hunter v. Macnaughton*, 5th June 1894, 21 R. 850. But I think the instances averred on record are too few to justify the general issue. The defender maintained that he could attack the pursuer's character at the trial without a counter issue. That point does not arise at present, and I express no opinion about it."

¹ *Milne v. Walker*, Nov. 24, 1893, 21 R. 155.

² *Carmichael v. Cowan*, Dec. 19, 1862, 1 Macph. 204, 35 Scot. Jur. 95; *Mason v. Tait*, July 10, 1851, 13 D. 1347, 23 Scot. Jur. 670; *M'Ivor v. McNeill*, June 28, 1873, 11 Macph. 777, 45 Scot. Jur. 510; *McLeod v. Marshall*, March 20, 1891, 18 R. 811.

³ *McNeill v. Rorison*, Nov. 12, 1847, 10 D. 15, at pp. 25-26, 19 Scot. Jur. 662; *Paul v. Jackson*, Jan. 23, 1884, 11 R. 460, at p. 468.

Argued for the pursuer;—The defender made no sufficient averment of systematic immorality against the pursuer prior to the date of the alleged slander to justify his counter issue.¹ The instances of alleged adultery subsequent to that date were quite irrelevant. There was no authority for allowing a counter issue to part of a case.

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LORD PRESIDENT.—I must own that this record is in a very unsatisfactory position, and I regret, in the reasonable interests of this defender, that we should have to dispose of the case on the present footing. But the question before us is, whether the Lord Ordinary has done right with this record in refusing the counter issue, and I am sorry to say that I think he has. I am astonished, I must say, that after repeated suggestions the counsel for the defender have deemed it necessary to adhere to their existing record. If the defender had said that the pursuer kept the lady mentioned in answer 4 as his mistress, and if he had relevantly averred four instances instead of only averring two, while in the plainest terms insinuating two more, then there might have been a very good reason for giving a counter issue, either in the frank language used, whether he kept this woman as his mistress, or "whether he repeatedly committed adultery with her," which would probably do. But, obliged as I am by the action of the defender to consider this counter issue on this record, I think the Lord Ordinary right.

LORD ADAM concurred.

LORD M'LAREN.—I think the averments in the fourth answer would have entitled the defender to a counter issue if the answer had been amended in the manner suggested by your Lordship. It contains the elements of a relevant averment, though wanting in precision of statement. But, seeing that the defender declines to state his case more precisely, I think that we should disallow the counter issue, because, as I read the record, the defender's averment is nothing more than that on two occasions the pursuer had been guilty of sexual immorality, which is not a counter case to the charge as averred by the pursuer.

LORD KINNEAR.—I agree that a slight alteration of the record would have made the averment in answer 4 perfectly relevant to support the counter issue. The defender was perfectly right not to make that alteration if he was conscious, as we must assume he was, that he could not bring the case up so far as to justify an averment which would have entitled him to a counter issue. That being so, we must dispose of the case on that footing, and I agree that we should not allow the counter issue.

THE COURT adhered.

KIRK MACKIE & ELLIOT, S.S.C.—WILLIAM GUNN, S.S.C.—Agents.

¹ Milne v. Walker, Nov. 24, 1893, 21 R. 155; Fletcher v. Wilsons, Feb. 21, 1885, 12 R. 683.

No. 30. THE GLASGOW, YOKER, AND CLYDEBANK RAILWAY COMPANY, Pursuers
(Reclaimers).—*D. Dundas—Grierson.*

Nov. 20, 1896. ALEXANDER DUNN MACINDOE AND OTHERS, Defenders (Respondents).
Glasgow, Yoker, and Clydebank Railway Co.
—*Jameson—C. J. Guthrie.*

COMMISSIONERS OF POLICE OF CLYDEBANK.

Burgh—Natural Water-course—"Sewer"—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), sec. 215.—Section 215 of the Burgh Police Act, 1892, enacts,—“All sewers and drains within the burgh, whether existing at the time when this Act comes into force or made at any time thereafter (except private branch drains . . .), shall vest in and belong to, and be entirely under the management and control of, the commissioners.”

A railway company which, under compulsory powers, had taken a piece of ground in a burgh, brought an action against the proprietor and the Police Commissioners for declarator that a burn which passed through the land was a sewer vested in the Police Commissioners, and that the company was not bound to pay compensation for it. The proprietor alone lodged defences.

It was proved that the burn was to some extent polluted by sewage from properties outside the burgh, but that no sewage from the burgh entered it above the point where the burn left the land taken.

Held (aff. judgment of Lord Kyllachy) that the burn was not a “sewer” in the sense of section 215 of the Burgh Police Act, 1892, and that the defender was entitled to compensation for it.

Question, whether section 215 applied only to sewers and drains which were *opera manufacta*.

1st DIVISION. IN 1894 the Glasgow, Yoker, and Clydebank Railway Company and Ld. Kyllachy. Alexander Dunn Macindoe and others, *pro indiviso* proprietors of the estate of Duntocher, in the parish of Old Kirkpatrick, Dumbartonshire, proceeded to arbitration in order to fix the compensation to be paid to the latter for certain portions of their estate which the former had given notice they were to take for the purposes of their undertaking.

On 5th April 1895 the oversman appointed by the parties fixed the “compensation at the sum of £3439, 11s. 1½d., should it be found that the burn or water-course intersecting lot 22A of the lands on the plan No. 8 of process was not a sewer or drain vested in the Commissioners of the burgh of Clydebank, in terms of the Burgh Police (Scotland) Act, 1892; * or alternatively, the sum of £2989, 11s. 1½d., should it be found that the said burn or water-course was a sewer or drain vested in the said Commissioners of Police, in terms of the said Burgh Police Act.”

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), sec. 215, enacted,—“All sewers and drains within the burgh, whether existing at the time when this Act comes into force or made at any time thereafter (except private branch drains, drains made and used for the purpose of draining, preserving, or improving land, and sewers made under any local or private Act of Parliament), shall vest in and belong to, and be entirely under the management and control of, the commissioners.”

Sec. 217.—“Nothing in this Act contained shall be construed to authorise the commissioners, contrary to any private right, to use, injure, or interfere with any sewers or other works already made or used for the purpose of draining . . . land under any local or private Act of Parliament, or for the purpose of irrigating lands, or to use, injure, or interfere with any water-course, stream, river . . . in which the owner or occupier of any lands . . . shall have right and interest, without the consent in writing of the person legally entitled to grant the same.”

On 17th June 1895 the railway company raised this action against the proprietors of the estate of Duntocher for declarator (1) "that the burn or water-course, which is known as the Boquhanran Burn, intersecting lot 22A of the lands" on the plans lodged in the reference "is a sewer or drain vested in the Commissioners of Police of the burgh of Clydebank in terms of the Burgh Police (Scotland) Act, 1892; and (2) that the pursuers are bound and obliged to pay to the defenders the sum of £2989, 11s. 1½d. sterling, and no more . . . as compensation for the lands purchased by the pursuers."

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The pursuers averred;—"The said burn or water-course intersecting lot 22A was a sewer or drain at the date of the pursuers' notice to take, and also when the Burgh Police (Scotland) Act, 1892, came into force. It has been used for purposes of sewage and drainage continuously, exclusively, and increasingly during a long period of years by owners and occupiers both within and outside the burgh of Clydebank, and the defenders and their predecessors have acquiesced therein all along." "The said burn or water-course was, at the date when this Act came into force, and now is, a sewer or drain in the sense and meaning of the statute, and is by operation thereof now vested in and belongs to the Commissioners of the burgh of Clydebank, within which burgh it flows, at least in its course of intersection of the field before mentioned."

The defenders answered;—"Admitted that the burn where it enters lot 22A contains some sewage from properties through which it runs, extending to about 405 acres, and containing a population of about 1000 or 1500. Explained that these properties are all outside the burgh of Clydebank. No rights have been granted to any proprietors of subjects within the burgh to lead sewage from said subjects into the said burn until below the point where it leaves lot 22A. . . . The burgh of Clydebank has a material interest in the question raised by the pursuers. It has not been called in this process."

The pursuers pleaded;—(1) The burn or water-course in question having been, at the date of the pursuers' notice to take, a sewer or drain within the meaning of the Burgh or Police (Scotland) Act, 1892, and having been as such vested in the Commissioners of Police of the burgh of Clydebank, the pursuers are entitled to decree of declarator in terms of the first conclusion of the summons. (2) The said burn or water-course being a sewer or drain as aforesaid, and the pursuers having tendered payment to the defenders of the sum of £2989, 11s. 1½d., with interest thereon at 5 per cent from 1st July 1894 till 13th April 1895, being the date of said tender, they are entitled to decree of declarator in terms of the second conclusion of the summons.

The defenders pleaded;—(1) All parties not called. (2) The burn or water-course intersecting lot 22A on the said plan not having been, at the date of the pursuers' notice to take, a sewer or drain vested in the Police Commissioners of the burgh of Clydebank, in terms of the Burgh Police (Scotland) Act, 1892, the defenders are entitled to absolvitor.

The case having been sisted in order to give the pursuers an opportunity of calling the Police Commissioners of the burgh of Clydebank for their interest, a supplementary action was raised by the pursuers against them for declarator in terms of the first conclusion of the leading action.

The Police Commissioners did not appear.

No. 30. On 22d January 1896 the Lord Ordinary (Kyllachy) conjoined the actions and allowed a proof.

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No appearance was made for the Police Commissioners of Clydebank.

The import of the proof is thus given by the Lord Ordinary in his opinion appended to his interlocutor of 10th July:—"The burn in question is, in its physical character, beyond all question a natural water-course. It is simply an ordinary Scotch burn, which rises at the foot of Duntocher, some three miles from the place in question, and flows thence through a comparatively open country till it joins the Clyde within the burgh of Clydebank. Moreover, up till about fifteen years ago, it was a practically pure stream—not perhaps fit for human use, but quite fit for watering cattle and similar purposes. Within recent years, however, it has undoubtedly become polluted by sewage, which has been permitted to pass into its course, and although open and in its natural state in and above the defenders' property, it is after it leaves the defenders' property, and for some distance before it reaches the Clyde, enclosed, at least in part, in a built drain or culvert."

It was further proved that the works of Messrs Somervail & Company, situated within the burgh of Clydebank, were drained into the burn, but wholly by sufferance of the defenders, the proprietors of Duntocher.

On 10th July the Lord Ordinary (Kyllachy) assoilzied the defenders from the conclusions of the action.*

* "OPINION.—The question in this case is a very short one. It is simply this, whether the burn known as the Boquhanran Burn is, where it passes through the defenders' property, a sewer or drain in the sense of the 215th section of the Burgh Police Act of 1892. If it is, the property of the burn at the place in question is vested in the Commissioners of Police of Clydebank, and the defenders are not entitled to compensation in respect of their property or interest in it. If it is not, there is no suggestion that it belongs to the Commissioners under any previous or other title, and accordingly in that case it is not disputed that the defenders are entitled to absolvitor. (His Lordship here stated the import of the proof as given *supra*.)

"The proposition of the pursuers therefore is, and must be, that wherever within the bounds of a burgh there exists a burn or water-course materially polluted by sewage, that burn or water-course is by the Burgh Police Act of 1892 vested in the burgh authorities. Now, I must say this strikes one at first glance as rather a startling proposition. But the pursuers say that such is the result of the Act, and particularly of the 215th section, which is quoted on record.

"I do not think I need say more than that, having read the section in question, and relative sections of the Act, as carefully as I could, I am unable to accept the suggested construction. On the contrary, it appears to me that reading the 215th section by itself, and also in connection with the rest of the Act, there are two things which are fairly clear. The one is that what is meant in section 215 by a sewer or drain is an *opus manufactum*. That, I think, is clear upon the language of the 215th section. The other is, that the Act throughout this part of it carefully distinguishes between sewers—that is, made or built drains—on the one hand, and natural water-courses, polluted or unpolluted, on the other. I refer specially to the sections of the Act which were all, I think, mentioned at the discussion—sections 217, 219, 221, 222, 227, 228, 229, 230, and 234. And, as I have said, having regard to the terms of those sections and of section 215, I consider that the pursuers' claim is not well founded, and that the defenders are entitled to absolvitor."

The pursuers reclaimed, and argued ;—By section 215 of the Burgh Police Act, 1892, all sewers and drains within burgh, with the exception of private branch drains, were vested in the Commissioners. It was illegitimate to read the expression “made” in the section, as the Lord Ordinary had done, as meaning “constructed.” The word really applied to a stream which had “become” a sewer or drain. A natural water-course might be a sewer.¹ This was supported by a perusal of the Public Health Act, 1875 (38 and 39 Vict. cap. 55), for section 4 (the interpretation clause) defined “sewer” as including sewers and drains of every description except private branch drains, and section 18 empowered the local authority “to cover in or otherwise improve any sewer belonging to them,” and, moreover, there was an absence of any expression like “constructed” drain.² It was proved that this stream had been polluted by sewage, and it made no difference that the sewage entered it from outside the burgh.³ Lastly, it was to be noted that while in the Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), any sewer (sec. 182) within private property was exempted from the control of the Commissioners, in the Burgh Police Act of 1892 there was no exemption except private branch drains used to drain a dwelling-house.

Argued for the defenders ;—The Act of 1875 was sharply distinguished from the later Act of 1892. The former contained a definition clause of “sewer,” and the sections of the latter referred to by the Lord Ordinary indicated that the Act meant to distinguish between natural water-courses and made or built drains. In short, it was clear that the 215th section dealt alone with *opera manufacta*, and could therefore have no application to this natural water-course. Nothing could be vested in the Commissioners under the section which was not administered by them, and they had never exercised any administration over the burn. But, further, there was in point of fact no burgh sewage falling into the burn, and even if there had been, that would not make the burn a sewer vested as such in the Commissioners.⁴

At advising,—

LORD PRESIDENT.—The general facts about this water-course are concisely stated in the second paragraph of the Lord Ordinary’s opinion, and I think that his Lordship has also accurately stated the controversy when he says : “The proposition of the pursuers therefore is, and must be, that wherever within the bounds of a burgh there exists a burn or water-course materially polluted by sewage, that burn or water-course is, by the Burgh Police Act of 1892, vested in the burgh authorities.”

Now, in considering this proposition, it is well to bear in mind what are the use and object of such vesting clauses as the one which is before us.

¹ Magistrates of Portobello v. Magistrates of Edinburgh, Nov. 9, 1882, 10 R. 130.

² Wheatcroft v. Local Board of Matlock, 1885, 52 L. T. (N.S.) 356; Bonella v. Twickenham Local Board of Health, 1887, L. R., 20 Q. B. D. 63; Travis v. Uttley, 1893, L. R., 1 Q. B. 233; Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 224.

³ Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 234.

⁴ Attorney-General v. Hackney Local Board, 1875, L. R., 20 Eq. 626; Attorney-General v. The Luton Local Board of Health, 1848, The Jurist, Vol. II., Part I., p. 180.

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They properly apply to things, be it roads or drains, which *de facto* are administered by the Commissioners under the executive clauses of the Act, and they are intended to give so much of a title as is necessary to get over any legal difficulties in the way of the Commissioners effectuating their statutory duties. Accordingly, to shew that by way of vituperation of its impurity this burn may be characterised as a sewer is not to the purpose. The Act does not try to put down nuisances by vesting their *locus* in the burgh authorities, and the sewers vested are authorised sewers provided or adopted by the burgh as the conduits of such sewage as the burgh has a duty to dispose of.

But this burn in no sense acts as a burgh sewer. Only one house within the burgh drained into the burn, and when this use was challenged by the proprietor of the burn it ceased. Not only does the burn not in fact act as part of, or in the service of, the burgh's sewage system, but, apart from this vesting clause, the burgh cannot pretend to any right to put their sewage into the burn *invito domino*. So far as the burgh is concerned, and apart from this vesting clause, the defenders might, by arrangement with the upper proprietors, purify this burn so that there should be no sewage carried by it at all. Now, it surely can never be held that this vesting clause was intended to deprive the defenders of any of their rights in this stream in order to support a non-existing administration of it by the Commissioners.

For these reasons I am for adhering to the Lord Ordinary's interlocutor. There is one part of his Lordship's opinion as to which I desire to express a reservation. I am not prepared to lay it down that the 215th section only applies to sewers and drains which are *opera manufacta*. It is quite true that a whole series of sections may be pointed to which can only apply to *opera manufacta*. But this may be because an artificial construction is much the most ordinary form of sewer or drain; and as the words "sewers and drains" do not in themselves exclude a wider construction, I prefer to rest my judgment on the other considerations advanced, leaving open the question whether the vesting clause may not cover some material water-courses which, in fact and lawfully, serve the sole purpose of conveying burgh sewage.

LORD ADAM.—(After citing section 217 of the Act, his Lordship proceeded)—It is clear, therefore, that there may be water-courses or streams within the burgh which do not vest in the Commissioners as drains or sewers, and with which they have no right to interfere.

The question therefore is, whether or not this Boquhanran Burn is, in fact, a water-course or stream of that description.

Now it appears from the evidence that this burn has a course of some three or four miles before it enters the burgh, and that when it enters the burgh it runs in its natural channel through the private property of the defenders. It forms no part of any drainage or sewage system of the burgh, and, in point of fact, while it flows through the defenders' property, it receives no sewage whatever from any house in the burgh, except by a private drain from Somervail's works, which are situated on the defenders' property, and which they can stop at any moment.

It seems to me to be clear that this is a water-course or stream in which

the defenders have a right and interest, and that therefore the Commissioners have no right to use or interfere with it without the defenders' consent, or, in other words, that it is not vested in them.

Now it will be observed that the Commissioners do not themselves maintain that this stream is vested in them as a sewer or drain. The claim is made by a railway company who have interfered with it, and the ground of their claim is that where it enters the burgh it is more or less contaminated with sewage, and therefore is a drain or sewer in the sense of the Act.

It is true that the burn is so contaminated—to a considerable extent when the water in it is low—to an inappreciable extent when it is high.

But I fail to see how that displaces the fact that the burn is a stream in which the defenders have a right and interest. If the sewage in it should at any time become a nuisance to the burgh, the Commissioners have their remedy and can put a stop to it.

I therefore think that the interlocutor of the Lord Ordinary is right, and should be affirmed.

I observe, however, that he is of opinion that this stream or water-course does not fall within the 215th section of the Act, because it is not an *opus manufactum*.

I think that the grounds which I have indicated above are sufficient for the judgment in this case, and I have not found it necessary to form an opinion as to whether his Lordship's views in this respect are sound or not.

LORD M'LAREN.—I consider that this is a case of the construction of an Act of Parliament expressed in ordinary language. There is no need of any interpretation clause, because Parliament has considered that the Courts of law are quite capable of distinguishing between a sewer and a running stream. Casuists may suggest that there is some resemblance between the two when a stream becomes polluted, but they are essentially distinct, and I agree with your Lordship that a sewer must be a thing either constructed for the purpose of removing waste matter, or appropriated to that purpose in some way. It is not at all likely that there should be found existing a natural channel in all respects suitable for the purpose of a sewer. When one comes to consider too curiously the effect of pollution, there is hardly anything in nature not more or less polluted, but the mere fact that a stream is polluted will never entitle it to be treated in a question of property or administration as in any way identical with a sewer.

LORD KINNEAR concurred.

THE COURT adhered.

W. & J. BURNES, W.S.—MACNOCHIE & HARE, W.S.—Agents.

No. 30.

Nov. 20, 1896.
Glasgow,
Yoker, and
Clydebank
Railway Co.
v. Macindoe.

MRS ISABELLA RAE, Pursuer (Respondent).—*Salvesen*—P. J. Blair.
ALEXANDER MILNE & SONS, Defenders (Appellants).—*Jameson*—
Constable.

No. 31.

Nov. 20, 1896.
Rae v. Milne
& Sons.

Reparation—Master and Servant—Workman killed by fall of wall—
Negligence—Relevancy.—A mason having been killed by the fall of a

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 & Sons.

wall which he was employed in building, his widow brought an action of damages at common law against his employers, the contractors for the mason work of the building, and averred that his death was due to the fault of the defenders, because—1. The wall was of weak and defective construction in respect (1) that the lime used contained an undue quantity of sand, and was insufficiently worked; and (2) that no proper “header” or binding stones were used in building it. 2. The defenders recklessly hurried on the building in spite of wet and unsuitable weather, and did not allow one course to be sufficiently dry before another was put on, with the result that the wall was in a very soft and raw condition. 3. While the wall was in this state, the defenders also, contrary to established custom, allowed the contractor for the carpenter work to drive “dooks” into the wall, with the result that the mason work was shaken and weakened.

Held that no fault was relevantly averred against the defenders.

2D DIVISION.
 Sheriff of
 Aberdeen,
 Kincardine,
 and Banff.

MRS ISABELLA DONALD OR RAE raised this action at common law, in the Sheriff Court at Aberdeen, against Alexander Milne & Sons, builders and contractors, concluding for £500 as damages for the death of her husband, George Rae, who, at the date of his death, was in the employment of the defenders.

The pursuer averred,—(Cond. 2) “On the 19th day of December 1895, the said George Rae was, in the ordinary course of his employment under the defenders, engaged in building the southmost gable of a house in Hosefield Road, Aberdeen, for the mason work of which the defenders were contractors, when suddenly, without warning, the part of said gable on which he was working gave way, and he was precipitated to the ground, a distance of 33 feet or thereby, and was killed.” (Cond. 3) “The said wall was of weak and defective construction in respect (1) that the lime used contained an undue quantity of sand, was insufficiently worked, and was otherwise of insufficient quality, and much inferior to what is necessary for stability and customary to use in the building of walls of the description of that in question; and (2) that no proper ‘header’ or binding stones were used in the building of said wall by the defenders, the stones used being insufficient in size, and otherwise unsuitable for that purpose.” (Cond. 4) “During the time the said wall was being built, the weather was damp and rainy, and was very unsuitable for building operations. Notwithstanding this, the defenders, especially looking to the construction of the building and the insufficient quality of the materials used, unduly and recklessly hurried on the erection of the wall, and did not allow one course to be sufficiently dry before another was put on, with the result that the wall was in a very soft and raw condition. On the said 19th day of December 1895, while the wall was in this state, defenders, also contrary to established custom, suffered or permitted the contractor for the carpenter work of said house to drive dooks into the said wall, with the result that the mason work was thereby shaken and weakened.” (Cond. 5) “The defenders were guilty of gross fault and culpable negligence (1) in building the said wall of insufficient materials; (2) in hurrying on the work during wet weather; and (3) in permitting the dooking to be done as aforesaid. The said wall collapsed in consequence of all, or one or other, of these defects, and the death of the said George Rae was therefore the result of the gross fault and negligence of the defenders.”

The pursuer pleaded;—(1) The pursuer’s husband having met his death through the gross fault and culpable negligence of the defenders, they are liable to her in damages.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments, in so far as material, are irrelevant. No. 31.

On 14th July 1896 the Sheriff-substitute (Robertson) pronounced this interlocutor:—"Repels the first plea in law for the defender, and . . . allows both parties a proof of their respective averments on the closed record, and to the pursuer a conjunct probation." Nov. 20, 1896.
Rae v. Milne
& Sons.

On appeal, the Sheriff (Crawford), on 5th October, adhered.

The defenders appealed to the Court of Session for jury trial, and argued;—The pursuer's averments were irrelevant. There was no averment to imply personal fault against the defenders. Neither the sand nor the lime was objected to on the ground of quality. The obligation of the defenders was to supply both of good quality. If they were not mixed in proper proportions, that was owing to the carelessness of the labourer. They would have been liable if this labourer had not been competent, but this was not averred. The averments in cond. 3 as to the "header" stones were open to the same criticism. Cond. 4 hung on cond. 3, and fell with it. Cond. 5 was clearly irrelevant, as it was not explained how one contractor could control the movements of another contractor engaged on the same building.

Argued for the pursuer;—It was admitted that the defenders were responsible for the quality of the lime. It was averred that the lime was insufficient in quality. So with regard to the stones. The defenders could not shelter themselves behind the labourer, for they did not plead "collaborateur." Recklessly rapid building, especially in wet weather, was a well-known source of danger, and it was relevantly averred. This alone might have caused the accident, and the pursuer was entitled to prove it. If the defenders could not control the carpenter, at least they could have forbidden the deceased to work on a dangerous wall. The wall was reduced to this condition by the carpenter's operations, and the defenders should have kept the deceased from this risk. Due care was a distinct duty on the part of the defenders, and failure to exercise it was sufficiently averred.

LORD JUSTICE-CLERK.—This record is as unlike a record for obtaining an issue on the ground of fault as any I have ever seen. It does not contain an averment that the defenders supplied imperfect material, or material insufficient in quality or quantity. The averment is simply that "the wall was of weak and defective construction in respect (1) that the lime used contained an undue quantity of sand, was insufficiently worked, and was otherwise of insufficient quality, and much inferior to what is necessary for stability and customary to use in the building of walls of the description of that in question." That is to say, that the lime as mixed contained too much sand. It is not said that it was so mixed by order of the defenders. It is only said that as a matter of fact it contained too much sand. That is not an averment of fault against anyone. One cannot help knowing that the mixing of lime is an operation usually carried out by ordinary workmen. They get a heap of lime and a heap of sand, and mix them in certain proportions which are perfectly well known to them. That is the work of an ordinary mason's labourer. There is nothing in this record to the contrary. It is said the lime was insufficiently worked, that is to say, insufficiently worked by the ordinary labourers who were appointed to mix it. Again,

No. 31. that is not an averment of fault for which the defenders are responsible. No want of due supervision by the defenders is averred.

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& Sons.*

Then the pursuer says that the wall was defective in respect "(2) that no proper 'header' or binding stones were used in the building of said wall by the defenders, the stones used being insufficient in size, and otherwise unsuitable for that purpose." It is not said that the defenders did not supply suitable stones. It is not said that there was any fault on their part in making no provision for the proper selection of stones. They would naturally expect that the workmen would apply for suitable stones, and that if they were not supplied they would complain. There is no averment to the effect that complaints as to the size of the stones were disregarded, or that stones of a proper size were asked for and refused by the defenders.

The next averment is—(His Lordship read cond. 4).

It is not alleged that if the carpenter comes and proposes, in accordance with his contract, to drive in dooks, he can be prevented by the mason from doing so. It is not even said that the defenders knew when he was coming, and failed to take steps to prevent dooks from being driven in. It is said that the carpenter was suffered to drive dooks into the wall "contrary to established custom," but it is not said that the defenders knew the carpenters were working at the wall at all. If the pursuer has any action for what was done by the carpenter, it must be against the carpenter himself.

It seems to me that by such loose and unconnected averments the pursuer has not stated a relevant case of fault against the defenders to go to a jury. I think the case should be dismissed. If there are really facts and circumstances known to the pursuer which would form the grounds of a relevant case against the defenders, she can bring another action.

LORD TRAYNER.—I agree. There is here no fault relevantly averred against the defenders.

LORD MONCREIFF.—I am of the same opinion. This record is too vague and wanting in specification to warrant us in granting the pursuer an issue to go to a jury.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"Recall the interlocutors of the Sheriff-substitute and the Sheriff of Aberdeen, &c. appealed against, of 14th July and 5th October 1896: Sustain the first plea in law for the defenders; dismiss the action, and decern: Find the defenders entitled to expenses in this and the inferior Court."

R. MACDOUGALD, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

PARISH COUNCIL OF SHOTTS, Pursuers (Appellants).—*C. J. Guthrie—Deas.* No. 32.

PARISH COUNCIL OF BOTHWELL, Defenders (Respondents).—*D.-F. Asher—Crabb Watt.*

PARISH COUNCIL OF RUTHERGLEN, Defenders (Respondents).—*Salvesen—Cullen.*

Nov. 24, 1896.
Parish Council
of Shotts v.
Parish Council
of Both-
well and
Rutherglen.

Poor—Settlement—Minor Pubes—Second marriage of pauper's mother.—A derivative residential settlement acquired by a woman on her second marriage does not enure to a child of her first marriage.

M died in Rutherglen in 1888, having his settlement in Bothwell, the parish of his birth. His widow, in the same year, married a man having an industrial settlement in Shotts parish, and went with her pupil son of the first marriage, who had been born in Rutherglen, to reside in Shotts. The son reached puberty in 1894, and after his mother's death in 1895 became a pauper.

Held that the son had not derived any settlement from his mother in the parish of Shotts, and that as he had lost, on attaining puberty, the derivative settlement he had in his father's birth parish, the parish of his own birth was liable for his relief.

PATRICK MALLAN, who resided in Shotts, became chargeable as a 1ST DIVISION. pauper on 12th August 1895, and obtained relief from the parish of Sheriff of Shotts. He continued chargeable. Lanarkshire.

The Parish Council of Shotts then raised the present action of relief in the Sheriff Court of Lanarkshire at Hamilton against (1) the Parish Council of Bothwell, which was the birth settlement of John Mallan, the pauper's father; and (2) the Parish Council of Rutherglen, the parish of the pauper's own birth.

The following facts were admitted by the parties:—The pauper, Patrick Mallan, was born in the parish of Rutherglen on 14th November 1880. He was the son of John Mallan and of Catherine Dillon or Mallan. John Mallan, the pauper's father, died on 19th April 1888. The pauper's mother thereafter was, on 25th November 1888, married to Charles Dobbin, who had a residential settlement in the parish of Shotts, which he still retained. She resided with her second husband, Charles Dobbin, in the parish of Shotts, till her death, which took place on 17th July 1895, and Patrick Mallan, the pauper, resided in family with her. The pauper's father was born in the parish of Bothwell, and he retained his settlement there until his death.

The pauper was a proper object of parochial relief.

The pursuers pleaded;—(2) The Parish Council of Rutherglen—the pauper being born in that parish—is bound to relieve the pursuers of the foresaid advances and of future relief, in respect of the said Patrick Mallan's birth settlement. (3) In the event of its being shewn by the Parish Council of Rutherglen that the pauper's settlement is in the parish of Bothwell, the pursuers are entitled to decree against the Parish Council of Bothwell to relieve the pursuers of advances and of future maintenance, in respect the said Patrick Mallan acquired through his father a settlement in that parish.

The defender Bothwell pleaded;—(2) In respect of the said Patrick Mallan being above the age of puberty, and being forisfamiliaried, and Rutherglen being the parish of his birth, his settlement is in that parish, and the Parish Council of Rutherglen are liable for his support. (3) Alternatively, in respect of the said Patrick Mallan having, while

No. 32. in pupillarity, acquired through his mother a derivative residential settlement in Shotts Parish, and not having lost such settlement by absence at the date of chargeability, the said parish of Shotts is liable for his support, and the Parish Council of Bothwell should be assoltized, with expenses.

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The defender Rutherglen pleaded;—(2) The defenders the Parish Council of the parish of Rutherglen are entitled to absolvitor, with expenses, in respect that (a) the pauper has never been forisfamiliated, and has therefore the parish of Bothwell or Shotts as his settlement; (b) *esto* that he has been forisfamiliated, he took, on the marriage of his mother with Charles Dobbin, the parish of Shotts as his settlement, and as that settlement was a derivative residential settlement, he has not lost it.

On 29th July 1896 the Sheriff-substitute (Davidson), *inter alia*, found that the pauper had acquired through his mother a residential settlement in the parish of Shotts, and that he was chargeable to that parish, and therefore assoltized the defenders.*

Shotts appealed, and argued;—The pauper here was beyond pupillarity, and received relief in his own right. That distinguished the present case from *Greig v. Adamson and Craig*.¹ There the children were in pupillarity, and the ground of judgment was that the mother was truly the pauper, not the children, and it was held that the mother, by her second marriage, had acquired the settlement of her second husband, but only for herself, not for her children.² The rubric of *Greig's* case seemed to go further, but it was not warranted by the judgment or by the opinions. The question raised in the present action was reserved in *Greig*.³ The rule was that the settlement of a pupil child was not affected by the second marriage of his mother.⁴ There was no authority to the effect that a child who had ceased to be a pupil, and whose father had not acquired an industrial settlement, had recourse against any but his own birth settlement.

Counsel for Bothwell were not called upon.

Argued for Rutherglen;—A father's residential settlement enured to his children, and was only lost by non-residence, and not by the

* "NOTE.—I have been unable to distinguish this case from that of *Wallace v. Muir* (Poor-Law Magazine, 1893, p. 445), where it was decided by the Sheriff of Lanarkshire that a child acquired a derivative settlement during the years of puberty by residence with his mother, and that a settlement so acquired can only be lost by non-residence, like other settlements. The decisions in the Court of Session seem to me to be to some extent conflicting. The case of *St Cuthbert's v. Cramond* (1 R. 174) lays down the principle distinctly, that a settlement acquired through the child's father adheres to the child after his death; but, in *Craig v. Greig and Macdonald* (1 Macph. 1172), a majority of a bench of seven Judges distinguished between a settlement acquired through a father and one obtained through a mother. *Wallace v. Muir*, however, is of course binding as an authority in this Court, and as the point at issue seems to have been distinctly raised and decided there, I do not think it is necessary to enter further into the question."

¹ *Greig v. Adamson and Craig*, March 2, 1865, 3 Macph. 575, 37 Scot. Jur. 203.

² *Beattie v. McKenna and Wallace*, March 8, 1878, 5 R. 737.

³ *Greig v. Adamson and Craig*, 3 Macph. 575, Lord Ardmillan at p. 581.

⁴ *Hendry v. Mackison and Christie*, Jan. 13, 1880, 7 R. 458; *Bothkennar v. New Monkland*, June 5, 1894, 31 S. L. R. 919.

attainment of puberty.¹ When the father was dead the same rule applied to the case of a mother. Here the mother had by her second marriage acquired a derivative residential settlement in Shotts, and that became the settlement of her child also—the child having no industrial settlement through his father—and could only be lost by non-residence. There had not been non-residence. The Sheriff-substitute had followed *Wallace v. Muir*.² That decision was exactly in point, and it was warranted by previous cases in the Court of Session.³ In the case of *Beattie*⁴ the facts were entirely different, and no question of residential settlement was raised. The case of *Grant v. Reid*⁵ shewed that a mother might acquire a residential settlement not only for her pupil children but also for her imbecile children, however old.

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LORD ADAM.—(After stating the facts of the case his Lordship proceeded)—In my opinion the parish of the pauper's own birth is responsible.

The first question which naturally and logically occurs is, what was the parish of settlement of this pauper when his father died in 1888? I think there can be no doubt that the parish of his father's settlement, the pauper being then a pupil, became his settlement. I think further that the authorities shew that so long as he continued a pupil that settlement could be lost by no act of his. Therefore, if matters had continued as they were, that would have been the parish of his settlement until he became a minor, and therefore capable of acquiring a new settlement, in which case it is not disputed that the parish of his own birth would have been the parish of his settlement.

It appears, however, that shortly after his father's death his mother married a man Charles Dobbin, who had a residential settlement in Shotts. The question is, whether the fact of the second marriage of his mother made any change in the settlement of the pauper. I think the authorities are against that view. I think the marriage of the pauper's mother effected no change, and did not deprive him of the right which he had in his own person to a settlement in the parish of his father's birth. I concur with Mr Deas's criticism of the case of *Adamson*⁶ that all that that decision settled was that where a woman married again she lost the settlement of her first husband and acquired that of her second husband for herself. She was the pauper in that case, not the children, and it was her settlement alone that required to be looked to, for the children were not to be treated as independent paupers.

I think that the principle of *Beattie*⁴ settles this case. There, as I understand it, it was decided that so long as the children are pupils and remain with their mother the right of settlement which they themselves acquired by the death of their father in the parish of his birth may be

¹ *St Cuthbert's v. Cramond*, Nov. 12, 1873, 1 R. 174.

² *Wallace v. Muir*, Sheriff Court, Poor-Law Magazine, 1893, p. 445.

³ *Crieff v. Fowles Wester*, July 19, 1842, 4 D. 1538, 14 Scot. Jur. 610; *Gibson v. Murray*, June 10, 1854, 16 D. 926, 26 Scot. Jur. 489.

⁴ *Beattie v. McKenna and Wallace*, 5 R. 737.

⁵ *Grant v. Reid*, May 25, 1860, 22 D. 1110, 32 Scot. Jur. 499.

⁶ *Greig v. Adamson and Craig*, 3 Macph. 575.

No. 32. temporarily suspended. So long as the mother was alive and the pupil living with her he would have had her settlement, for she would have been the pauper. But she died, the pupil attained puberty; he then became capable of acquiring a settlement on his own account, and the result is, that after attaining puberty, as the case of *Cramond*¹ shews, the settlement of his own birth became his settlement.

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Rutherglen.

It was said that there was a specialty in this case, in respect that there was here not a birth settlement but a settlement which the widow had acquired by residence, and it was said, on the authority of the *Crieff*² case, that that made a difference. I do not think the facts bear that out, for, as far as any settlement of the widow is concerned, as soon as she married she ceased to have an independent settlement, and only had that of her husband, between whom and the pauper there is no legal relation. In the next place, I think it is equally clearly out of the case that the pauper acquired any settlement in the parish of Shotts, for so long as a child is under fourteen years of age it has no *animus* to change its own residence.

I am therefore of opinion that we should recall the Sheriff-substitute's interlocutor, and hold the parish of Rutherglen liable.

LORD M'LAREN.—I am of the same opinion. It seems to result from the authorities that a pupil child is incapable of acquiring an independent settlement. Now, as connected with the history of this case, we had to consider what was the settlement of the pauper during the period of pupillarity. The law on that subject is that the father—who of course is liable to maintain the child—when he becomes a pauper takes that liability along with him to the parish, and, whether he be alive or dead, the parish of his father's settlement is the parish which is liable to keep the child, and to give it sustenance during the period that the child is incapable of earning a livelihood. This rule, which has been very much discussed, was extended first to the case of a mother who acquires during her widowhood an independent industrial settlement, and because she is responsible for the aliment of her child, it was held that she had a claim against the parish of her industrial residence for her child as well as for herself. And then, in the case of *Greig*,³ this rule was further extended to the case where the mother's settlement is not acquired by industrial residence, but is acquired through her re-marriage. But those decisions, while settling the question of the liability for the maintenance of a pupil child, throw very little light upon the present question, which relates to the liability for a child who has been forisfamiliarated. I think they throw little light on the question, because whenever a child becomes forisfamiliarated the question of settlement has to be considered afresh and independent of the liability during the past. Now, I take it that the settlement which the child acquires from the father in consequence of the father's industrial residence will adhere, and failing that, the settlement which the child may acquire from the mother through her industrial residence will adhere to the child until lost in the usual way; and that derived settlement from either parent

¹ 1 R. 174.

² 4 D. 1538, 14 Scot. Jur. 610.

³ 3 Macph. 575.

is the one that constitutes a prior claim on the parish—prior to the latent claim which always exists against the settlement of the child's birth. But it seems to me it would not be a sound extension of the principle of derivative settlements to hold that it should be extended to the case of the settlement of a stepfather, as I think the fallacy of the argument consists in extending a rule that may be convenient and just in the case of pupillarity to a new question that arises upon forisfiliation. It is impossible to discover any tangible ground for subjecting the parish of the stepfather's industrial residence to liability for the stepchild. He is not bound to maintain the stepchild. He is bound to maintain his wife, and that is a very good reason why she should have a settlement through him. But the stepfather sustaining no legal relation towards his stepchild, and owing him no duty of support or obligation towards him, it would be inconsistent with legal principle to hold that his settlement should take effect upon the stepchild. Now, as this pauper Patrick Mallan had a father who died without having an industrial settlement, and a mother who never acquired an industrial settlement of her own, it follows that the child must fall back upon the parish of his own birth, which is always liable, unless its liability is displaced by some stronger tie or ground of liability. I therefore am of opinion that the parish of Rutherglen, the parish of the pauper's birth, is the one that is responsible for his maintenance.

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Parish Council
of Shotts v.
Parish Councils of Both-
well and
Rutherglen.

LORD KINNEAR.—I agree. The question is whether this pauper is chargeable on the parish of his own birth, or secondly, upon the parish of his father's birth, or thirdly, upon the parish in which his mother is said to have acquired a derivative settlement by residence after her marriage with a second husband. I take it to be settled that the father's birth settlement transmits to his children only while they are in pupillarity, and therefore the parish of the father's birth seems to me to be relieved upon perfectly clear and well-established principles. I can see no grounds upon which the parish of his stepfather's birth or residence should be made liable. The settlement which the widow acquired by residence after her first husband's death and during her second marriage was not an independent industrial settlement acquired by herself, but through her second husband's settlement, from which I am unable to see that the children of her first marriage could acquire any right. Therefore I agree with your Lordships that we must fall back upon the parish of the pauper's own birth.

The LORD PRESIDENT was absent.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute dated 29th July 1896: Find the Parish Council of the parish of Rutherglen, the parish of the pauper's birth, liable for his support: Decern in favour of the pursuers against the said parish as concluded for: Assoilzie the Parish Council of the parish of Bothwell from the conclusions of the action, and decern," &c.

D. HILL MURRAY, S.S.C.—JAMES GIBSON, S.S.C.—H. B. & F. J. DEWAR, W.S.—Agents.

No. 33. CRAWFORD NOBLE AND ANOTHER, Pursuers (Respondents).—*Ure*—

A. S. D. Thomson.

Nov. 24, 1896. EDWARD HART, Defender (Reclaimer).—*Comrie Thomson—W. Brown.*
Noble v. Hart.

Lease—Condition—Forfeiture—Drunkenness—Public-House—“Doing anything which may endanger” licence.—By lease of a restaurant for eleven years, from 28th May 1892, it was provided that in the event of the lessee failing to conduct the business properly, or committing any breach of the licence certificate held by him for the premises, or any offence against the Public-Houses Acts or Excise laws, or permitting betting on the premises, “or doing anything which may endanger the continuance or renewal” of the licence certificate, it should be competent for the lessors to bring this lease to a termination either immediately or at any term of Whitsunday or Martinmas thereafter.

In June 1896 the lessors brought an action of declarator of forfeiture of the lease and removal against the tenant, averring that on 8th June 1895 the defender had been drunk and incapable while in personal charge of the business; that on 14th April 1896, at the Licensing Court, he admitted this, and that the licensing magistrates renewed his certificate, stating “that they had no wish to take away defender’s business at this time, but if a similar charge were brought against him very likely it would be taken away.”

The Court (*rev. judgment of Lord Kincairney*, who had allowed a proof before answer) *dismissed* the action as irrelevant.

2D DIVISION.
Lord Kin-
cairney.

By lease dated July 1893 Crawford Noble junior and John Alexander Henderson, merchants in Aberdeen, trustees for behoof of the Aberdeen Cord Manufacturing Company, let to Edward Hart the restaurant and cellarage No. 28 Guild Street, Aberdeen, for eleven years from 28th May 1892.

The lease provided, *inter alia*,—“The said premises are let for the purpose of carrying on a first-class restaurant and refreshment rooms, and are not to be used for any other purpose, the second party undertaking duly and properly to conduct the business during the continuance of this lease; and in the event of the second party [Hart] failing so to conduct the said business, or of his committing any breach of the licence certificate held for said premises, or any offence against the Public-Houses Acts or Excise laws, permitting betting on the premises, or doing anything which may endanger the continuance or renewal of the certificate of licence held for the premises under the statutes for the regulation of public-houses in Scotland . . . it shall be competent for the first parties to bring this lease to a termination, and to enter into possession of the said premises, either immediately or in their option at any term of Whitsunday or Martinmas thereafter, in the same manner as if the whole years of this lease had run and expired, without any process of law, or proceeding of any kind, other than a letter addressed and delivered or posted to the second party at the premises hereby let.”

On 15th June 1896 Noble and Henderson brought an action against Hart for declarator that he had incurred a forfeiture of the lease and for removing.

The pursuers averred;—(Cond. 4) “The defender has contravened the stipulations of the said lease, and has incurred a forfeiture thereof, in respect that he failed duly and properly to conduct the business carried on by him in the premises, and endangered the continuance and renewal of the said licence by becoming drunk and incapable while in personal charge of the business. It is the fact that on or

about Saturday, 8th June 1895, the defender was drunk, and was in consequence totally incapable of duly and properly conducting the said business, and he was found in this condition by a police inspector and constable. At the Licensing Court, held in Aberdeen on 14th April 1896, the matter was reported to the magistrates by the chief constable, who informed the Bench that the defender was addicted to drink, and was found in that condition on the said premises as stated above. By an error the date assigned for the said offence was 3d June, whereas it ought to have been 8th June. The defender who was present, and who was represented by an agent, was personally asked by the Court whether he denied the chief constable's statements, and he replied that he did not. Bailie Edwards then stated for the Court that they had no wish to take away defender's business at this time, but if a similar charge were brought against him very likely it would be taken away. A renewal of the licence was then granted to the defender."

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The defender pleaded;—(1) The pursuers' averments are irrelevant.

On 29th October 1896 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Before answer, allows to the pursuers a proof of their averments in condescendence 4, and to the defender a conjunct probation."

The defender reclaimed.¹

LORD JUSTICE-CLERK.—I am of opinion that nothing is averred in condescendence 4 sufficient to bring this case under the clause of forfeiture in the lease. The words at the end of that clause, "doing anything which may endanger the continuance or renewal of the certificate of licence," must be read in connection with the specific examples which go before. These shew that before forfeiture can take place something must be done which seriously endangers the licence. Now it is here averred that on one particular occasion the defender was drunk and incapable of conducting his business; it is no doubt also averred that the chief constable informed the bench that the defender was addicted to drink, and was found in that condition on the premises on the occasion in question, and it is further averred that the defender, who was present, "was asked by the Court whether he denied the chief constable's statements, and he replied that he did not." But I am unable to take this last averment as coming to more than an averment that he did not deny his drunkenness on that single occasion. What may seriously endanger the licence may be difficult to define, but the averment of what occurred to endanger the licence must be specific and certain, and I think that nothing of that sort has been averred against the defender. I am unable to take the averments on record as more than an averment that the pursuer was intoxicated on one occasion, and that at the Licensing Court he admitted that he had been so. There is no averment of an indication on the part of the magistrates that they thought this one act had endangered the licence. It was said by one of them that if a similar charge was again brought the licence might probably be taken away. But this was as regards the future, and shews that as regards the past the magistrates had no intention of dealing with the licence at all.

¹ *Defender's Authorities*.—Wooler v. Knott, 1870, L. R., 1 Ex. Div. 124; Fleetwood v. Hall, 1889, L. R., 23 Q. B. Div. 35. *Pursuers' Authority*.—Hermann v. Powell, 1891, 60 L. J. Q. B. 628.

No. 33. It is remarkable that the whole of the pursuers' contention is based on what took place in June 1895, a year before this action was brought. There
Nov. 24, 1896. is no ground for thinking that since June 1895 the defender has done any-
Noble v. Hart. thing to endanger the licence. I must say that I think there is a great deal in the suggestion made by Lord Moncreiff in the course of the argument, to the effect that if action is to be taken under the lease it must be taken either immediately or at the next ensuing term. If that is so, then of course there is an end of the case. But even assuming that the pursuers had a right under the lease to allow the matter to stand over and to bring it up at a subsequent date, I think they have not stated on record that anything was done by the defender to endanger this certificate, which has been renewed by the magistrates since the act of which the pursuers complain is said to have occurred.

LORD YOUNG.—I think this case requires careful consideration before we can come to the conclusion to alter the interlocutor of the Lord Ordinary allowing a proof before answer. I am greatly averse—I think I may say that all your Lordships are averse—to interfering with such an interlocutor, and I have therefore given this case careful consideration before coming to the conclusion that it is exceptional.

The only violation of the lease which the pursuers aver is found in condescendence 4, and, in my opinion, that averment simply amounts to this, that the defender was drunk on 8th June 1895, a year before this action was brought. There is no averment that the defender was addicted to drinking, or had done anything, or left anything undone, in consequence of any bad habit of his which would interfere with the regularity of the conduct of the business or the renewal of the licence. It is, no doubt, averred that a policeman stated to the Licensing Court that the defender was addicted to drink, but I cannot take an averment that a statement was made by a policeman to the magistrates as an averment by the pursuers themselves of the facts alleged to have been stated by the constable. There ought to have been a substantive averment by the pursuers. I therefore come to the conclusion that the only averment we have here is an averment that on 8th June 1895, a year before the action was brought, the defender, who had been in possession of the premises for four years, was drunk on one occasion. I do not think that such an averment entitles the pursuers even to a proof before answer.

LORD TRAYNER.—I agree. I think the first plea for the defender must be sustained. The only averment stated by the pursuers at all relevant to infer forfeiture of the licence is that the defender was intoxicated on 8th June 1895. But the rest of the pursuers' averments shew that, as the matter stands, this conduct on the part of the defender did not endanger the licence. It may be said that, when the case came up before the Licensing Court and the licence was granted, Bailie Edwards remarked that if a similar charge was again brought against the defender his licence would very likely be taken away. But this is only the expression of a possibility. Taking into account the mode in which the Court dealt with the matter, I think it is plain that they did not consider the defender's conduct a matter which really endangered the licence. The licence having been renewed,

and there being no averment that anything has occurred since to endanger the licence, I am of opinion that this action should be dismissed. No. 33.

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LORD MONCREIFF.—I agree in the conclusion at which your Lordships have arrived. I am influenced a great deal by the long delay which took place before the pursuers took action. In that respect the case is in marked contrast to that of *Hurmann*.¹ The act charged is said to have been committed in June 1895, and the case was not raised until a year afterwards, while the clause of forfeiture, if truly construed, in my opinion, provides that action must be taken either at once or at the term of Whitsunday or Martinmas following the alleged offence. The landlord took no action, and when the Licensing Court was held this isolated act of drunkenness on the part of the defender was brought to the notice of the magistrates. I think it must be held that the Court did not think that this solitary act endangered the licence, because they renewed the licence. I am of opinion that it is now too late for the pursuers to take action. If they had taken action either at once or at the term after the alleged offence was committed they might have been entitled to a proof. But on account of the delay in bringing the action, and as a result of what took place at the Licensing Court, I think that the licence has as yet never been really endangered, and that the present action is irrelevant.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the first plea in law for the defender, and dismissed the action.

ANDREW NEWLANDS, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

THE LORD ADVOCATE (as representing the Board of Trade), First Party. No. 34.

—*Sol.-Gen. Dickson—Cooper.*

JOHN HUTCHINGS (as representing the Leith Local Marine Board), Nov. 24, 1896.
Second Party.—*Salvesen.* Board of Trade
v. Leith Local
Marine Board.

Ship—Board of Trade—Local Marine Board—Cancellation of Master's Certificate—Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), secs. 469, 470, and 471.—The Board of Trade remitted a case under sec. 471 of the Merchant Shipping Act, 1894, for inquiry to a Local Marine Board, who reported that they found the charge proved, and recommended that the certificate be suspended, but refused to cancel or suspend the certificate on the ground that they had no power under the Act to do so.

In a special case presented by the Lord Advocate as representing the Board of Trade, and by the secretary of Leith Local Marine Board as representing that Board, *held* (1) that the Local Marine Board was a "Court" within the meaning of sec. 470, subsec. (b) of the Act of 1894, and had power to cancel or suspend the certificate of a master, mate, or engineer; (2) that the Board of Trade had no power to cancel or suspend a certificate except on the ground that the holder of it has been "convicted of an offence."

Opinion (per Lord Trayner) that the word "offence" refers to an offence which may be punished by fine or imprisonment.

THE Board of Trade, on 4th February 1896, remitted a case under 2D DIVISION. section 471 of the 1894 Act to the Local Marine Board at Leith for inquiry, and the latter made a report thereon on 7th February 1896,

¹ 60 L. J., Q. B. 628.

No. 34. in which they "find the charge proven, and recommend that his certificate be suspended," but refused to cancel or suspend the certificate of the person whose conduct was inquired into, on the ground that they had no power under the Act to cancel or suspend.

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The Board of Trade maintained that a Local Marine Board had the power under the said Merchant Shipping Act, 1894, to cancel or suspend the certificate of a master, mate, or engineer; but the Leith Local Marine Board maintained that a Local Marine Board was not a Court within the meaning of section 470 (b) of the Act, that it had no power of itself to cancel or suspend such a certificate, and that its functions were limited to pronouncing a finding whether the person accused was or was not guilty of the charge made against him, and to reporting to the Board of Trade with a recommendation as to how his certificate should be dealt with. The Board of Trade, however, further maintained that the Board of Trade had no power to cancel or suspend upon such a recommendation, but only when a master, mate, or engineer had been convicted of any offence.

In these circumstances this special case was presented by (1) the Lord Advocate, as representing the Board of Trade, and (2) John Hutchings, secretary to the Local Marine Board at Leith.

The questions of law were:—"1. Whether a Local Marine Board has power under the said Merchant Shipping Act, 1894, to cancel or suspend the certificate of a master, mate, or engineer? 2. Has the Board of Trade power to cancel or suspend the certificate of a master, mate, or engineer when a Local Marine Board has reported in favour of its cancellation or suspension?"

The Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60), repealed the whole of the Merchant Shipping Act, 1854, and of the Merchant Shipping Amendment Act, 1862, and by sections 469, 470, and 471, it provided as follows:—

Sec. 469.—"The Board of Trade may suspend or cancel the certificate of any master, mate, or engineer, if it is shewn that he has been convicted of any offence."

Sec. 470.—"(1) The certificate of a master, mate, or engineer, may be cancelled or suspended,—(a) By a Court holding a formal investigation into a shipping casualty under this part of this Act, or by a Naval Court constituted under this Act, if the Court find that the loss or abandonment of or serious damage to any ship, or loss of life, has been caused by his wrongful act or default, provided that, if the Court holding a formal investigation is a Court of summary jurisdiction, that Court shall not cancel or suspend a certificate unless one at least of the assessors concurs in the finding of the Court: (b) By a Court holding an inquiry under this part of this Act into the conduct of a master, mate, or engineer, if they find that he is incompetent, or has been guilty of any gross act of misconduct, drunkenness, or tyranny, or that in a case of collision he has failed to render such assistance or give such information as is required under the fifth part of this Act: (c) By any Naval or other Court where under the powers given by this part of this Act the holder of the certificate is superseded or removed by that Court. (2) Where any case before any such Court as aforesaid involves a question as to the cancelling or suspending of a certificate that Court shall, at the conclusion of the case or as soon afterwards as possible, state in open Court the decision to which they have come with respect to the cancelling or suspending thereof. (3) The Court shall in all cases send a full report on the case with the

evidence to the Board of Trade, and shall also, if they determine to cancel or suspend any certificate, send the certificate cancelled or suspended to the Board of Trade with their report. (4) A certificate shall not be cancelled or suspended by a Court under this section unless a copy of the report, or a statement of the case on which the investigation or inquiry has been ordered, has been furnished before the commencement of the investigation or inquiry to the holder of the certificate."

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Section 471.—“(1) If the Board of Trade, either on the report of a Local Marine Board or otherwise, have reason to believe that any master, mate, or certificated engineer is from incompetency or misconduct unfit to discharge his duties, or that in a case of collision he has failed to render such assistance or give such information as is required under the fifth part of this Act, the Board may cause an inquiry to be held. (2) The Board may either themselves appoint a person to hold the inquiry or direct the Local Marine Board at or nearest the place at which it is convenient for the parties or witnesses to attend to hold the same, or where there is no Local Marine Board before which the parties and witnesses can conveniently attend, or the Local Marine Board is unwilling to hold the inquiry, may direct the inquiry to be held before a Court of summary jurisdiction. (3) Where the inquiry is held by a Local Marine Board, or by a person appointed by the Board of Trade, that Board or person (a) shall hold the inquiry, with the assistance of a local stipendiary magistrate, or if there is no such magistrate available, of a competent legal assistant appointed by the Board of Trade; and (b) shall have all the powers of a Board of Trade inspector under this Act; and (c) shall give any master, mate, or engineer against whom a charge is made an opportunity of making his defence either in person or otherwise, and may summon him to appear; and (d) may make such order with regard to the costs of the inquiry as they may think just; and (e) shall send a report upon the case to the Board of Trade. (4) Where the inquiry is held by a Court of summary jurisdiction the inquiry shall be conducted and the results reported in the same manner, and the Court shall have the like powers, as in the case of a formal investigation into a shipping casualty under this part of this Act, provided that, if the Board of Trade so direct, it shall be the duty of the person who has brought the charge against the master, mate, or engineer, to the notice of the Board of Trade, to conduct the case, and that person shall in that case, for the purpose of this Act, be deemed to be the party having the conduct of the case.”

Section 473 of the said Act provides,—“(1) A master, mate, or engineer whose certificate is cancelled or suspended by any Court, or by the Board of Trade, shall deliver his certificate (a) if cancelled or suspended by a Court, to that Court on demand; (b) if not so demanded, or if it is cancelled or suspended by the Board of Trade, to that Board, or as that Board direct. (2) If a master, mate, or engineer fail to comply with this section he shall for each offence be liable to a fine not exceeding fifty pounds.”

By section 475, subsec. (1) it is provided that the Board of Trade may in all cases, and shall in certain specified cases, when an inquiry into the conduct of a master, mate, or engineer has been held, order a rehearing, and by subsec. (3) it is provided,—“Where on any such investigation or inquiry a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or

No. 34. engineer, and an application for a rehearing under this section has not been made, or has been refused, an appeal shall lie from the decision to the following Courts, namely (a) if the decision is given in England or by a Naval Court, to the High Court; (b) if the decision is given in Scotland, to either Division of the Court of Session; (c) if the decision is given in Ireland, to the High Court in Ireland."

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The Act is divided into parts, and the above sections are in Part VI., which is entitled "Special Shipping Inquiries and Courts."

The powers of Board of Trade inspectors are enumerated in section 729.

By section 742, it is further, *inter alia*, provided as follows:—"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them, that is to say, 'Court,' in relation to any proceeding, includes any magistrate or justice having jurisdiction in the matter to which the proceeding relates." The constitution of Local Marine Boards is regulated by sections 244 and 245 of the said Act.

The Merchant Shipping Act, 1854, and the Merchant Shipping Amendment Act, 1862, which were both repealed by the Act of 1894, contained the following provisions:—

Under section 241 of the said Merchant Shipping Act, 1854, the Board of Trade had power either to institute an investigation into a charge of incompetency or misconduct, or to direct a Local Marine Board to do so, and under section 242 of the said last-mentioned Act power was vested in the Board of Trade to suspend or cancel the certificate of any master or mate if upon any investigation made in pursuance of section 241 he was reported to be incompetent, or to have been guilty of any gross act of misconduct, drunkenness, or tyranny. Under subsection (4) of said section 242 power was vested in the Board of Trade to suspend or cancel the certificate of a master or mate if he is shewn to have been convicted of any offence.

These provisions of the Act of 1854 were amended by the Merchant Shipping Act Amendment Act, 1862, and the power given to the Board of Trade or to a Local Marine Board of instituting an investigation was extended to charges of incompetency or misconduct on the part of certificated engineers.

Section 23, subsection 1, of the Amendment Act of 1862 provided as follows:—"The power of cancelling or suspending the certificate of a master or mate by the 242d section of the principal Act conferred on the Board of Trade shall (except in the case provided for by the fourth paragraph of the said section) vest in and be exercised by the Local Marine Board, Magistrates, Naval Court, Admiralty Court, or other Court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade."

Argued for the first party;—If either question were answered in the affirmative that would be sufficient, otherwise a supplementary Act would require to be passed. The first question should be answered in the affirmative, and the second in the negative. The Local Marine Board was a "Court" *ad hoc* appointed by the Board of Trade. It was objected that the terms of section 471 (3) by conferring the powers enumerated implied that the Local Marine Board was not a Court. The proper view was that the Act by these provisions added to the powers of the Local Marine Board, and by conferring

special powers converted it into a Court. The word "defence" in that section implied that it was a Court for the hearing of a debated case in the ordinary way. This view was assisted by the terms of section 466 providing for formal investigations, which undoubtedly dealt with a Court, and yet also gave leave for preferring a defence. Suppose the Board of Trade appointed a Sheriff-substitute to make an inquiry, there was no doubt that he, sitting with an assessor, could suspend a certificate. If the person so appointed could do so, surely the same was true of a Local Marine Board sitting with a legal assessor. It was applying no great strain to the Act to contend that the Board, in such a case, was simply in the same position as a person appointed by the Board of Trade. (2) Unless the Local Marine Board had the power, the Board of Trade had not. It would be a strong result that a body, not a Court, and who had not heard the evidence, could convict.

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Argued for the second party;—The former Act expressly gave this power to Local Marine Boards. If the Consolidation Act of 1894 did not, it was not competent to spell out of it any such power. The inference was that the power was withdrawn. The Local Marine Board was not a Court. Section 244 defined it. The primary purpose of it was to carry out the provisions of the Act. It was administrative, not judicial. It was an examining and inspecting body. If it were a Court the statute need not have enumerated the powers which are inherent in all Courts. Cancellation of certificate was a sentence, and the Local Marine Board could not pronounce this if it was not a Court. But it might have power to convict, leaving it to the Board of Trade to punish.

At advising,—

LORD TRAYNER.—There are two questions presented to us here for determination. The answers to be given to them depend on the construction of certain clauses in the Merchant Shipping Act of 1894. I deal with the second question first.

By the Merchant Shipping Act of 1854 (section 242), power was given to the Board of Trade to suspend or cancel the certificate of any master or mate in certain cases there enumerated. No other authority could exercise such a power. But by the Amendment Act of 1862 (section 23), the power of cancelling or suspending certificates (by that Act extended to engineers' certificates) was taken from the Board of Trade, except in one case, and vested in "the Local Marine Board, Magistrates, Naval Court, Admiralty Court, or other Court or tribunal"; by which the cases involving suspension or cancellation of certificate were investigated or tried. The one case in which power to deal with a certificate was reserved to the Board of Trade was where the holder of the certificate was "shewn to have been convicted of any offence." So stood the case when the Act of 1894 was passed, which repealed the Act of 1854 and also the Amendment Act of 1862. The whole grounds therefore on which certificates of masters, mates, and engineers can be cancelled or suspended, as well as the authority by which such cancellation or suspension can be ordered, must be found in the provisions of the Act of 1894. By section 469 of that Act there is conferred on the Board of Trade power to cancel or suspend certificates where it is shewn that the holder thereof "has been convicted of any offence";

No. 34. that is a re-enactment of the power reserved to the Board by the Amendment Act of 1862, where the general power (and indeed until then, the exclusive power) of cancelling and suspending certificates was taken from the Board and vested elsewhere. No other power, beyond what I have stated, of dealing with certificates is conferred on the Board of Trade by the Act of 1894. It is perhaps not necessary in answer to the question before us to define exactly what is meant by these words "convicted of any offence." But I venture to say on this point that the "offence" here referred to is what is more commonly called a criminal offence—an offence, that is, which may be punished by fine or deprivation of liberty. It does not in my opinion extend to such delinquencies as drunkenness on board ship, or acts of tyranny, and certainly not to incompetency, for all or any of which a certificate may be cancelled or suspended by the Court or tribunal inquiring into such a charge. I am of opinion that the Board of Trade has no power to cancel or suspend any certificate except upon the ground that the holder of it has been "convicted of an offence," and therefore that the second question should be answered in the negative.

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The first question is, whether a Local Marine Board has power under the Act of 1894 to cancel or suspend a certificate. It has that power undoubtedly if it can be regarded as a "Court" within the meaning of section 470, subsection (b). Now, I am of opinion that the Local Marine Board when holding an inquiry into the conduct of a master, mate, or engineer, under that provision, as it may do when so directed by the Board of Trade, is a "Court" within the meaning of the Act. The Board of Trade may direct such an inquiry to be made by any person it pleases to nominate, or by any Local Marine Board, or a Court of summary jurisdiction. In all such cases, the person or persons before whom the inquiry is made constitute the Court of inquiry. I think it difficult to reach any other conclusion with reference to a Local Marine Board, when the provisions of section 471, subsection 3, are taken into consideration. By that section the Local Marine Board are directed to hold the inquiry with the aid of a legal assistant; they are authorised to summon the person to appear before them against whom the charge is made—to give him an opportunity of making his defence, either in person or otherwise (which includes appearance by agent or counsel), to summon witnesses and recover documentary evidence—and to make such order as to costs as they may think just. All these are the proper actions and functions of a Court. This clause (section 471) does not in terms give the power to suspend or cancel the certificate, any more than give power to dismiss the charge or complaint. But that is because section 470, subsection (b), has already given the power to suspend or cancel, and, of course, to refuse to do so if the charge or complaint is not established.

The principal argument addressed to us in opposition to this view was that by the interpretation clause (section 742) the word "Court" is said to include "any Magistrate or Justice having jurisdiction," &c. But that clause does not exclude from the meaning of "Court" every person not a Magistrate or Justice. The clause does not say that the word "Court" shall mean every Magistrate or Justice having jurisdiction—but only that it shall include such persons. The definition is not exhaustive, for it would not include, at least not necessarily, such a judge as a Wreck Commissioner.

On these grounds I think the first question should be answered in the affirmative. No. 34.

Nov. 24, 1896.

Board of Trade
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Marine Board.

LORD MONCREIFF.—I am clearly of the same opinion. I do not think that the questions put to us present any real difficulty. Previously to the passing of the Merchant Shipping Act of 1894 a Local Marine Board possessed the power of cancelling or suspending the certificate of a master or mate for any of the reasons specified in section 242 of the Act of 1854, the power of the Board of Trade in this respect being confined by the Amendment Act of 1862, section 23, subsection (1), to the case provided for by the fourth paragraph of the said section, viz., of the master or mate having been shewn to have been convicted of any offence.

I do not find that the Merchant Shipping Act of 1894 has either taken away any of the powers conferred in this respect upon a Local Marine Board by the earlier statutes, or increased the powers of the Board of Trade. By section 469 the power of the Board of Trade as to cancelling or suspending a certificate is confined as before to the case of a master, mate, or engineer having been convicted of an offence. As to the powers of a Local Marine Board I think that if section 471 is read before 470, it is quite plain that not only are those powers not taken away, but that by section 471, subsection (3), Local Marine Boards are rendered more efficient for the performance of their duties as a Court.

The definition of the word "Court" in the interpretation clause, section 742, does not, I think, create any difficulty. It is plainly not exhaustive.

I agree generally in the opinion which Lord Trayner has delivered, and, in particular, in his statement as to the meaning and effect of the successive statutory provisions bearing on the powers of a Local Marine Board, and need add no more.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

THE COURT answered the first question in the affirmative, and the second in the negative.

DAVID TURNBULL, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

GAVIN BROWN CLARK, Petitioner.—*Ure—Cooper.*

ROBERT SUTHERLAND, Respondent.—*W. C. Smith.*

ALEXANDER DUGALD MACKINNON, Respondent.—*W. Campbell—Crole.*

No. 35.

Dec. 2, 1896.

Clark v.
Sutherland.

Election Law—Election Petition—Return of election expenses—Failure to make timeous and true return—Petition for authorised excuse—Corrupt Practices Act, 1883 (46 and 47 Vict. cap. 51), sec. 34.—Opinions that the Court has no jurisdiction to entertain an application by a candidate under sec. 34 of the Corrupt Practices Act, 1883, for an authorised excuse for failure to make a timeous and true return of election expenses unless the petitioner admits in his petition that he has contravened the statute.

Election Law—Election Petition—Return of election expenses—Failure to make timeous and true return—Petition for authorised excuse—Title to appear—Corrupt Practices Act, 1883 (46 and 47 Vict. cap. 51), sec. 34.—Where a candidate applies under sec. 34 of the Corrupt Practices Act, 1883, for an authorised excuse for failure to make a timeous and true return of

No. 35. election expenses, any elector in the constituency has a title to appear and oppose the application.

Dec. 2, 1896. *Question* whether a person who is not an elector in the constituency has
Clark v. a title to oppose such an application.
Sutherland.

1st Division. THIS was a petition at the instance of Dr G. B. Clark, Member of Parliament for the county of Caithness.

The petitioner stated that he had become a candidate for the county of Caithness at the general election in 1895, and had been duly elected Member of Parliament for that constituency. He had acted in the election as his own election agent.

That on the evening of 27th August 1895, being the thirty-fifth day after his return, the last day allowed by the Corrupt Practices Act, 1883,* for transmitting the account for election expenses, he posted at the House of Commons post-office the return of election expenses, but without a voucher for £5, 15s., which he had paid to James Nicol for hiring, which voucher he had not received in time.

That an action in the English Courts had been raised against the petitioner by Alexander Dugald Mackinnon, a law-agent in Portree, who had no connection with the county of Caithness, for penalties for alleged failure to make a timeous, true, and complete return of his election expenses as required by the said Act. "The petitioner believes that he made a timeous and true return of his election expenses in terms of said Act."

"The return of election expenses made by the petitioner is said to

* Section 33 of the Corrupt Practices Act, 1883 (46 and 47 Vict. cap. 51), enacts, *inter alia*,—"1. Within thirty-five days after the day on which the candidates returned at an election are declared elected, the election agent of every candidate at that election shall transmit to the returning officer a true return (in this Act referred to as a return respecting election expenses) in the form set forth in the second schedule to this Act or to the like effect, containing, as respects that candidate (a) a statement of all payments made by the election agent, together with all the bills and receipts (which bills and receipts are in this Act included in the expression 'return respecting election expenses'); (b) a statement of the amount of personal expenses, if any, paid by the candidate; (c) a statement of the sums paid to the returning officer for his charges, or, if the amount is in dispute, of the sum claimed and the amount disputed; (d) a statement of all other disputed claims of which the election agent is aware; (e) a statement of all the unpaid claims, if any, of which the election agent is aware, in respect of which application has been or is about to be made to the High Court; (f) a statement of all money, securities, and equivalent of money received by the election agent from the candidate or any other person for the purpose of expenses incurred or to be incurred on account of or in respect of the conduct or management of the election, with a statement of the name of every person from whom the same may have been received. . . . 5. If in the case of an election for any county or borough the said return and declarations are not transmitted before the expiration of the time limited for the purpose, the candidate shall not, after the expiration of such time, sit or vote in the House of Commons as member for that county or borough until either such return and declarations have been transmitted, or until the date of the allowance of such an authorised excuse for the failure to transmit the same as in this Act mentioned, and if he sits or votes in contravention of this enactment, he shall forfeit one hundred pounds for every day on which he so sits or votes to any person who sues for the same. . . ."

be not in conformity with the said Act (a) because the envelope in which it was sent from London bears the London post-mark of the 28th August 1895, while the last day on which, in terms of the Act, the return could be made, was the 27th August 1895; (b) because it was not accompanied by the receipt for the £2, 2s. paid to the Lybster Temperance Hall committee; and (c) because it was not accompanied by the receipt for the £5, 15s. paid to James Nicol.

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"With regard to (a) the petitioner has discovered that letters posted after 10 P.M. at the House of Commons post-office are not removed therefrom and marked with a date stamp till after midnight"; (b) the receipt was sent with the return, but the Sheriff-clerk stated that he had not received it, and the petitioner obtained and sent a duplicate; (c) Nicol's receipt was handed to Sheriff-clerk on 2d September 1895.

The petitioner further stated that he had inadvertently omitted to fill up in the return the date of the election, and had inserted Mr Nicol's Christian name as "John" instead of James.

The petitioner then set forth sec. 34 of the Corrupt Practices Act, 1883.*

The petitioner craved the Court "to find that the petitioner did timeously transmit a true return of his election expenses, incurred by him as candidate for the county of Caithness, at the election which took place therein on 23d July 1895, to the returning officer for the

* Section 34 of the Corrupt Practices Act, 1883, enacts, *inter alia*,—"1. Where the return and declarations respecting election expenses of a candidate at an election for a county or borough have not been transmitted as required by this Act, or being transmitted contain some error or false statement, then—(a) If the candidate applies to the High Court or an Election Court and shews that the failure to transmit such return and declarations, or any of them, or any part thereof, or any error or false statement therein, has arisen by reason of his illness, or of the absence, death, illness, or misconduct of his election agent or sub-agent, or of any clerk or officer of such agent, or by reason of inadvertence, or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant, or . . . the Court may, after such notice of the application in the said county or borough, and on production of such evidence of the grounds stated in the application, and of the good faith of the application, and otherwise, as to the Court seems fit, make such order for allowing an authorised excuse for the failure to transmit such return and declaration, or for an error or false statement in such return and declaration, as to the Court seems just." "3. The order may make the allowance conditional upon the making of the return and declaration in a modified form or within an extended time, and upon the compliance with such other terms as to the Court seem best calculated for carrying into effect the objects of this Act, and an order allowing an authorised excuse shall relieve the applicant for the order from any liability or consequences under this Act in respect of the matter excused by the order; and where it is proved by the candidate to the Court that any act or omission of the election agent in relation to the return and declaration respecting election expenses was without the sanction or connivance of the candidate, and that the candidate took all reasonable means for preventing such act or omission, the Court shall relieve the candidate from the consequences of such act or omission on the part of his election agent. 4. The date of the order, or if conditions and terms are to be complied with, the date at which the applicant fully complies with them, is referred to in this Act as the date of the allowance of the excuse."

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said county, in terms of the Statute 46 and 47 Vict. cap. 51, section 33, or otherwise, and in any event, to make an order for allowing an authorised excuse for the petitioner's failure (1) to transmit the return of his election expenses within the time fixed by the Statute 46 and 47 Vict. cap. 51, section 33; (2) to enclose as part of said return the receipt for £2, 2s. paid by the petitioner to the Lybster Temperance Hall committee; (3) to enclose as part of said return the receipt for £5, 15s. paid by the petitioner to James Nicol, Wick; (4) to insert the date of the election in the return which he made; and (5) to state accurately the Christian name of the said James Nicol in the said return, or for his failure to do any of the above wherein your Lordships shall consider that the petitioner has not complied with the statute; and further, to make an order allowing all or any of the above failures or omissions, if found to have been committed, to be an exception or exceptions from the provisions of the said Act, which would otherwise make the same an illegal practice,* and to declare that the petitioner shall not be subject to any of the consequences under the said Act of his said acts, failures, or omissions; or to do further or otherwise in the premises as to your Lordships shall seem proper."

The Court ordered the petition to be intimated upon the walls and in the Minute-book, and to be advertised.

Answers were lodged by Robert Sutherland, farm servant, an elector in the county of Caithness, and by Alexander Dugald Mackinnon, mentioned in the petition, who had raised an action against the petitioner for penalties in the High Court of Justice in England.

Sutherland averred "that the petitioner's declaration as to expenses was not in statutory form, as it did not specify the amount of the expenses (which was left blank), or the date of the election; that the return and declaration were not transmitted to the Sheriff-clerk within the statutory period, which expired on 27th August 1895; that the return was not accompanied by the statutory bills and receipts, and was therefore no true return; that although the petitioner's attention was directed by the Sheriff-clerk of Caithness-shire to these facts shortly after the said defective return was made, the petitioner took his seat and voted in the House of Commons for a whole session without making any application for relief. This respondent accordingly submits that the petitioner is not now entitled to the relief craved."

Mackinnon objected to the prayer of the petition being granted on like grounds, and further submitted that the application, in the first alternative prayer thereof, was incompetent, *et separatim* that the matters referred to in the petition being at present under the consideration of the English Courts, it was not convenient to try the question at issue in the present application.

At the hearing the respondents objected to the competency of the petition, on the grounds (1) that an application under either section

* This crave was for an order under section 23 of the Act, which authorises the Court, in certain circumstances, to make an order allowing any act or omission of a candidate which would, but for that section, be an illegal practice, payment, employment, or hiring, to be an exception from the provisions of the Act "which would otherwise make the same an illegal practice, payment, employment, or hiring, and thereupon such candidate . . . shall not be subject to any of the consequences under this Act of the said act or omission."

23 or section 34 must proceed upon an admission that the provisions of the statute had not been complied with ;¹ and (2) that in raising the issue whether he had committed illegal practices, the petitioner was inviting the Court to consider a question already competently raised in England in the action for penalties.

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After some discussion counsel for the petitioner craved and obtained leave to amend the petition by deleting the first crave, and the averments in support thereof, and also the last crave of the prayer, viz., those for a finding that the petitioner had timeously transmitted a true return, and for declarator that he should not be subject to any of the statutory consequences of his acts, failures, or omissions.

Argued further for the petitioner ;—The petitioner craved the Court to exercise the jurisdiction conferred upon it by sections 23 and 34 of the Corrupt Practices Act. In order to obtain complete relief it was necessary for the petitioner to apply under section 23 as well as section 34, for it might be contended that an authorised excuse granted under the latter section only took effect from the date on which it was granted, and was no defence against a claim for penalties incurred prior to that date. The respondents had no *locus standi* to oppose the application. The statute did not contemplate the appearance of other parties than the candidate in the application, and, in any view, Mackinnon, who was not an elector in the county, but merely a common informer, could have no title to intervene. Further, the respondents had set forth no relevant grounds for opposing the application, as they did not aver that the irregularities committed by the petitioner had been committed in bad faith.

Argued for the respondent Mackinnon ;—Looking to the original form of the petition, there was no doubt of this respondent's title to appear, for the petitioner craved a finding which would have been a judgment on the question raised by the respondent in his action for penalties. But the respondent's title was not cut down by the amendment made on the petition, for the petitioner averred that he was applying for a certificate which would, in his opinion, be a good ground of defence to the respondent's action, and the respondent had evidently a right to see that such a certificate was not given except on proper grounds. Section 23 was not intended to apply to omissions in the return or declarations of a candidate. The averments in the answers were relevant. Various particulars in which the petitioner had failed to comply with the statute were specified, and the statute imposed upon the candidate the burden of shewing that such failures were due to inadvertence and not to any want of good faith.

The respondent Sutherland argued that as an elector in the petitioner's constituency he had a clear title to intervene in the application, and to discuss the question whether the illegalities which had admittedly been committed were due to inadvertence or want of good faith.

LORD PRESIDENT.—It seems to me that the amendments which have been made on the petition are sufficient to make it competent under the statute. As I take it, we have jurisdiction only to furnish an authorised excuse to persons who have something to be excused, not to try the question whether something has occurred which requires an excuse. The petitioner must

¹ Walsall Case—Day's Election Cases, 77 and 106.

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make up his mind on that question, and Mr Ure has done well for his client in striking out of the prayer the crave for a finding that the principal thing—the first of the three offences supposed to have been committed—has not been done. Accordingly, the proceedings must necessarily go on from this point on the footing that the question is whether an excuse should be awarded. He has also done well to strike out of the last part of the prayer a declaration for which no statutory warrant can be found. The last part of the amended prayer, which desires the Court to make an order under section 23, is one which we do not require at present to consider, as it will be entirely open to the Court subsequently disposing of the case to settle whether effect can be given to section 23 at one and the same time with section 34. In my view therefore the petition has been reduced by these very material alterations to an ordinary plain-sailing application under section 34. I presume that your Lordships will consider that we should remit—as we have power to—to one of the Judges to proceed with the case. Probably an Election Judge will be the best to select.

We have been challenged to determine whether either of the parties who have appeared as respondents have a title so to appear. I think there is force in Mr Ure's observation that, if the petition could have been treated as it stood when the debate commenced as a petition under section 34, there would be great room for doubt whether Mr Mackinnon had any place in the controversy. But, unfortunately for the petitioner, the application was not then for an excuse, but for a declarator that there was no need of an excuse, and the only possible reason suggested for that crave being allowed was that the petitioner is at present defendant in an action in the English Courts at the instance of this respondent, where he affirms, and the petitioner denies, that there has been an offence in contravention of the Act. In these circumstances, it seems to me that the petitioner by his own choice has really convened Mr Mackinnon to this Court, to see that an order is not pronounced which might be incompetent, but which would have the appearance of a decree by a Court of law cutting away the ground of his action in the English Courts. Accordingly, I am of opinion that Mr Mackinnon was well entitled to come here, and what is more, that he has succeeded in his contention. We have not to determine more than this at present, but I am at a loss to see what *locus standi* Mr Mackinnon would have in the sequel to this case, now that it has been reduced to the scale and compass of an ordinary application for an excuse for an offence admittedly committed.

As regards Mr Sutherland, he has in his answers confined his statements within very sober and modest limits, and has not made any aggressive or injurious reflections on the conduct of his Parliamentary representative; but on the other hand, though his social position may not be of the most important, he is, like every elector, entitled to come forward,—it may be at his own expense,—but at all events to come forward and appear in this proceeding. I should therefore be averse to pronouncing anything which would discourage his laudable vigilance, but at the same time he must bear in mind that it will depend on the sequel and the course of the proceeding what the pecuniary result may be to him.

LORD ADAM concurred.

LORD M'LAREN.—I am of the same opinion. It appears to me that the condition of an application under section 34 is that some act has been committed either by the candidate or his agent or other representative, which is a contravention of the provisions of the statute that are intended to secure a complete return of election expenses. The powers of the Court are very ample to allow an authorised excuse, which shall have some effect—I do not say what effect—in relieving the candidate from the consequences of the contravention. But unless the petitioner comes here setting forth that there has been contravention, the foundation on which our jurisdiction depends does not exist.

I agree that the petition as framed was open to observations affecting its relevancy, and I also agree that Mr Mackinnon was entitled to come here in order to see that no decree was given out (as it might be if the attention of the Court were not called to the point), to the prejudice of his action in the English Court.

I have no doubt that the provisions of the statute as to advertisement within the applicant's constituency are intended to enable any elector to appear and watch the case, and to see that the application is fully scrutinised before being granted.

LORD KINNEAR concurred.

THE COURT allowed the amendments on the petition proposed at the bar, and the same having been made, remitted the cause to Lord Kyllachy to proceed as might be just.

M'NAUGHT & M'QUEEN, S.S.C.—A. & S. F. SUTHERLAND, S.S.C.—DUNCAN SMITH & M'LAREN, S.S.C.—Agents.

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THOMAS HARDIE AND OTHERS (Peter Waddell's Trustees), First Parties.—*Rankine—Pitman.*

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ALEXINA WADDELL, AND HER TUTOR, Second Parties.—*D.-F. Asher—W. Campbell.*

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MRS CATHERINE WADDELL, Third Party.—*D.-F. Asher—W. Campbell.*

MOSES ADAMSON, Fourth Party.—*A. M. Anderson.*

Succession—Testament—Holograph Writing.—In the repositories of a deceased person who left a formal settlement were found, but not tied up along with it, two holograph writings. The first ran thus:—"August 27, 1888—Annuity for life Mrs Wood Waddell, 30 Queen's Crescent, for £100, £3000 codicil to my will for Alexina Waddell, my late nephew W. Wood Waddell, daughter Alexina Waddell." The document bore the name and address of the deceased in his own handwriting at the left-hand bottom corner, away from the writing.

The second document was in pencil, and ran thus:—"May 14th 1894—Moses Adamson, the sum of £100 hundred pounds. 14th May 1894.—The sum of One hundred pounds, Peter Waddell." There was added in ink,—“May 14, 1889.” There was written on the back of the paper in ink,—“May 14th 1894, pay to Moses Addemson One hundred pounds stg.”

Held that the writings were not testamentary.

Lowson v. Ford, March 20, 1866, 4 Macph. 631, and *Colvin v. Hutchison*, May 20, 1885, 12 R. 947, approved.

Succession—Conditio si institutus sine liberis decesserit—Bequest by uncle to nephew and niece.—A testator directed his trustees to pay to his sister the

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sum of £6000, to "W, son of my late brother Andrew, the sum of £5000," and "to the only surviving daughter of my said brother the sum of £5000." These legatees were his only near relatives. In the same clause of the settlement legacies were left amounting in all to £40,000, and ranging from £500 to £4000, to distant relatives and strangers in blood. The residue, which amounted to £100,000, was left to charities. W predeceased the testator, leaving a daughter.

Held (*dub.* Lord Adam) that the *conditio si sine liberis* applied to W's legacy, there being nothing in the settlement to shew that the testator was moved to select his nephews and nieces as objects of his bounty by any other consideration than their relationship to him.

Per Lord M'Laren,—"I cannot help thinking that the true rule, and the only workable rule, is that in the case of a testator who has no children of his own, the benefit of the *conditio* will be given to the issue of his legatees, being nephews or nieces or their descendants, unless it appears from the will itself that the nature of the bequest was personal favour to the legatee rather than relationship."

Bogie's Trustees v. Christis, Jan. 26, 1882, 8 R. 453, *approved*.

1ST DIVISION. PETER WADDELL, 5 Claremont Park, Leith, died without issue on 18th June 1895, leaving a trust-disposition and settlement, dated 18th June 1886, and codicil dated 24th October 1888.

This special case was presented by Dr Thomas Hardie and others, the trustees—first parties—and by Alexina Waddell, only child of William Wood Waddell, the testator's nephew, and her guardian, second parties; by Mrs Catherine Walker Waddell, third party; and by Moses Adamson, fourth party.

It may be stated generally that two questions were raised—(1) Whether two holograph writings found in the deceased's repositories were testamentary; and (2) Whether a legacy of £5000 left by the testator in his settlement to his nephew William Wood Waddell, who predeceased the testator, fell, under the *conditio si sine liberis*, to his daughter Alexina, the second party.

I. *Holograph Writings.*

The special case contained statements to the following effect:—

The settlement contained this clause,—*Quinto*. "That my trustees shall pay and deliver all such legacies, gifts, or provisions, and implement all such instructions as shall be contained in any codicil or any memorandum or writing by me clearly expressive of my will, though not formally executed, declaring that the same, whether formal or informal, shall be held and taken to be part and parcel of these presents."

"Subsequent to the testator's death a holograph writing in the following terms was found in his repositories:—

August 27, 1888

Annuity for life

Mrs Wood Waddell

30 Queen's crescent

for £100

£3000 codicil to my will for Alexina Waddell my late nephew W. Wood Waddell daughter Alexina Waddell.

Peter Waddell

5 Claremont Park

Links Leith

"The testator on 27th August 1888, at a meeting with his agent, the late John T. Mowbray, LL.D., W.S., instructed him to prepare a

codicil to the said trust-disposition and settlement. After various consultations a draft codicil was framed, containing, *inter alia*, a clause directing the trustees to pay 'to my grandniece, Alexina Waddell, daughter of my late nephew William Wood Waddell, sometime residing at No. 30 Queen's Crescent, Edinburgh, the sum of £1000 sterling.' Thereafter, upon 24th October 1888 the codicil was executed, this clause having been deleted." The draft codicil shewing this deletion was produced.

"The testator on 29th August 1888 instructed the said John T. Mowbray to purchase an annuity of £100 on the life of the said party of the third part, and subsequently, on 31st August 1888, he instructed Mr Mowbray to increase the amount of the annuity to £150. On 6th September 1888 an annuity of £150 on Mrs Waddell's life was purchased by Mr J. T. Mowbray."

"Moses Adamson, the party hereto of the fourth part, acted for some time as the personal attendant of the testator, but left his employment in May 1894. After the death of the testator there was found in his repositories a holograph writing in the following terms:—

[The words in italics were written in pencil.]

May 14th 1894

Moses Adamson

*The sum of £100 hundred
pounds st*

14 May 1894

The sum of One hundred pounds peter Waddell

May 14 89

[Written on the back in ink.]

May 14th 1894

Pay to Moses Addemson

One hundred pounds stg

"The testator drew from the Bank of Scotland, Leith, monthly, certain sums to enable him to meet the house bills, &c. On 14th May 1894 he signed a cheque for £100 on the said bank in favour of the said party of the fourth part, but which cheque was afterwards cancelled, and on the same date he signed another cheque, also in his favour, for the same amount, which was paid to the said party of the fourth part by the bank on that date. The amount so uplifted was by the party of the fourth part handed to the testator to enable him to meet the current house expenses, &c." There was no statement that the holograph writings were found along with the settlement.

The second and third parties maintained that the first holograph writing was testamentary.

The fourth party maintained that the second was so.

The trustees for themselves, and as representing the residuary legatees, maintained that they were not testamentary.

II. *Conditio si sine liberis.*

With regard to the question whether the *conditio si sine liberis* applied to the legacy of £5000 in favour of William Wood Waddell, the testator's nephew, the following statements were made in the special case:—The testator had two brothers, Andrew and James, and one sister, Elizabeth, all of whom he survived. Andrew Waddell was the only member of the family who had issue, viz. (1) Elizabeth, who died in 1880 unmarried; (2) William Wood Waddell, who died on 19th July 1888, leaving a daughter, Alexina, born on 12th October

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1886; and (3) Mrs Mary Waddell or Wilson. Mrs Wilson and Alexina Waddell, the testator's niece and grandniece, survived him. They were his nearest relatives. He was also survived by Mrs Catherine Walker Waddell, the widow of William Wood Waddell.

The testator's settlement, dated 18th June 1886, set forth, *inter alia*, the following trust purposes:—“(Secundo) That my trustees shall convey to my sister, Elizabeth Waddell, residing with me at 5 Claremont Park aforesaid, my share of the whole effects in the house No. 5 Claremont Park aforesaid, belonging jointly to me and her, except certain pictures . . . (Tertio) That my trustees shall pay or retain the following legacies, *videlicet*,—To the said Elizabeth Waddell [his sister] the sum of £6000 sterling; to William Wood Waddell, presently residing in No. 6 Mansfield Place, Edinburgh, son of my late brother Andrew Waddell, the sum of £5000 sterling; to Mrs Mary Waddell or Wilson, only surviving daughter of my said brother Andrew Waddell, the sum of £5000 sterling.”

Here followed legacies to strangers in blood, *inter alia*, six legacies of £1000 each to the daughters and son of George Louthan *nominatim*, a legacy of £4000 to John Gordon, and a legacy of £4000 to Mrs S. J. Gordon or Liddle, and other legacies.

By the fourth purpose the testator directed his trustees to deliver to William Wood Waddell a painting by W. Goven dated 1641.

By the sixth purpose the testator directed the residue of his estate to be divided among certain charities named.

In a codicil, dated 24th October 1888, the testator left two legacies to strangers, and directed his trustees to deliver to the National Gallery of Scotland, Edinburgh, the painting above mentioned, the bequest thereof “having lapsed by the predecease of the said William Wood Waddell; and I revoke and alter the preceding trust-disposition and settlement, in so far as is necessary to give effect to these presents, but no further or otherwise.”

The legacies amounted to £40,000, and the residue was estimated at £100,000.

The second parties contended that the *conditio si sine liberis* applied to the legacy of £5000 in favour of William Wood Waddell, and that his daughter was entitled thereto.

The opinion and judgment of the Court was asked on the following questions:—“1. Are the second parties entitled to the legacy of £5000 bequeathed to the said William Wood Waddell? 2. Are the second and third parties respectively entitled to the sum of £3000 and to the annuity of £100 mentioned in the holograph writing of 27th August 1888? 3. Is the party of the fourth part entitled to the sum of £100 mentioned in the holograph writing of 14th May 1894?”

Argued for the first parties;—*Holograph Writings*.—(1) The writing of 27th August 1888 was clearly, on the face of it, merely a memorandum prepared by the deceased with a view to a consultation with his legal adviser. Had it been intended as a codicil, it would have been headed “codicil to my will.” It contained no words of gift, and was in no way testamentary. Although signed, it was at most a document containing a mere specification of names and sums of money. This view was supported by extrinsic evidence.¹ Two days

¹ *Lowson, &c. v. Ford, &c.*, March 20, 1866, 4 Macph. 631, *per* Lord Cowan, 638; *Munro v. Coutts*, July 13, 1813, 1 Dow, 437.

after the date of the memorandum, the deceased instructed his agent to buy an annuity of £100 for Mrs Waddell, which he afterwards increased to £150, and further, a draft codicil was prepared bequeathing £1000 to Alexina, although the bequest in her favour was afterwards cancelled by the deceased. The direction in clause 5 of the settlement instructing the trustees to give effect to informal memoranda applied only to documents which, although containing technical defects, expressed an intention to make a testamentary gift.¹ The same argument applied to the writing in favour of Adamson. (2) *Conditio si sine liberis*.—The rule of construction admitting the *conditio si institutus sine liberis decesserit* applied at first to bequests by parents to children. It was then extended to the relation of uncle and nephew or niece, but only subject to the qualification, that it should appear from the will that the uncle had placed himself *in loco parentis* to the object of his bounty.² The Court would not readily extend the doctrine beyond descendants.³ There was no case in which the doctrine of *in loco parentis* had been given effect to, unless the settlement was one of the nature of a family provision. It might not be necessary that every member of the family should receive something, but that the settlement should be a family one in the sense that no one else benefited by it was characteristic of all the cases, and especially of *Bryce's Trustee*⁴ and *Forrester's Trustees*.⁵ Here, however, there was a special bequest to an individual contained in a clause consisting otherwise of a list of legacies to various families and individuals, to all of whom the testator must be held to have been *in loco parentis* if the doctrine were to be applied.⁶ The *conditio* therefore did not apply.

Argued for the second and third parties;—(1) *Holograph Writings*.—The document of 27th August was signed, dated, and contained a specification of what the writer desired. It fell accordingly to be given effect to as a testamentary writing. The testator evidently had foreseen that he would be from time to time making alterations on his settlement, and he had inserted clause 5 to meet such a contingency. (2) *Conditio si sine liberis*.—The *conditio* applied to a bequest by an uncle to a nephew or niece, unless circumstances disclosed in the will shewed that the bequest was given upon the ground of *delectus personæ*, or as a memento.⁷ The deceased had only three relatives when he made the will. He did not pick and choose, but provided substantially for each of them. There was nothing to support the view that the mere relation between the amount given to them and the total *corpus* of the estate was necessarily exclusive of

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¹ Hamilton, &c., v. White, June 15, 1882, 9 R. (H. L.) 53, per Lord Chan. Selborne, 55.

² Hall v. Hall, March 17, 1891, 18 R. 690, opinions of consulted Judges, p. 698; Bogie's Trustees v. Christie, &c., Jan. 26, 1882, 9 R. 453, per Lord President Inglis, pp. 455-6.

³ Hall v. Hall, *supra*.

⁴ Bryce's Trustee, March 2, 1878, 5 R. 722.

⁵ Forrester's Trustees v. Forrester, July 12, 1894, 21 R. 971.

⁶ Allan v. Thomson's Trustees, May 30, 1893, 20 R. 733; Douglas' Executors, Feb. 5, 1869, 7 Macph. 504, 41 Scot. Jur. 268; Blair's Executors, &c., v. Taylor, &c., Jan. 18, 1876, 3 R. 362.

⁷ Bryce's Trustees, March 2, 1878, 5 R. 722, per Lord Gifford, p. 729; Forrester's Trustees v. Forrester, July 12, 1894, 21 R. 971, per Lord M'Laren, p. 973.

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the idea underlying the *in loco parentis* doctrine. If Alexina was found to have right to £3000 under the writing of 27th August, that did not preclude the application of the *conditio*.¹

Argued for the fourth party;—*Holograph Writings*.—The writing of 14th May fell under the description of informal documents, to which validity was to be given under clause 5 of the settlement. There was on the back a specific direction to pay, which, though not *in gremio* of the document, fell to be taken into account as explaining its contents.²

At advising,—

LORD M'LAREN.—The testator Peter Waddell died in June 1895, leaving a considerable fortune. He disposed of more than £40,000 in legacies, and the residue, estimated at over £100,000, is destined to charitable uses. The first question in the case relates to the effect of a legacy of £5000 to a nephew; the second and third questions depend on the validity of two memoranda which are said by the persons named in them to be testamentary writings, the trustees of Mr Waddell maintaining the contrary.

We intimated to the parties that the questions would be considered in a different order, because it is necessary first to consider what are the writings constituting the will of the testator before we can proceed to determine what is the true legal construction and effect of these writings.

The point really raised by the second and third questions are, whether the writings bearing date 27th August 1888, and 14th May 1894, or either of them, are codicils or testamentary instruments, and I shall so consider the questions.

In considering such a writing as that of 27th August, we have to begin with the elementary question, What are the essentials of a testamentary gift? We see from the decisions that testamentary effect has been given to writings which to all appearance were in their inception mere drafts or memoranda to be used in the preparation of a will or codicil, on the principle that where a testator puts up the writing or memorandum with the principal will, he may be assumed to be willing that his testamentary intention should stand on the words there used. But the Court has never gone so far as to hold that a mere specification of names and sums of money without words of gift would amount to a will. The contrary has been distinctly affirmed by both Divisions of the Court. I refer specially to Lord Cowan's opinion in *Lowson v. Ford*,³ and that of the Lord President in *Colvin v. Hutchison*.⁴

The paper in question begins (after the date) with the words, "Annuity for life, Mrs Wood Waddell, 30 Queen's Crescent, for £100." Now, one may infer from these words that the deceased was in some way concerned with obtaining an annuity for life for Mrs Wood Waddell. But whether he was to purchase this annuity for the lady out of her own funds, or to make her a present of it, and in the latter case whether by gift *inter vivos* or by bequest, is wholly uncertain. As a matter of fact, only two days after the date of the memorandum Mr Waddell instructed his agent to pur-

¹ Bryce's Trustee, March 2, 1878, 5 R. 722.

² Burnie's Trustee v. Lawrie, July 17, 1894, 21 R. 1015.

³ 4 Macph. 636.

⁴ 12 R. at p. 955.

chase an annuity of £100 for the lady, which he afterwards increased to £150. This makes it perfectly clear that so far as Mrs Wood Waddell's name is concerned the memorandum was not expressive of a testamentary intention, but I should come to the same conclusion independently of the extrinsic facts, important though they be. The writer might have changed his mind and never purchased an annuity, but does it follow that his estate is to be put under an obligation to do so? I think that such a conclusion is altogether inadmissible. I think that in the absence of words of gift or direction it must be taken that there is no present testamentary intention, and an intention to give, if not expressed, is what no Court of law can supply.

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I come to the same conclusion with respect to the other entry in the paper beginning, "£3000 codicil to my will for Alexina Waddell." The words convey no meaning to an ordinary reader, though doubtless the writer knew what he meant. It would be a mere guess to say that the note was written to remind the writer to cause a codicil to his will to be prepared in favour of Alexina. It appears that such a codicil was prepared, but the lady took no benefit under it, because Mr Waddell, for reasons known to himself, struck the bequest in her favour out of the draft.

With regard to the supposed bequest of £100 to Moses Adamson, I can only repeat that a will or testamentary intention is not expressed by merely writing the name of a person and a sum of money against the name. It appears that Mr Waddell was in use to draw cheques payable to Moses Adamson, his servant, and it is conjectured that at a time when he was suffering from physical weakness he wrote these words on a scrap of paper to try his hand before filling up a cheque. Whatever may be the true explanation, I am of opinion that the writing of 14th May 1894 is not a bequest in favour of anyone.

I pass to the consideration of the first of the questions of law in the special case. By his trust-disposition Mr Waddell made a bequest of £5000 in favour of William Wood Waddell, designed "son of my late brother Andrew Waddell." Now, William Wood Waddell died in the testator's lifetime, about two years after the execution of his trust-deed or will, and the question is whether his daughter Alexina is entitled to claim this legacy under the *conditio si sine liberis decesserit*.

In considering this question I shall leave out of view the circumstance already alluded to, that a draft exists in which this lady's name appears as a legatee for the sum of £1000, because, according to the best opinion I can form, this is not a circumstance relevant to the present inquiry. According to the judgment of the Court in the case of *Bogie's Trustees*,¹ the question whether a testator has put himself *in loco parentis* towards a nephew or niece is independent of extrinsic facts and circumstances, and is to be determined by the will itself. Now, if the scheme of the will is such as would affix the character of a parental provision to the particular bequest, it is consistent with sound principle to hold that this character can only be taken away, and the provision transformed into an ordinary legacy by a subsequent testamentary act, or at least by evidence in writing that the testator did not intend that the issue of his nominee should come into the parent's place.

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Passing from this specialty, I would observe that while the decisions are certainly adverse to the extension of the *conditio* to collaterals, there has been a disposition to admit it liberally within the degree of relationship in which it is properly applicable. It is certainly not limited to the case of a gift of a share of residue, though where a share is given to a nephew or niece with the usual destination, this is sufficient to exclude the *conditio* from any pecuniary legacy which may be given to the same person, the latter being deemed a personal gift. But again, if we are to be guided by the Lord President's views as developed in the case of *Bogie*,¹ it is not a necessary ingredient of a parental provision that all the testator's nephews and nieces are treated alike, or even that every member of the class should receive something, and if I rightly follow the judgment, as a father may leave a child out of his will because he is wealthy and does not need to be provided for, or because he is undeserving, so also the childless uncle may, for reasons known to himself, exclude a brother's child from his will, and still be a parent in the sense of the *conditio* to those nephews or nieces and their descendants for whom he undertakes or proposes to provide. It is easy to see that where so understood the phrase "*in loco parentis*" ceases to be a limitation, and expresses only the reason of the extension of the *conditio* to nephews and nieces. I confess that this consequence does not alarm me. I think it is much better that the relationship being defined the principle of implied conditional institution should be liberally applied, than that its application should be determined according to the impression which a Judge may form as to the assumption by a testator of a character which probably never entered his mind at all.

In the present case I understand that all the testator's nearest relations who were living at the date of the will are included, and I see that each of them receives a substantial sum. The sister receives £6000, and each of his brother's children £5000, so that the element of personal prepossession does not enter largely, if at all, into the case. It is true that legacies of smaller amount, chiefly sums of £1000, but in two instances sums of £4000, are given to strangers in blood or persons who are only distantly related to the testator, while the residue goes to charity. But this is not necessarily inconsistent with the supposition that the ties and duties of relationship were in the view of the testator in providing for his nephew and niece. The moral duty cannot reasonably be stretched further than the extent of a reasonable provision sufficient to keep the legatee from want. The circumstance that the testator has not dealt as liberally with his brother's children as he might have done, or as they might reasonably expect, does not seem to me to constitute a sound argument for depriving their issue of the benefit of the implied conditional institution which it is admitted would be a rightful claim if the bulk of the succession had been divided between the parents.

I have not thought it necessary to discuss the numerous decisions upon this principle of the law of wills, though I have examined them carefully, because I think that this case is not precisely ruled by any of the previous decisions. The *in loco parentis* doctrine is a somewhat artificial rule at

¹ 9 R. 453.

best; its application is nowhere subjected to any definite test, and it does not seem capable of more precise definition than such as is given in the case to which I have referred. I cannot help thinking that the true rule, and the only workable rule, is that in the case of a testator who has no children of his own, the benefit of the *conditio* will be given to the issue of his legatees, being nephews or nieces, or their descendants, unless it appear from the will itself that the nature of the bequest was personal favour to the legatee rather than relationship. I am therefore of opinion that the first question ought to be answered in the affirmative.

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LORD ADAM.—I agree that clearly the first question to determine is,—What are the testamentary writings of the deceased? No doubt his trust-disposition and settlement is one, and his codicil of 24th October 1888 is another; but there is a question in the first place with regard to the holograph writing of 27th August 1888, viz., whether that is a testamentary writing, or merely a memorandum intended by Mr Waddell to refresh his memory.

The question comes before us in the form of a special case, and to my mind that precludes us from ascertaining a very significant fact, viz., where this holograph writing was found. If, as has happened in previous cases, it had been found tied up in a bundle with other documents undoubtedly testamentary, that fact might give it a testamentary character, while if it were found separate in a chest of drawers, or what are vaguely described as “repositories,” that would put a different aspect on the question. Now, we are entitled to assume that this writing was not tied up with testamentary writings, for otherwise it should have been judicially brought to our notice. Coming then to the writing itself, as Lord M'Laren has remarked, there are no words of gift or expressing any desire or intention to give. The words used are—(Here his Lordship quoted the terms of the writing). Now, there is mention of a codicil, but that is equally vague, and accordingly the mere fact of his mentioning it is quite consistent with the writing being only a memorandum by which Mr Waddell wished to refresh his memory when visiting his agents. It is true that it is signed, but it is noticeable that the signature is not found where one would expect to find it in a testamentary writing, but down in the left hand corner of the paper, away from the writing. Accordingly I agree that this is not a testamentary writing, and I am also clearly of the same opinion with regard to the second document before us.

It appears to me that our decision on these documents is a very fortunate one for Alexina Waddell in the consideration whether the *conditio si sine liberis* applies, for if we had concluded that there was a special legacy to her of £3000 that would have precluded the application of the *conditio*. I must confess that I have great difficulty with reference to this question. In cases where an uncle makes a bequest to nephews and nieces, the rule, as laid down in *Bogie's Trustees*,¹ is that the *conditio* applies when the testator has put himself *in loco parentis*. Now, that is a very vague expression, and it is very difficult to say what its exact meaning is. I could have

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understood it if it were competent to go outside the deed and examine the facts to see how the testator had provided for the legatees in his lifetime, but it is not relevant to do this, and accordingly the test laid down in *Bogie's*¹ case is whether the testator "in his settlement has placed himself in a position like that of a parent towards the legatees, i.e., has made a settlement in their favour similar to what a parent might have been presumed to make." I confess that I see great difficulty in applying that test. Parents have various dispositions and children various characters, and it is hard to decide according to the circumstances of each case, and with reference to the special provisions here, it is difficult to conclude that if Mr Waddell had been dealing with his own children he would have left such a testament, and on these grounds I find a difficulty in concurring. But the test is so vague that as your Lordships are of opinion that this deed does fulfil its requirements, I am unwilling to differ from you, and accordingly I agree.

LORD KINNEAR.—I agree with all that has been said by your Lordships as to the order in which the questions should be considered by us, and also in holding that the two holograph writings are not testamentary. On the second question, as to the application of the *conditio si sine liberis*, I originally shared Lord Adam's difficulty, but on consideration I have come to concur with Lord M'Laren, for the reasons stated by him, and chiefly on the ground that I find nothing in the testament to shew that the testator was moved by any other considerations in selecting his nephews and nieces as the objects of his bounty than that of their relationship to him. I cannot find in previous decisions any definite or distinct limitation of the condition which is said to qualify the application of the general rule that the testator must have placed himself *in loco parentis* to the legatees, except that the person claiming the benefit of the *conditio* must shew that the testator made the bequest in consideration of relationship, and not for any more special reason applicable exclusively to the individual legatee. I agree with Lord M'Laren that we must adopt the former of these alternative views.

The LORD PRESIDENT concurred.

THE COURT answered the first question in the affirmative, and the second and third in the negative.

PATRICK C. JACKSON, W.S.—CARMICHAEL & MILLER, W.S.—MILLER & MURRAY, S.S.C.—Agents.

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Thin & Sinclair v. Arrol & Sons.

THIN & SINCLAIR, Pursuers (Reclaimers).—*D.-F. Asher—Sol.-Gen. Dickson—John Wilson.*

ARCHIBALD ARROL & SONS, AND OTHERS, Defenders (Respondents).—*Balfour—Ure—Napier.*

Reparation—Contract—Agreement to give credit to third party induced by fraud—Loss resulting from advances made during a course of years—Measure of damages.—In November 1889, Barber, who carried on business as a merchant, and who had been financed by Arrol & Sons, to whom he was then largely indebted, applied to Thin & Sinclair to make advances to him. Thin & Sinclair having made inquiries, and having obtained infor-

mation from Arrol & Sons as to the amount of Barber's indebtedness to them, agreed to give Barber "an open credit for £5000 to £6000, and any bills you may draw on us . . . in addition to this amount must be against bills of lading." Immediately thereafter Thin & Sinclair advanced £6000 to Barber, and subsequently during a course of business transactions made further advances to him upon bills of lading, with the result that Barber's account shewed a debit balance of £10,500.

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In March 1894 Thin & Sinclair raised an action against Arrol & Sons, in which they averred, *inter alia*, that the defenders had in November 1889 fraudulently understated the amount of Barber's indebtedness to them, and that but for their misrepresentation the pursuers would not have agreed to give Barber credit to any extent. They further averred that Barber was unable to pay the £10,500 standing at his debit, and they accordingly claimed that sum as damages, maintaining that they were entitled to be restored to the position they were in prior to making any advances to Barber.

After a proof the Court *assolized* the defenders, the Lord President, Lord Adam, and Lord Kinnear, on the ground that the alleged misrepresentation was not established, Lord McLaren, on the ground that the pursuers were not entitled to be restored to the position which they held before the agreement was made, but reserving his opinion as to whether the pursuers would have been entitled to claim damages for loss by the advance of £6000.

Opinion by the Lord President that when a person has been induced to enter into a contract by the fraud of a third person, he is not entitled to be relieved of the contract by the third party, but is only entitled to damages.

Contract—*Creditor's obligation not to "take legal steps" to recover debt.*—A, who had been financing B, declined to make further advances, but with the view of assisting B to get advances from T, sent to T a letter agreeing (1) that he, A, should "not take legal steps against B within seven years from this date to enforce payment of the balance" due to him; (2) that during that time he would not sell or foreclose mortgages held by him over B's property; (3) that he would not hold against B's debt any goods sent by B for sale which had been purchased with T's money.

Held (*aff. judgment* of Lord Kyllachy) that A's letter did not preclude him during the currency of the seven years from recovering payment of B's debt by other means than those specified in the letter.

ON 22d March 1894 Thin & Sinclair, merchants in Liverpool, raised this action against Archibald Arrol & Sons, brewers, Glasgow, and Thomas Kennedy & Son, esparto brokers there, concluding for payment of £10,500.

1st DIVISION.
Ld. Kyllachy.

The nature of the action was described by the Lord Ordinary (Kyllachy) as follows:—"The pursuers in this case are merchants in Liverpool, who, from 1889 until recently, financed upon certain terms the business of a certain Mr Barber who is or was a shipper of esparto from Oran, in Algeria, to the United Kingdom. The result of the business has, it appears, been unsatisfactory, the pursuers being—including interest and commission—over £10,000 in advance, and Barber's ability to pay being apparently doubtful. The object of the action is to recover from the defenders, who are merchants in Glasgow, damages equivalent to the amount thus lost or likely to be so, and the ground of the demand is two-fold—(1) That the defenders, who had up to November 1889 been Barber's correspondents, and were at that time his creditors to a large amount, made or were parties to the making of misrepresentations as to the amount of Barber's indebtedness, by which misrepresentations the pursuers were induced to undertake Barber's business; (2) That the defenders having, in connection with what I may call the transfer of Barber's agency to the

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pursuers, come under certain obligations with respect to the non-enforcement of the debt due to them, violated those obligations by entering into a certain private agreement with Barber, and acting under that agreement in a certain manner."

It is not necessary for the purposes of this report to refer further to the first ground of action mentioned by the Lord Ordinary than to say that the Lord Ordinary and the First Division held that the pursuers had failed to prove any misrepresentation on the part of the defenders.

The pursuers averred that for some years prior to November 1889 the defenders Arrol & Sons had made large advances to Mr Barber, whose agents in Glasgow were the other defenders, Thomas Kennedy & Son; that the senior partner of Arrol & Sons had died a short time prior to November 1889, and that after his death the defenders Arrol & Sons became anxious to cease financing Barber, and to receive payment of the debt then due by him to them.

These averments were not disputed by the defenders.

The pursuers further averred,—“It was, therefore, in the autumn of 1889, arranged between the defenders and Barber that the latter should approach the pursuers with the view of inducing them to make cash advances to him with reference to his esparto business, and so enabling the business to be carried on, and the defenders to get their debt satisfactorily paid off. Accordingly, Barber, in the beginning of November 1889, called upon the pursuers in Liverpool, and asked them to finance him to the extent of £5000 or £6000. He explained that he was indebted to the defenders, and stated that they were willing to agree to allow the amount of their debt to stand over for a period of years, so far as it was not covered by the then stock of esparto grass held by Barber, and represented by a stock list which he shewed to the pursuers. The pursuers, being disposed to entertain Barber's proposal, wrote him” the following letter:—The letter, which was quoted in full, contained the following passage.—“8th November 1889.—Dear Sir,—We now beg to put in writing the terms on which we are willing to enter into business relations with you. It shall be agreed that the present stock of grass held by you at Oran and elsewhere, as represented by the stock list in the hands of Messrs T. Kennedy & Son, of Glasgow, and dated 31st October 1889, shall be sold through Messrs Thomas Kennedy & Son, and the proceeds of the sales credited to your account with Messrs Thomas Kennedy & Son, and Messrs A. Arrol & Sons. An agreement in writing must be given us by these firms [the defenders] undertaking that, if the proceeds of the sales of the stock do not produce sufficient to pay off your indebtedness to them, they will wait for a minimum period of seven years for the balance. Further, that Messrs Arrol give us an undertaking, by a legal document drawn up in Glasgow to the satisfaction of our solicitors, and containing the foregoing agreement, will not for a minimum period of seven years foreclose the mortgage which they hold on your property in Oran and/or Tlelat so long as the agreement lasts, or in any way to dispose of it unless they have the purchaser bound to fulfil the same obligations, and agree and undertake not to hold any grass that may be purchased by you with our money against any of your obligations to them. We are willing to give you an open credit for £5000 to £6000, and any bills you may draw on us or our bankers in addition to this amount must be against bill of lading. . . .” Barber went to Glasgow and saw the defenders on the 9th November. The defenders agreed to the terms of the pursuers’

letter in all respects, and authorised Barber to write saying this, which he did on the 9th November. The defenders, it is believed and averred, saw the letter he wrote at the time.

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"In compliance with the conditions laid down by the pursuers, the defenders sent them an undertaking, dated 19th November 1889, in the following terms:—'Messrs Thin & Sinclair, Liverpool,—With reference to your letter of the 8th instant to Mr Thomas A. Barber, Oran, we, Messrs Archibald Arrol & Sons, merchants, Glasgow, and Thomas Kennedy & Son, merchants, Glasgow, agree—First, that for the amount that shall continue to be owing by Mr Barber to us, Messrs Archibald Arrol & Sons, and Thomas Kennedy & Sons, of his existing debt or debts to us or either (whether on open account or on the mortgage or mortgages held by us Archibald Arrol & Sons), after crediting the proceeds of the stock of grass in Oran and elsewhere, as represented by the stock lists referred to in your letter, we, or either of us, shall not take legal steps against Mr Barber within seven years from this date to enforce payment by him of the balance, but you shall be bound to agree to Mr Barber himself selling the farm or vineyard included in one of his mortgages to us, Archibald Arrol & Sons. Second, that during the subsistence of the agreement or arrangement between you and Mr Barber, but not exceeding a period of seven years, we shall not, without your previous consent in writing, sell or foreclose the mortgage or mortgages held by us, Messrs Archibald Arrol & Sons, over any of the property, whether in Oran and/or Tlelat or La Senia contained in our mortgages. Third, that we shall not hold any grass which may be purchased by Mr Barber with your money against any of Mr Barber's obligations. Fourth, this agreement is subject to the arrangement embodied in your letter to Mr Barber being acted on, and shall only be binding on us during the subsistence of that arrangement, and the agreement to be binding upon the parties for the time being comprising our said firms.—ARCHD. ARROL & SONS.—THOS. KENNEDY & SON.'

"By the said letters the defenders, *inter alia*, agreed to allow the balance of Barber's debt to them to stand over for a period of seven years, and represented to the pursuers that the defenders would wait for payment of said balance for that period, that the pursuers might rely on them doing so, and might enter into the proposed arrangement for financing Barber, and make cash advances to him as proposed, on the footing that the defenders would let their said claim stand over for seven years. On the faith of the undertaking and representations so given and made by the defenders, the pursuers agreed to finance Barber as proposed, and proceeded to make advances to him, with the result that the latter is at this date largely in their debt. It has turned out that Barber is not able to discharge this debt, and the pursuers believe and aver that, by their transactions with him on the faith of said undertaking and representations of the defenders, the pursuers are losers to the amount of about £10,500, conform to statement herewith produced." "It has recently come to the pursuers' knowledge that, in breach of the good faith and terms of the bargain between them, Barber and the defenders, at the very time when, as the pursuers understood the defenders were agreeing to wait for seven years for the said balance of their debt, the latter were taking legal steps to enforce payment of said balance within the said period. In particular, on the said 9th November 1889, Barber was constrained by the defenders to enter into an agreement with them, which is set

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The defenders fraudulently concealed said agreement of 9th November 1889 between them and Barber from the pursuers lest the pursuers should refuse to carry out the foresaid arrangement for financing Barber. If the pursuers had been informed or become aware of the said agreement, they would have declined to have any transactions with Barber. The whole object of the pursuers requiring the defenders to wait for their debt, viz., to secure that Barber should be free to carry on his business without pressure from the defenders, was defeated by said agreement. . . . The defenders, in fraud and in breach of their said undertaking to the pursuers, continued from time to time to harass Barber for payment of the balance due by him to the defenders. The result was that from the outset Barber was seriously embarrassed for funds; they frequently cabled him to pay sums; they passed drafts on him; they treated the agreement with him as legally binding, and enforceable at any time; and they refused to renew bills. By these means, since November 1889, the defenders have forced payment from Barber of about £10,000 to account of their debt over and above the proceeds of said stock. In consequence of the pressure brought by the defenders to bear on Barber, he was obliged to use the funds supplied to him by the pursuers in making remittances to the defenders to account of the balance due to them. In consequence of the defenders' said actings, Barber's business seriously suffered, and the pursuers' position as his financiers was most prejudicially affected. Their claim against Barber for advances made to him, amounting, as above stated, to upwards of £10,000 has in consequence become irrecoverable from him; whereas, but for the defenders' actings in breach of their agreement, the pursuers would have been kept safe, and would have recovered full payment from Barber."

The defenders referred to the letters founded on, and *quoad ultra* denied these averments.

* The following letter, dated 9th November 1889, by Barber to Arrol & Sons, was produced:—"Messrs Archibald Arrol & Sons, merchants, Dixon Street, Glasgow.—9th November 1889.—Gentlemen,—Whereas, in connection with the consignment of esparto grass and wine and other merchandise by me, Thomas Andrew Barber, merchant, Oran, to Thomas Kennedy & Son, merchants, Glasgow, for sale, and with the financing of bills against same drawn by me upon you, and discounted by or through you, I am indebted to you in sums amounting to about £28,217 sterling (including bills on the circle); and whereas, in order to liquidate said indebtedness, I have made certain verbal proposals to you, which it is proper I should submit in writing. Therefore I now submit the following proposals for your acceptance, viz.:—(First) Messrs Thin & Sinclair, of Liverpool, shall assist me in carrying on the business at Oran and Tlelat hitherto carried on by me. . . . (Eighth) The balance due by me to you, after deduction of all remittances, cash payments, and proceeds of shipments hereinbefore provided to be paid to you, shall be paid to you by me at the rate of £4000 sterling per annum, beginning the first payment on 31st January 1890, with interest on balance due from time to time at 5 per centum per annum. (Ninth) I shall forthwith accept and deliver to you bills for £10,000 sterling to be drawn by you on me, payable at Oran, on account of cash already advanced by you to me. . . . (Lastly) Your acceptance of this proposal shall be conditional on my satisfying you that an arrangement has been concluded between me and Messrs Thin & Sinclair, and that they advance me at least £5000 sterling to assist me in carrying on my business."

The pursuers pleaded ;—(1) The pursuers, having been induced to finance the said T. A. Barber, and having made advances to him as condescended on, in consequence of the fraudulent concealment and misrepresentations of the defenders as to material facts, are entitled to recover the amount of the loss thereby sustained by them. (2) The defenders, having acted in bad faith and in contravention and breach of the undertaking condescended on, to the loss, injury, and damage of the pursuers, the defenders are liable to the pursuers in reparation. (3) The pursuers having suffered loss and damage to the amount sued for, in consequence of the defenders' breach of undertaking, decree should be granted as craved, with expenses.

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On 27th June 1894 the Lord Ordinary (Wellwood) allowed parties a proof.

The defenders reclaimed, but the First Division adhered.

Thereafter a proof was led, and on 5th May 1896 the Lord Ordinary (Kyllachy) assoilzied the defenders.*

* In his opinion the Lord Ordinary reviewed the evidence at length, and held that on the facts the pursuers had failed to establish misrepresentation on the part of the defenders. With regard to the remedy sought by the pursuers, his Lordship said,—“I did not hear from the pursuers what I thought a sufficient argument for the proposition on which their claim of damage is rested, viz., that the measure of the damage due to them (supposing their case otherwise to be established) is the whole loss which they have sustained upon their four years' transactions with Barber. I do not say more at present than that that seems to be a difficult proposition.

“It remains, however, to consider the pursuers' second ground of action, viz., the defenders' alleged breach of contract, first, by entering into their agreement with Barber of 9th November 1889, and second, by pressing the latter for payment under that agreement. This matter has bulked largely in the proof and argument, but, in the view I take, I may deal with it shortly. The agreement of 9th November 1889 between the pursuers and the defenders, said to have been broken by the defenders, involved, as I read it, three points—(1) That the defenders should not for seven years take legal steps to enforce payment of the balance due by Barber after realisation of all existing stocks. (2) That during the same period the defenders should not sell or foreclose their mortgage or mortgages. (3) That they should not hold any grass purchased with the pursuers' money (that is to say, any grass so purchased and sent to them for sale) as against any of Barber's obligations. Now, I can find no evidence that the defenders did any of the things that were thus forbidden. They took no action or diligence against Barber. They did not sell or foreclose, or attempt to sell or foreclose, their mortgages. They did not retain, or attempt to retain, as against Barber's obligations, any grass which came into their possession. And this being so, I am of opinion that, taking the terms of the agreement as the measure of the defenders' obligation, no breach of contract has been committed.

“What the pursuers appear to assume is that, because the defenders agreed to take no legal steps for seven years, they were debarred from accepting from Barber an undertaking to pay them off at the rate of £4000 a year, and were not at liberty to press Barber from time to time for fulfilment of that undertaking, or, indeed, for any payment at all. I am not, I confess, able to discover in the agreement of 19th November any warrant for that assumption. It may have been understood (it is admitted to have been so understood, although the agreement does not express it) that no payment should be made to the defenders out of the price of grass purchased with the pursuers' money except in so far as such price represented profits. But it was, as I read the evidence, quite contemplated in November 1889

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The pursuers reclaimed.

The hearing was chiefly concerned with a consideration of the evidence. On the question of the damages claimed the pursuers argued;—The sum claimed was the amount due by Barber if the account between him and the pursuers was closed. The sum mentioned in the agreement with Barber, viz., £6000, was the minimum which the pursuers were bound to advance, but they were under no obligation not to exceed that sum. The cause of all the advances to Barber, and of the consequent loss and damage to the pursuers, was the fraudulent misrepresentation of the defenders. The pursuers were therefore entitled to the whole sum of £10,500, and to be restored to the position they were in before being misled by the defenders.

Argued for the defenders;—The pursuers had failed to prove any misrepresentation or breach of the agreement by the defenders. Even if it were otherwise, £6000 was the limit of the credit which the pursuers were under obligation to give. That limit was reached early in 1890. The balance of the alleged loss—it was not yet an ascertained loss—was the result of a course of voluntary trading extending over several years. There was no law to support a claim to recover such a loss as that from the defenders.

At advising,—

LORD PRESIDENT.—This case has been very fully and carefully argued, the speeches of counsel having occupied five days. The Lord Ordinary has closely analysed the mass of material before him, and has explained his views in considerable detail. As I am satisfied of the soundness of his Lordship's conclusions, I shall summarise rather than fully develop the grounds of my adherence.

The pursuers in argument presented their case as resting on two grounds—(1) Fraudulent misrepresentation made by the defenders in regard to the amount of the indebtedness of Barber at the date of the agreement between him and the defenders, and (2) the "secret agreement." On either of those subjects the pursuers' case has most formidable difficulties to encounter, having regard to their averments on record, the proved facts, and the remedy sought.

that between the profits of his vineyard and the profits of his esparto business (including the rents of his stores) Barber would or might be in a position to pay £4000 a year to the defenders without trenching on the pursuers' money. And in point of fact it has not, in my opinion, been proved that the defenders have, since 1889, either asked or received any payments from Barber which they had reason to know were made out of the pursuers' money. They received in all to account of their indebtedness £3171 of principal and £3469 of interest, &c., the last payment of principal being made in June 1892, and the last payment of interest in June 1893, and there is certainly no proof (indeed it is admitted that upon the materials available the point is incapable of proof) that Barber did not, between his vineyard, his stores, and his business, earn profits at least equal to those payments. In any case the defenders say that they so believed, and give their grounds for so believing, and I am unable to say that those grounds are displaced by the proof. . . . Altogether, even if I felt called upon to go beyond the terms of the written agreement, and to follow the parties into the ethical questions into which the proof in this part of the case largely diverged, I doubt whether I should, upon the materials before me, see my way to a different conclusion than that which I have reached in point of law."

(After stating his opinion on the evidence that the pursuers had failed to prove misrepresentation on the part of the defenders, his Lordship proceeded) :—

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2. The pursuers' case about what was called in the debate "the secret agreement," stands in a very curious position, and rests, as I think, on a total misconception of what was done, and in this instance done in writing, in 1889.

In 1889, as everybody now admits, the reason why Barber required to go to the pursuers at all was that the Arrols, who had been financing him, declined to finance him any longer. That he was indebted to the Arrols at that date was matter of course, and the pursuers were told that the death of one of the partners of Messrs Arrol was the reason why they declined to give Barber more money, and wanted him to get someone else to do so. It is plain, on these facts, that the Arrols simply assumed the position of creditors for what Barber owed them on the account. In order to keep their debtor going they were willing to make some concessions, which might induce the new financier to come forward. They did so, and in the letter of 19th November 1889 they set down in black and white the specific concessions they made. It is as plain as anything can be that those concessions did not preclude the Arrols from asking and taking from Barber, during the seven years, as much money as they could get out of him by other means than those which were waived for that stipulated period.

Yet, on record, the pursuers have set out that the bargain was that the Arrols should allow the balance to stand over for seven years, and, on record, the "secret agreement" is impugned because it is a violation of this bargain. When the "secret agreement" is compared, not with this imaginary bargain, but with the letter which set out the bargain, it is seen that the one in no way infringes the rights conceded by the other. So long as they kept within their concessions to the pursuers the Arrols were at perfect liberty to make any arrangements with Barber which they saw fit. Examining the arrangement actually made, I think Mr Balfour's observation was just,—that the most of it is in favour of the debtor, and subserved the purpose common to the pursuers and defenders alike, of fostering Barber's business and keeping him afloat. On the question more directly before us, I am of opinion that the "secret agreement" was not a violation of the written undertaking of the Arrols to the pursuers, and that the steps actually taken by the defenders under that agreement were not in violation of their undertaking to the pursuers. There need have been no mystery about the agreement, and had it been shewn to the pursuers at the time they would, as best I can judge, have quite approved of it. Their annoyance at its existence would seem to be due to the ill result of their adventure, and the erroneous impression of their own rights as against Mr Arrol, which misrecollection of the facts has induced them to put on record.

I indicated, at the outset, that a difficulty common to both grounds of action attends the remedy sought. The pursuers' counsel admitted that they have not proved damage, in the sense of actual loss resulting on their account with Mr Barber. They maintained that their true right, they having been deceived, was to have the defenders to relieve them of that account. It is, I think, impossible to sustain this contention. The pursuers cannot,

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and the Court cannot, create between the defenders and Barber contractual relations which do not exist. Accordingly, against a third party, a bystander, although it may be an interested bystander, by whose fraud a contract has been induced, the remedy must necessarily be damages,—to wit, the loss directly, or naturally, resulting from his fraud. As the pursuers' case fails upon the facts, it is not perhaps necessary to further prosecute this subject.

I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM.—I concur.

LORD M'LAREN.—I have considered this case with the care which its importance and the extended character of the oral and documentary evidence demands, but for reasons which will appear my opinion may be very shortly stated.

I shall consider first the question of damages. The hypothesis is that the defenders, by fraudulent representations, or by concealment amounting to a partial and untrue representation as to the credit and solvency of Barber, induced the pursuers to enter into an agreement whereby the pursuers undertook to make Barber an immediate advance, without security, of a sum not exceeding £6000, and also to make further advances in the ordinary course of business against bills of lading. The pursuers advanced the full sum of £6000, and during a course of business extending from the year 1889 to 1894 they accepted Barber's drafts against bills of lading. The result was an ultimate loss, as appearing in their ledger account, of £10,500. This sum is claimed from the defenders as damages, on the ground, as I understood the argument, that the pursuers are entitled as against the defenders to be restored to the position they occupied before the agreement was made.

In my opinion, the principle of restitution is incapable of being applied to a claim of this nature, and no authority for such an extension of the principle was or could be cited. My view may be illustrated in this way. The purpose for which the defenders were consulted was to assist the pursuers in coming to a decision whether they would be safe in making an advance of £6000 to Barber without security. Now, if the defenders had guaranteed Barber to that amount, £6000 would be the limit of their responsibility however large the ultimate deficit might be in the trading account which followed on this advance. But the argument is that because the defenders did not guarantee Barber, but only made untrue representations as to the state of his account with them, they are to be liable in the whole ultimate loss arising on a course of trading extending over a term of years. There are two answers to this view, the one theoretical and the other practical. In the first place, it involves the paradox that the liability resulting from a representation should be greater than the liability consequent on a guarantee; secondly, the sum which a banker or a mercantile agent advances without security may be held to be advanced in reliance on representations as to the credit and solvency of the debtor; but what he advances upon ordinary mercantile security, such as bills of lading, must in ordinary circumstances be taken to be advanced upon his own judgment as to the state of trade and the sufficiency of the security. Especially is this the

case where the advances extend over a period of years during which the conditions of the case are necessarily altered, so that the alleged representations cannot justly be held to have any application to the circumstances of the debtor at the times when the successive advances are made.

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What I have said may be applied with a slight variation to the case made against the defenders in respect of their having entered into an agreement with Barber to pay them so much a year to account of his debt. If it could be established that the defenders had received payments from Barber which were not taken out of profits, I think the pursuers would have a good claim to have these sums restored to the debtor's estate, on the ground that the defenders had agreed not to take payment out of gross purchased with the pursuers' money. But it was admitted at the bar that the proof did not contain materials for proving that such payments were made out of stock.

I understood the Dean of Faculty to disclaim any argument founded on the immediate advance of the £6000, and leading to an alternative claim of special damage of that amount. I was anxious that this view should be left open for our consideration, because my difficulties as to the question of damage would not affect a claim thus limited. But no such claim has been made or argued, and I shall give no opinion regarding it.

In what I have said I have not answered the question of fact whether the defenders, while professing to make a full disclosure of Barber's indebtedness to them, concealed the existence of debt amounting to about £16,000.

Now, with my view of the duty of a Judge, I never would give an opinion that a party was guilty of fraud in an action in which such a finding could not be followed out to an effective conclusion. As I am unable to accept the theory of estimation of damages which the pursuers have put before us, and no other claim of damage is open to our consideration, I prefer not to express an opinion on the issues of fraudulent concealment.

I concur in the judgment proposed assoilzieing the defenders, on the ground that on the facts as stated the pursuers are not entitled to the remedy of restitution, and that no other relief is claimed.

LORD KINNEAR.—I agree with your Lordship in the chair and with the Lord Ordinary.

THE COURT adhered.

J. & J. ROSS, W.S.—J. W. & J. MACKENZIE, W.S.—Agents.

JOHN WOTHERSPOON AND ANOTHER, Petitioners.—*C. K. Mackenzie*
—*Aitken*.

No. 38.

THE BRESCIA MINING AND METALLURGICAL COMPANY, LIMITED, AND
LIQUIDATOR, Respondents.—*Lorimer*.

Dec. 5, 1896.
Wotherspoons
v. Brescia
Mining and
Metallurgical
Co., Limited.

Company—Winding-up—Objection to intimation of petition for winding-up—Companies Act, 1862 (25 and 26 Vict. cap. 89), secs. 79 and 80.—Circumstances in which objections by a limited company to intimation of a petition by a debenture-holder for the judicial winding-up of the company, which was in course of being wound up voluntarily with a view to reconstruction, on the ground that the intimation would be injurious to the interest of the company, repelled.

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1st Division.

THIS was a petition at the instance of John Wotherspoon and his wife for the judicial winding-up of the Brescia Mining and Metallurgical Company, Limited, in which they held mortgage debentures to the respective value of £1000 and £500 out of a total of £12,000. John Wotherspoon also held 100 fully paid-up £10 ordinary shares. At the date of the petition the company was in course of being wound up voluntarily, with a view to reconstruction.

The petitioners stated that interest to the amount of £37, 10s. was overdue on John Wotherspoon's debentures, and that the company was unable to pay its debts.

At the calling in the Single Bills, the company and the liquidator in the voluntary winding-up appeared, and objected to an order for intimation being pronounced, on the ground that the publication of the petition would be detrimental to the interests of the company. They were allowed to lodge answers without any order for intimation being pronounced. In their answers the company and liquidator stated:—Until lately the petitioner John Wotherspoon had been a director of the company. Along with the other directors, he had agreed not to present his coupons for debenture interest when they became due. He had accordingly never applied for payment, and the presentation of the petition was the first intimation that he desired payment. The interest due to the debenture-holders, other than directors, had been duly paid. The respondents were willing to pay the interest due. The capital of the debentures was not due for some years. The petitioner had himself concurred in the shareholders' resolution in favour of the reconstruction of the company. The large majority of the debenture-holders, in number and value, approved of the scheme, and the liquidator had presented a petition in order to obtain authority to summon a meeting of the debenture-holders, for the purpose of obtaining their approval in a formal manner.

Parties were thereafter heard on the petition and answers. At the date of the hearing, the interest due to the petitioner John Wotherspoon was still unpaid.

Argued for the petitioners;—An order for intimation should now be granted. Sufficient grounds were set forth to justify the application—(1) There was a debt of £37, 10s. to one of the petitioners which had been due since the preceding July, and they also held debenture bonds over the property of the company, which were contingent debts, amounting to £1000 and £500 respectively. (2) The company was stated to be unable to pay its debts, and the fact that the small sum due to the petitioners was still unpaid shewed that the statement was probably true. Where it was averred that a company was unable to pay its debts the custom of the English Courts was to order a proof. The *Oregonian*¹ case was a very special one, and bore no resemblance to the present. There the company was a going concern. Here it was in course of being wound up voluntarily.

Argued for the respondents;—The petitioners had no title, as the respondents were ready to pay the only debt presently due to either of them. The petitioner John Wotherspoon was a party to the winding-up resolution, and was therefore debarred from opposing the reconstruction scheme,² and much more from taking steps to have the

¹ *Macdonell's Trustees v. Oregonian Railway Co.*, June 12, 1884, 11 R. 912.

² *Companies Act*, 1862, sec. 161.

company wound up by the Court. The petition disclosed no sufficient ground for the application. A mere statement that a company was not able to pay its debts was not enough, unless there was a statement of some debt actually due which the company had failed to pay on demand.¹ The public intimation of the application would obviously be to the detriment of the company, especially in view of the delicate nature of the transactions necessary to the carrying through of a reconstruction scheme.

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LORD PRESIDENT.—The motion by the petitioners is for an order for intimation and service. Now, I think the Court would not be entitled to refuse that order unless some one comparing to oppose the petition could instantly verify an objection to the title of the petitioner, or could shew some very special reason of danger to the common interests which might arise from the order being granted. Now, the *Oregonian*¹ case was one of the latter description, because there the company was carrying on, and proposed to continue to carry on, such business as it had, and happened to be in a very crucial relation to its tenants, the railway company in America, and the Court felt that, as the company would go on but for the intervention of the petitioner, they were entitled, in the interests of all concerned, to withhold an order which might have in those special circumstances an immediate and detrimental effect upon all concerned. Now in this case, by way of contrast, the company themselves avow that they must be wound up. They propose that the winding-up should be voluntary, and with a view to reconstruction. The petitioner, taking a different view of the general interests, says he agrees that the company should be wound up, but asks that it should be wound up judicially. That is a totally different *species facti* from that which the Court had to consider in the *Oregonian*¹ case. The question, therefore, which we now have to consider is, whether any special reason has been shewn why the proposal of the petitioner should not be considered, and, in the first place, publicly intimated. I think the case is one in which the petitioner is entitled to have his proposal proceeded with, at all events to its initial stage, and I am therefore in favour of granting his motion for intimation and service.

LORD ADAM concurred.

LORD M'LAREN.—I am of the same opinion. The petitioners, or at least one of them, have a title capable of instant verification, because the interest due upon a debt has not been paid, and though it is some days since this petition was presented, no steps have been taken for payment of the petitioning creditor's debt. This might not be conclusive, as the amount of the debt is not large, if it could be shewn that the interests of the company would be injuriously affected by an order for advertisement and service. It is however idle to maintain that the credit of the company is at stake, because there is standing a resolution to wind up the company voluntarily. Whether that will result in a reconstruction is a question with which we are not at present concerned, the question before us being between voluntary

¹ *European Life Assurance Society, L. R. 9 Eq. 122; Macdonell's Trustees v. Oregonian Railway Co., June 12, 1884, 11 R. 912.*

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LORD KINNEAR concurred.

THE COURT ordered the petition to be intimated, advertised, and served.

SMITH & WATT, W.S.—JOHN REIND, S.S.C.—Agents.

No. 39.

JOHN MACKAY, Petitioner.—*M'Lennan*.

Dec. 8, 1896.
Mackay.

Bankruptcy—Cessio—Discharge—Report by trustee not obtainable—Nobile officium—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), sec. 146—Bankruptcy and Cessio (Scotland) Act, 1881 (44 and 45 Vict. c. 22), sec. 5.—Where in consequence of the death of the trustee in a cessio the bankrupt was not able to obtain the statutory report with a view to his discharge, the Court remitted the case to the Accountant of Court for his report.

1ST DIVISION. ON 24th January 1890 decree of cessio was pronounced against John Mackay, dairyman. J. J. Stewart, C.A., was appointed trustee. A first and final dividend of 1s. 8d. in the pound was paid to the creditors. The trustee died on 11th September 1895.

On 15th October 1896 Mackay, in order that he might be finally discharged of all debts due by him before the date of the cessio, and being unable, owing to the death of the trustee, to obtain the statutory report in terms of the Bankruptcy (Scotland) Act, 1856, sec. 146, and the Bankruptcy and Cessio (Scotland) Act, 1881, sec. 5,* presented a petition craving the Court, *inter alia*, (1) to remit to the Accountant of Court to prepare a report in terms of sec. 146; (2) to accept the Accountant's report as equivalent to the statutory report; and (3) to remit to the Sheriff to "appoint the petition to be intimated," and to follow forth the procedure usual in such petitions in the Sheriff Court.

The petitioner stated,—“The petitioner is unable to obtain such a report under a petition for his discharge presented in the said Sheriff Court. According to the practice in said Sheriff Court, the acceptance of such a report in lieu of a statutory report by the trustee involves an exercise of the *nobile officium*, competent only to your Lordships.”

* The Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), sec. 146, enacts, that a bankrupt may petition to be finally discharged on the expiration of two years from the date of the sequestration without any consents of creditors, but it is provided that it shall not be competent for him to present such a petition “until the trustee shall have prepared a report with regard to the conduct of the bankrupt,” and certain other points.

The Bankruptcy and Cessio (Scotland) Act, 1881 (44 and 45 Vict. c. 22), sec. 5, enacts that “a debtor with respect to whom decree of *cessio bonorum* has been pronounced shall be entitled, on the expiration of six months from the date of such decree, to apply to the Sheriff to be finally discharged of all debts contracted by him before the date of such decree, and the provisions of the 146th section of the Bankruptcy (Scotland) Act, 1856, with regard to the conditions on which a bankrupt shall be entitled to obtain his discharge on the expiration of . . . two years . . . from the date of the sequestration,” shall apply to a debtor with respect to whom decree of cessio has been pronounced.

The petitioner cited the undernoted case.¹

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THE COURT remitted to the Accountant as craved, and thereafter the Accountant, having lodged a report favourable to the petitioner, accepted the report in place of, and declared it equivalent to, the statutory report, and remitted to the Sheriff to appoint the petition to be intimated, &c.

PHILIP, LAING, & Co., S.S.C., Agents.

MINNIE GREEN OR BORTHWICK (Deceased), Pursuer.
GEORGE GREEN (Green or Borthwick's Executor), Minuter
(Respondent).—*Comrie Thomson—W. Wallace.*

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Dec. 8, 1896.
Green or
Borthwick v.
Borthwick.

ROBERT FORRESTER BORTHWICK, Defender (Reclaimer).—*Salvesen—Younger.*

Title to Sue—Executor—Husband and Wife—Declarator of marriage—Breach of promise and seduction—Process—Summons—Conclusions.—A woman brought an action against a man concluding for declarator of an irregular marriage, "but if it shall be found that the pursuer is not married to the defender, then and in that case" for £3000 as damages for breach of promise and seduction. The pursuer pleaded that decree of declarator ought to be pronounced, "or alternatively" that decree ought to be pronounced "in terms of the alternative conclusions of the summons."

While the action was in dependence the pursuer died, and her executor craved leave to be sisted as pursuer, stating that he proposed to insist in the conclusion for damages only. The defender objected, on the ground that the conclusion for damages was in its terms conditional on decree of absolvitor in the declarator being pronounced, and that the executor was not *in titulo* to move for declarator.

Held (aff. judgment of Lord Stormonth-Darling) that the conclusions were truly alternative, and that the executor was entitled to be sisted to the effect of pursuing the conclusion for damages.

Opinion (per Lord Young) that the executor of the pursuer of an action of declarator of marriage was entitled to be sisted as pursuer, and to proceed with the action.

ON 15th November 1895 Minnie Green or Borthwick raised an action against Robert Forrester Borthwick, the conclusions of which were as follows:—"Therefore the Lords of our Council and Session ought and should find facts, circumstances, and qualifications proven relevant to infer marriage between the pursuer and the defender, and find them married persons accordingly; and therefore decern and ordain the defender, the said Robert Forrester Borthwick, to adhere to and cohabit with the pursuer, and treat and entertain her in all respects as his lawful wife: But if it shall be found that the pursuer is not married to the defender, then, and in that case, the defender ought and should be decerned and ordained, by decree foreshaid, to make payment to the pursuer of the sum of £3000 sterling on account of the defender having refused to implement and fulfil a promise of marriage made by defender to the said pursuer, and on account of the defender having seduced the pursuer."

The pursuer pleaded;—(1) Marriage between the pursuer and defender, the said Robert Forrester Borthwick, having been duly constituted by promise *cum subsequente copula*, decree of declarator to that effect ought to be pronounced. (2) Marriage between the pur-

¹ White, March 18, 1893, 20 R. 600.

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suer and defender having been duly constituted by acknowledgment, declarator ought to be pronounced to that effect. (3) Or alternatively, the defender having promised to marry the pursuer, and having failed to carry out his promise to her, and having seduced her, decree ought to be pronounced against him in terms of the alternative conclusions of the summons.

The defender denied both the marriage and the breach of promise and seduction.

On 21st December 1895 the record was closed, and a proof allowed.

On 31st December the pursuer died intestate, and on 30th March 1896 her brother, George Green, was appointed her executor-dative.

Thereafter the executor lodged a minute, setting forth that he "desires to be sisted as pursuer in the cause, and he craved the Lord Ordinary to sist him as pursuer in room and place of the said Minnie Green or Borthwick."

On 31st October 1896 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"Having considered the cause, sists George Green, executor-dative to the deceased pursuer Minnie Green or Borthwick, as pursuer in room and place of the said deceased Minnie Green or Borthwick, conform to minute of sist No. 8 of process: Finds the defender liable in the expense of the discussion in connection with the competency of the said minute of sist; modifies the same at the sum of £5, 5s. sterling, for which sum decerns against the defender for payment to the said George Green, and allows the parties a proof of the averments on record relative to the conclusion of the summons for damages for breach of promise and seduction, to proceed on a day to be afterwards fixed." *

* "OPINION.—The defender's counsel admits that an executor has a good title to insist in an action of damages for injury to person or character, provided it has been raised by the deceased person before his death. This rule is well settled, and is not affected by the fact that under the judgment in *Bern's Executor v. Montrose Asylum*, 20 R. 859, a different rule holds where the deceased person has died without raising the action. Accordingly, if the present action had been one simply of damages for breach of promise and seduction, there could have been no doubt of the executor's right to be sisted as a pursuer in room of the defunct. But it is said that the executor has no such right, because the leading conclusion is for declarator of marriage. I assume that this is a conclusion so purely personal to the woman that, especially when founded on promise *subsequente copula*, it could not be insisted in by anyone else. Indeed the executor here avows his intention, if he be sisted, of prosecuting the action only to the effect of recovering damages. I am quite unable to see why the presence of this conclusion in the summons should affect the executor's right to be sisted. Once he is sisted he can elect to proceed only under the conclusion for damages, just as the deceased could have done. There is nothing inconsistent in the two conclusions, because the proof of promise in order to establish marriage is of a much more stringent kind than the proof of promise to obtain damages for breach, and the deceased herself, while maintaining the promise to the fullest extent, might well have despaired of establishing it by the writ or oath of the defender.

"Accordingly the executor, in the course which he proposes, need not contradict or abate one word of the averments which the deceased instructed her advisers to make. He might conceivably be met (though I have no reason to suppose that he will be met) by a proposal on the part of the defender to amend his pleadings to the effect of submitting that there was a marriage, but that is an answer which might equally be made although

The defender reclaimed, and argued ;—An executor was not entitled to institute an action of damages for personal injury to the deceased whom he represented,¹ but he might carry on such an action if it had been raised before the death of the deceased. An action for declarator of marriage or for divorce was different ; while the representatives of the defender of such an action might be sisted,² the representatives of the pursuer were not so entitled ; the reason being that the status of the parties could not be altered after the death of either.³ The first conclusion, therefore, of the present action could no longer be insisted in, and the second conclusion fell with it as being merely ancillary to the first. Nothing could be done under the second conclusion until the first was disposed of, and it could not now be disposed of, there being no one *in titulo* to move in it. Probably the defender was not entitled to absolvitor *quoad* the first conclusion, but must remain satisfied with the practical security that there never could be anyone to move for decree, but whether entitled to absolvitor or not the defender did not ask for it.⁴

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Argued for the pursuer ;—The pursuer did not insist in the conclusion for declarator of marriage, so that the pecuniary conclusion for damages for breach of promise of marriage alone remained. Admittedly such a conclusion, if the subject of a separate action, might be insisted in by an executor. Nor apparently would the defender have had any objection to such a conclusion even when the summons contained a conclusion for declarator of marriage, provided the conclusions were alternative, so that the one might be insisted in without reference to the other. The defender's argument thus came to turn on a highly technical and strict construction of the present summons ; but looking especially to the pleas, the fair reading of the summons was that the conclusions were alternative. The pursuer, therefore, was entitled to take up the conclusion for damages as if the other conclusion had never existed.

At advising,—

LORD YOUNG.—In 1895 a young woman raised an action against a Mr Borthwick. The first conclusion is for declarator of marriage, the second and only other conclusion (which is necessarily alternative to the first) is for damages for seduction. Shortly after the pursuer raised her action she died, and her executor lodged a minute craving to be sisted as pursuer in her room and place. The Lord Ordinary pronounced an interlocutor sisting the

there was no conclusion for declarator. Whether such an averment would avail the defender after closing the record on the footing that there was no marriage, is a different question, which has nothing whatever to do with the form of the action. On the record as it stands, the parties have joined issue on the question whether the admitted connection was mere concubinage, or a surrender of the woman's person induced by a promise of marriage, and I am of opinion that the executor is entitled to be sisted in order to prove that it was the latter, and thus to recover the pecuniary damages which in that case (failing marriage) would have been due to the deceased."

¹ *Bern's Executor v. Montrose Asylum*, June 22, 1893, 20 R. 859.

² *Ritchie v. Ritchie*, March 11, 1874, 1 R. 826.

³ *Bell's Prin.* sec. 1534 ; *Fraser on Husband and Wife*, p. 1145.

⁴ *Stewart v. Menzies*, Feb. 4, 1836, 14 S. 427 ; *Robertson v. Henderson*, Nov. 19, 1833, 12 S. 70 ; *Maloy v. Macadam*, Jan. 9, 1885, 12 R. 431 ; *Fraser, Husband and Wife*, p. 504.

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executor as pursuer, and it is against this interlocutor that the defender has reclaimed. The question, therefore, which we have to decide is whether this judgment of the Lord Ordinary is right, which declares that the executor of a pursuer who has died after raising an action of this kind is entitled to be sisted as pursuer in room and place of the deceased?

On this subject I have already expressed an opinion in the case of *Bern's Executor v. Montrose Asylum*.¹ What I said was this:—"I have not overlooked the rule of our law and practice that the raising of an action by the sufferer from the wrong changes the situation altogether." That is dealing with the rule brought before the Court, that a claim for damages for personal wrong of any kind does not transmit either to the executor of the party against whom the wrong is committed or against the executor of the party committing the wrong. "Action raised changes the situation in many, perhaps most, other cases as well as this, and that for reasons quite apart from the notion of discharge or waiver being thereby excluded. The most obvious of these is perhaps this, that the case is there brought within these well-settled rules, viz, 1st, that when the defender in a pending action dies it may always be transferred against his legal representative; and 2d, that when the pursuer of such action dies, not only may his representative be sisted in his room, but if required by the defender, must sist himself or allow the defender to have judgment on the footing of his refusal, which will be effectual against the estate of the deceased which he holds or administers. The effect may seem great and striking when the action has been newly brought, but it has been found impossible to distinguish between one stage of an action and another. This rule of our law that action raised changes the situation is in accordance with, but not, so far as I know, founded on the Roman law on the same subject (Justinian Institutes, lib. 4, tit. 12, sec. 1)—"*Ponales autem actiones quas supra diximus si ab ipsis principalibus personis fuerint contestatæ et hæredibus dantur et contra hæredes transeunt.*"

In the present case we do not require to consider whether the executor is entitled to continue the action raised by the deceased so far as the decree for declarator of marriage is concerned, because the executor tells us that he is not going to proceed with that conclusion of the summons, and the defender does not oppose it being abandoned. I am, however, inclined to think that in all cases where a pursuer dies after bringing an action of declarator of marriage, her executor is entitled to be sisted as pursuer so that he may continue the action. The transmissible rights of the deceased which pass to the executor, and which the executor is entitled and properly bound to enforce, might largely depend on whether she was married to the defender or not. Thus, for example, if a man died against whom a woman had brought an action of declarator of marriage, and after him the woman also died, the executors of both would be entitled to come in and insist upon the action being decided, because the executors of both would be interested in the question whether they were married persons or not. If they were not married persons the whole of the man's estate would go to his own executor; if they were married a considerable portion would go to the executor of the widow. An action of damages for seduction would ad-

¹ June 22, 1893, 20 R. p. 873.

mittedly pass to the executor of the pursuer who died during its dependence, and it is not, I think, doubtful that the defender would be at liberty to aver and prove that he was married to the deceased pursuer—for that would be a legitimate and conclusive defence to the claim of damages for seduction. It is, I think, a mistake to suppose that a question regarding a disputed marriage cannot be raised, tried, and decided after the death of either, or indeed both of the parties, by anyone having legitimate interest in the question. Here it is, I think, the right of the defender to have absolvitor with expenses from the declarator of marriage, unless the executor of the deceased pursuer shall establish it. The executor's right to be sisted is, I think, absolute.

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In this case we are only concerned with the conclusion for damages. The question really is, whether the executor of a deceased pursuer of an action of damages for seduction is entitled to be sisted and pursue that conclusion, or shall be excluded from doing so because there is in the summons a prior conclusion for declarator of marriage. I see no force in the defender's argument, and am therefore of opinion that the Lord Ordinary was right in sisting the executor of the deceased pursuer.

LORD TRAYNER.—The mode in which the conclusions of the summons are expressed creates a difficulty in disposing of the question raised by this reclaiming note. Read strictly, these conclusions exclude from the consideration of the Court the conclusions for damages until there has been a decision pronounced on the first conclusion. Now, on the first conclusion there has been no decision or finding of any kind, and I greatly doubt, the pursuer being dead, whether any finding can competently be pronounced thereon.

I desire to reserve my opinion on the question whether a declarator of marriage can in any circumstances be either raised or insisted in by any representative of one of the parties. But having regard to the averments and pleas of the pursuer, I think I may read the conclusion of the summons as really alternative, and in that view of the summons I am of opinion that the deceased pursuer's executor may competently be sisted to insist in the second of the alternative conclusions, being one for a money claim.

LORD MONCREIFF.—The Lord Ordinary has sisted the executor as pursuer, but he has practically sustained his title only to the extent of suing the second conclusion of the summons, because although he has not dismissed the action as regards the first conclusion, he only allows a proof as regards the second.

Although the second conclusion is awkwardly worded, I think it is in substance simply an alternative conclusion. After the pursuer raised the action she could have departed from the first conclusion at any time and taken up the second. The action was proceeded with because the defender refused to recognise her claims, and the pursuer having died while carrying on the action, I do not see why the executor cannot now take up the second conclusion of the summons. I therefore concur.

The **LORD JUSTICE-CLERK** concurred.

THE COURT adhered.

A. LAURIE KENNAWAY, W.S.—CAMPBELL FAILL, S.S.C.—Agents.

No. 41. RANDOLPH GORDON ERSKINE WEMYSS AND OTHERS (Wemyss' Trustees) AND ANOTHER, Pursuers (Reclaimers).—*D.-F. Asher—Rankine*
 Dec. 11, 1896. —*Ure.*
 Wemyss' Trustees v. THE LORD ADVOCATE, Defender (Respondent).—*Lord-Adv. Murray—C. N. Johnston.*
 Lord Advocate.

Superior and Vassal—Crown—Sea—Barony Title—Submarine Coal—Prescription.—In a question between the Crown and a vassal, held (1) that the grant of a barony, with parts and pertinents, cannot, apart from prescriptive possession explaining the grant otherwise, be construed to carry the coal under the bed of the sea *ex adverso* of the barony lands; but (2) that, if coal below low-water mark has been openly worked from barony lands for more than the prescriptive period, such possession is sufficient to shew that the coal below low-water mark, so far as the same is workable from the barony lands and within the lateral boundaries of the barony, was included in the original grant.

Opinion by the Lord President that the right of the proprietor of a barony to work as much coal as he can under the sea from the barony lands infers a right of property in an area of coal susceptible of definition should the Crown shew an interest to sue for definition.

Superior and Vassal—Title—Grant of coal infra fluxum maris.—A grant of land adjoining the seashore, with the privilege of working the coal *infra fluxum maris*, confers a right to work the coal underneath the foreshore, but implies an exclusion of any right to coal beyond low-water mark, so that possession of such coal is possession without a title.

Superior and Vassal—Title—Disjunction of united barony by division of superiority.—By crown charter of resignation and novodamus granted in 1651 the three baronies of W., E., and M., which were separately described, were united into a single united barony. Upon the restoration of Episcopacy in 1662 the superiority of the barony of M., which was within the regality of St Andrews, reverted to the Archbishop of St Andrews, and the vassal resigned the lands to the archbishop, and obtained a charter from him. At the Revolution the superiority again passed to the Crown, and crown charters of the whole lands of W., E., and M. were subsequently granted to the vassal. These charters, however, did not re-erect the three baronies into a single barony.

Held that, as a barony cannot be held of different superiors, M. ceased to be part of the united barony in 1662, and that, as it had never been re-united therewith, possession of submarine coal *ex adverso* of the lands of W. could not be founded on to instruct a title to such coal *ex adverso* of the lands of M.

Superior and Vassal—Crown—Barony—Union of baronies with different titles—Possession.—A crown charter of resignation and novodamus erected three baronies, W., E., and M., which were separately described, into a united barony, but did not expressly make any additional grant. The description of the lands of W. contained no boundary seawards. After the union of the baronies the proprietor worked the coal under the bed of the sea beyond low-water mark *ex adverso* of W. for the prescriptive period.

Opinion by Lord Adam that the proprietor was not entitled to found on this possession further than as explaining his title to W.

Homologation—Adoption—Minor—Transaction by curators without concurrence of minor.—The right of a proprietor of estates adjoining the sea to work coal below low-water mark was challenged by the Crown during his minority. The estates to which the minor had succeeded consisted in part of entailed and in part of unentailed lands. The administration of the unentailed estate was vested in the testamentary trustees of the minor's father, who were also the curators of the minor. These trustees, without the concurrence of the minor, entered into a transaction with the Crown, whereby they on their part accepted a lease of the whole coal below low-

water mark *ex adverso* of both the entailed and unentailed estates, and the Crown agreed not to claim damages in respect of the coal which had been worked in the past. After he came of age the proprietor accepted an assignation of the lease, and subsequently applied for and obtained from the Crown a reduction of the royalty payable under, and a modification of the mode of working enjoined by, the lease. When he so acted in regard to the lease, the proprietor was unaware that he had well-founded claims to the coal below low-water mark, and that the lease was the result of a compromise, involving a surrender of his claims, between his father's trustees and the Crown. No. 41.
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In an action of declarator brought by the proprietor against the Crown upwards of fourteen years after he had reached majority, *held* (1) that the trustees having had no right to transact in regard to the entailed estates, their whole agreement with the Crown was null; and (2) that the actings of the proprietor after he came of age, while he was ignorant of his rights, did not infer homologation or adoption of the transaction, and that he was not barred from challenging it.

THIS action was raised in December 1893 by Randolph Gordon Erskine Wemyss, of Wemyss, and others, trustees under a trust-disposition and conveyance granted by the said Randolph Gordon Erskine Wemyss, dated and recorded in 1891, and by Randolph Gordon Erskine Wemyss as an individual, against the Lord Advocate as acting for the Commissioners of the Treasury, the Board of Trade, and the Commissioners of Woods and Forests. The pursuers sought declarator that (1) the ground forming the foreshore of the sea or of the estuary of the Forth between high-water mark and low-water mark *ex adverso* of the united barony of Wemyss, including therein the ancient baronies of West Wemyss, East Wemyss, and Methil, all in the county of Fife, belonging to the pursuers, and the coal and other minerals therein, and (2) the coal and other minerals under the sea *ex adverso* of the said united barony and foreshore thereof, belonged in property to the pursuers as trustees foresaid, and were parts and pertinents of the said united barony, subject to the rights of the Crown as trustee for public uses, so far as regarded the seashore. They further sought declarator that they were not bound by the terms of a lease entered into between the Honourable James Kenneth Howard, one of Her Majesty's Commissioners of Woods and Forests, and the trustees of the late James Hay Erskine Wemyss, dated in 1875, and if necessary craved reduction of said lease. 1st Division.
LdStormonth-Darling.

The pursuers, who were infeft as trustees in certain lands, including the ancient baronies of West Wemyss, East Wemyss, and Methil, founded upon the terms of a crown charter of resignation and novodamus granted in favour of their predecessor, David, second Earl of Wemyss, in 1651, with instrument of sasine following thereon in 1652. This charter contained a conveyance of the three ancient baronies above mentioned, the several subjects being separately described therein.

In the case of West Wemyss the barony lands were conveyed with parts and pertinents, but the charter made no mention of coal—it was neither expressly granted nor reserved.

In the case of the barony of East Wemyss there was a conveyance of the lands “cum carbonibus carbonariis . . . cum speciali et plenaria ptate. et privilegio . . . lucrandi et effodiendi carbones et carbonaria infra fluxum maris infra bondas predict. ac etiam edificandi et tenendi salinarias patellas infra aliqua. partem dict. bondarum inter lie podlockraig et torrentem de Denburne.”

The grant of Methil was with parts and pertinents, “cum carbonibus et carbonariis tam subtus terra quam supra terram.”

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The charter contained a clause erecting the three old baronies into one united barony, but no new grant of any kind was made in connection with the united barony.

The lands of West Wemyss and East Wemyss were never afterwards disjoined, and passed by a regular progress into the hands of the pursuers. The later titles dealt with the coal in substantially the same terms as those above set forth.

After the re-establishment of Episcopacy in 1662 David, second Earl of Wemyss, resigned the barony of Methil, which was situated within the regality of St Andrews, to the Archbishop of that see, and obtained a charter from him. The mode in which the barony was subsequently dealt with was correctly set forth in answer 1 for the defender, quoted *infra*.

The pursuers averred;—(Cond. 1) The united barony erected by the charter of 1651 had never afterwards been dissolved. (Cond. 3) It included the foreshore, and (cond. 4) the coals and other minerals under the foreshore and sea *ex adverso* thereof. (Cond. 5) The pursuers and their predecessors had from time immemorial worked the coal under the foreshore and sea *ex adverso* of a part of the united barony. (Cond. 6) Upon his father's death in 1864 Mr Randolph G. E. Wemyss had succeeded to the whole barony lands (except certain portions which had been alienated). These lands were partly unentailed and partly entailed, the sea-board of the entailed being more extensive than that of the unentailed lands. The unentailed lands were under the administration of the testamentary trustees of Mr J. H. E. Wemyss until 1879, when Mr Randolph G. E. Wemyss attained majority. The lease mentioned in the summons applied to the whole coal under the sea-bed *ex adverso* of both the unentailed and entailed lands. That lease was *ultra vires* of the trustees. Further, the trustees had not in accepting it come under any agreement to abandon Mr Wemyss' proprietary right to the submarine minerals. If they had, they had acted in ignorance of his rights, and the agreement was not binding on them, and should be set aside. Mr Wemyss had only recently become aware of his rights in the submarine minerals, and of the invalidity of the lease.

The defender in answer stated;—(Ans. 1) “ . . . Denied that the said estates constitute one united barony. Explained that the united barony created by the said charter of 1651 was dissolved on the re-establishment of Episcopacy after the Restoration, and the superiority of the barony of Methil, which lay within the regality of St Andrews, reverted to the Archbishop of that see. The barony of Methil accordingly is not included in crown charters of the lands of Wemyss, granted in favour of pursuers' authors in 1671 and 1673. Separate charters of the barony of Methil were obtained by them from Archbishop Sharpe, who, by a charter of 1662, created Methil a burgh of barony. A subsequent charter of the same was granted by him in 1665, on which sasine followed in favour of pursuers' author on 27th September 1665. At the Revolution the superiorities of the see of St Andrews reverted to the Crown. Crown charters of the whole lands of Wester Wemyss, Easter Wemyss, and Methil, were granted in favour of pursuers' authors in 1711 and 1756. The lands, however, were not by these charters reconstituted into one barony, although it is declared that one sasine taken at the manor place of West Wemyss, or upon any part of the ground of the said barony of Wemyss, shall suffice for all the lands.” (Ans. 3) “ Not

known as to the extent of the pursuers' possession of the foreshore, No. 41. but explained that the defender has raised no question with the pursuers with reference to pursuers' rights in the foreshore." (Ans. 4) Denied that the pursuers' estate includes the coals and other minerals under the sea beyond the foreshore *ex adverso* of the said estate. (Ans. 5) Denied that the lands form a united barony. *Quoad ultra* not known and not admitted. In Ans. 6 the defenders averred that the trustees of the late Mr Wemyss had on behalf of Randolph G. E. Wemyss abandoned all claim to the submarine minerals, and that the agreement to that effect into which they had entered had been homologated and adopted by Mr Wemyss after he came of age.

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The pursuers pleaded ;—1. The pursuers being heritable proprietors of the foreshore and the coal therein, and the coal under the sea *ex adverso* of the said united lands and barony of Wemyss, are entitled to decree in terms of the first conclusion of the summons. 2. The lease libelled having flowed *a non domino*, and being *ultra vires* of the lessees, and having been accepted by them in ignorance of the said Ralph Gordon Erskine Wemyss' rights in and title to the coal and others thereby leased, the pursuers are entitled to decree in terms of the second conclusion of the summons. 3. There having been no homologation or adoption of the lease to the effect of excluding the present action, the pursuers are not barred from insisting on the same. 4. The title of the pursuers is sufficient, especially as interpreted by immemorial or prescriptive possession, to carry the minerals claimed in the summons. 5. The possession of the submarine minerals *ex adverso* of part of the united barony is sufficient to explain the scope of the crown charters along the whole of the continuous seaboard of the said barony. 6. The agreement founded on in the defences does not exist in fact, and *separatim*, is not binding on the pursuers, in respect that, if made, it was *ultra vires* of the trustees.

The defenders pleaded ;—2. The pursuers are barred from insisting in their present claims, in respect (1) that the pursuer Mr Wemyss and the said trustees, by entering into the said transaction or compromise, and by accepting and working the minerals under the said lease, admitted that the right of property in the said minerals belonged to the Crown, and barred themselves from afterwards disputing the right of the Crown thereto ; and (2) that the pursuer Mr Wemyss ratified or otherwise homologated and adopted the said transaction or compromise and the said lease, and worked the minerals under the said lease as modified by the arrangements with him condescended on, and thereby admitted and barred himself from afterwards disputing that the Crown had right to the said minerals. 3. Upon a sound construction of the titles relied on by the pursuers, the said titles do not convey the minerals under the sea below low-water mark. 4. The titles libelled by the pursuers do not form a *habile* ground for the acquisition by prescriptive possession of any minerals under the sea below low-water mark, and *separatim*, such minerals cannot in law be acquired by prescriptive possession.

On 27th June 1894 the Lord Ordinary (Stormonth-Darling) allowed the parties a proof of their averments in condescendence and answer 6.

The result of the proof was as follows :—On 7th August 1874 Mr Howard, one of Her Majesty's Commissioners of Woods and Forests, wrote to Randolph G. E. Wemyss, stating that it had recently come

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to his knowledge that Mr Wemyss was working coal at West Wemyss under the bed of the sea, and challenging his right to do so.

On 24th August Mr Wemyss' agents, Messrs Melville & Lindsay, replied, stating that the matter had been referred to them. "We have accordingly made inquiry, and we now state, in reply, (1) That the family of Wemyss have been in the uninterrupted possession of the barony of Wemyss for upwards of two hundred years, under charters from the Crown; (2) that for more than forty years they have, as owners of the barony, worked the coal under the bed of the Firth of Forth, *ex adverso* of the lands of the barony, and this not secretly, but in the most open and public manner possible; and (3) that such title and possession exclude all interferences on the part of the Crown, in regard to the coal in question, which can be worked only by means of pits sunk on the Wemyss land or shore.

"If, however, notwithstanding the above facts, you are advised that the Crown has right to the coal under the Forth, opposite to and connected with the barony lands, and is prepared to try the question of ownership in a Court of law, we would be disposed to recommend to Mr Wemyss, rather than enter upon a protracted litigation, to make some sacrifice by paying to the Crown a small rent or royalty for the coal he may find convenient still to take out under the existing very precarious working."

On 28th August Mr Howard replied that he was not aware upon what assumption it could be contended "that the fact that the proprietor of a barony had worked the coal under the bed of the sea by subterranean passages from his own land, even for forty years, entitled him to claim that his barony included the bed of the sea for an undefined distance," and that he must assume that the workings which had been carried on were an encroachment on the rights of the Crown, and that Mr Wemyss was liable to account for the full value of the coal raised and gotten.

On 25th September Mr Howard wrote offering to grant Mr Wemyss a lease of the coal, &c. under the bed of the sea upon certain terms, and after some further correspondence Mr Wemyss' agents wrote agreeing to accept a lease. In May 1875 a lease was executed in favour of the testamentary trustees of the late Mr J. H. E. Wemyss,* by which Mr Howard, as one of the Commissioners of Woods and Forests, let to the said trustees the whole coal, &c. under the bed of the sea *ex adverso* of the barony lands below low-water mark, for a period of thirty years from 1st January 1874. The lease bound Her Majesty in warrandice from fact and deed only. It contained a declaration that "as a consequence, and in respect of this lease being entered into, it shall not be competent to, nor in the power of, the said James Kenneth Howard, for behoof foresaid, or his successors, to raise any question with or to make any claim whatever against the trustees of the said James Hay Erskine Wemyss or their foresaids, in respect of workings by the said trustees, and their predecessors or authors or tenants of coals or other minerals under the sea *ex adverso* of the lands and barony of Wemyss, prior to the term of entry under these presents, all such questions and claims being hereby departed from and expressly renounced."

The lease included the coal *ex adverso* both of the entailed and

* Under the settlement of Mr J. H. E. Wemyss his trustees were appointed curators to his son Randolph.

unentailed lands, of which the latter only were under the administration of the trustees. No. 41.

In 1879 Randolph Wemyss, upon attaining majority, accepted an assignment of the lease from the trustees, which was duly intimated to the Crown. Dec. 11, 1896.
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In 1887 the agents of Mr Wemyss, acting on his instructions, applied for and obtained a reduction of the royalties payable to the Crown under the lease.

In 1890 Mr Wemyss, through his agents, obtained from the Crown a modification of the terms of the lease in regard to the mode of working the coal, and a minute of alteration was duly annexed to the lease.

The evidence shewed that Mr Wemyss was not aware at the date of the above transactions of the terms of the titles under which he held the barony, though these were in his possession, of the grounds on which he might lay claim to a proprietary right to the coal, or of the nature of the transaction entered into between his father's trustees and the Commissioners of Woods and Forests.

On 22d December 1894 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"The Lord Ordinary having considered the closed record, proof, and productions, and in respect that it is stated for the defender at the bar that he does not oppose decree of declarator in terms of the first declaratory conclusions of the summons, finds, decerns, and declares in terms thereof: Sustains the second plea in law for the defender, and in respect thereof assoilzies the defender from the remaining conclusions of the summons, and decerns: Finds the defender entitled to expenses," &c.*

* "OPINION.—The pursuer, as proprietor of the barony and estate of Wemyss, in Fifeshire, seeks by this action to establish his right to the coal and other minerals under the sea *ex adverso* of that estate and the foreshores thereof. His case on the merits is laid both on express grant from the Crown, by a charter of resignation and novodamus granted in 1651 and confirmed ten years later by Act of the Scottish Parliament, and also on immemorial possession founded on his barony title. But it appears that in 1875, when the pursuer was a minor, his father's trustees (who were also his curators) accepted from the Crown a lease of the coal in question, which does not terminate till 1905, and that the pursuer himself, who came of age in July 1879, arranged with the Crown in 1887, and again in 1890, important modifications of the lease, both as regards the rate of lordship and the mode of working the coal. The Crown accordingly pleads that he is barred by these transactions from insisting in his present claims.

"I am of opinion that this plea is a good one, and ought to be sustained. I shall consider (1) how the matter would have stood if the pursuer had been of full age at the time when the lease was entered into, and (2) whether the fact of his having then been in minority makes any difference.

"On 7th August 1874 the late Mr Howard of the office of Woods challenged the right of the proprietors of Wemyss to extend their coal workings under the bed of the Firth of Forth, on the ground that the minerals in that situation, unless specially granted away, were the property of the Crown. The matter was at once inquired into by Messrs Melville & Lindesay, who were at that time agents for the Wemyss family, and on 24th August they addressed a letter to Mr Howard, in which they stated (1) that the Wemyss family had been in the uninterrupted possession of the barony of Wemyss for upwards of 200 years under charters from the Crown; (2) that for more than forty years they had, as owners of the barony, worked the coal

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The pursuers reclaimed, and after hearing parties, the Court recalled the Lord Ordinary's interlocutor *hoc statu*, and allowed parties a proof of their respective averments so far as not already admitted to probation.

After the proof, the parties lodged a joint minute of admissions, stating,—“(1) That for more than the prescriptive period prior to 1874 the pursuer the said R. G. E. Wemyss and his predecessors, continuously, and without interruption, worked the coal under the foreshore and beyond the foreshore, under the bed of the sea, *ex adverso* of a part of the lands of West Wemyss; but the defender does not admit that the working of the said coal under the bed of the sea came to the knowledge of the Commissioners of H. M. Woods and Forests prior to the year 1874. (2) That there never was any

under the bed of the Firth of Forth *ex adverso* of their lands in the most open and public manner; and (3) that such title and possession excluded all interference on the part of the Crown. They then proceeded in the following words:—‘If, however, notwithstanding the above facts, you are advised that the Crown has right to the coal under the Forth, opposite to and connected with the barony lands, and is prepared to try the question of ownership in a Court of law, we would be disposed to recommend to Mr Wemyss, rather than enter upon a protracted litigation, to make some sacrifice by paying to the Crown a small rent or royalty for the coal he may find convenient still to take out under the existing very precarious working.’ In reply, Mr Howard denied that working coal under the bed of the sea on a barony title, even for forty years, could ever have the effect of setting up a right to the bed of the sea as part of the barony. Accordingly he intimated his view that the Wemyss workings had been an encroachment upon the ungranted rights of the Crown, and that the proprietor was liable to account for the full value of the coal which had been raised. At the same time he indicated that the full rights of the Crown in that respect might not be demanded.

“Further negotiations followed and resulted in the granting of the lease to which I have referred, in which the Crown, as a consequence of the lease being accepted, expressly departed from all claims in respect of bygone workings.

“Now, this was unquestionably ‘a transaction,’ as that phrase is defined by Lord Stair, i. 17, 2. Both parties maintained their respective views, but each ‘quitted some part of what they claimed, to redeem the vexation and uncertain event of a plea.’

“When that is the case, Lord Stair says,—‘It is therefore the common interest that the transaction should be firmly and inviolably observed, which both by the Roman law and our customs has been held as sacred and necessary for men's quiet and peace.’ If an action had been raised by the Crown, and the proprietor of Wemyss had compromised it by accepting a lease in consideration of the Crown's renunciation of all claims for bygones, I apprehend it would have been impossible for either party afterwards to set aside the compromise on any ground except misrepresentation or fraud. I do not see that a different rule should be applied to a transaction entered into for the purpose of averting a threatened lawsuit. In the case of *Stewart v. Stewart* (1839), M'L. and Rob. 401, the House of Lords refused to set aside such a compromise on the ground that a particular point of law had been mistaken or overlooked.

“The pursuer, however, maintains his right to cut down the lease (for that is substantially the claim which he makes), not merely on the ground that his advisers in 1875 were wrong in giving up that part of his case which was founded on a barony title followed by possession, but also on the ground that he has recently discovered the crown charter of 1651, which, as he says, contains an express grant of the minerals in question. I do not

working of the coal under the bed of the sea below low-water mark *ex adverso* of the lands of East Wemyss and Methil until after the year 1874. (3) That the pursuers have right to the foreshore, and to the coal under the foreshore, of the lands of West Wemyss, East Wemyss, and Methil."

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The proof shewed that, although the fact that coal under the bed of the sea was being worked from the barony lands might not have come to the knowledge of the Commissioners of Woods and Forests prior to 1874, the working had been in no sense clandestine, but had been well known and talked about in the district, reported upon by the Government Inspector of Mines, and also made the

dispute his contention that, for the purpose of testing a plea in bar, everything must be assumed in his favour. But, even assuming that the crown charter does contain an express grant, it must be borne in mind that the deed was in his possession, and that its contents might have been known to his advisers, at the time when the compromise was made. I am aware that this element existed in the case of *Cooper v. Phibbs* (L. R., 2 Eng. and Ir. Appa. 149), where the very same facts existed of a man having taken a lease of a heritable subject which was truly his own. But the essential difference between that case and the present is that there was in it no element of compromise. Both parties contracted under a mutual mistake and misapprehension as to their relative and respective rights. One party believed himself to be entitled to the property, the other party believed that he was a stranger to it. Accordingly there was no threat of litigation, and there were no opposing claims which could form the subject of a transaction. The question was treated just as if both parties had contracted on the footing that a particular person was dead, when in truth he was alive.

"If a similar state of facts had existed in the present case I do not say that the mere lapse of time, and the difficulty of reinstating parties in the position which they occupied in 1875, would, of themselves, have prevented the remedy of reduction being granted. But it is a peculiarity here that the pursuer does not limit himself to the case of express grant. He still maintains his case on a barony title, followed by possession, and it is obvious that the lapse of time might make it much more difficult for the Crown to meet that case now than if they had taken action when they threatened to take it in 1875. The element of compromise also makes this important difference, that if the lease were to be set aside the Crown would undoubtedly be entitled to revive their claim for bygones, and that also might be rendered more difficult to establish by the fact that the pursuer has been working the coal under the lease for nearly twenty years.

"The next question is, whether the fact of the pursuer having been a minor in 1875 gives him a right to a relief which he would not otherwise be entitled to. That the trustees were entitled to compromise claims connected with the unentailed lands, which formed the trust-estate, so as effectually to bind him, is clear enough. But he might have been entitled, after he attained majority, to challenge the lease as regards the entailed lands, if he had exercised his right in time. So far from doing that, however, he transacted with the Crown for himself in 1887, when he was twenty-nine, and again in 1890, when he was thirty-two. By the formal minute which was entered into in the latter year, he expressly agreed that the lease should be continued for its unexpired period according to its terms, in all respects, except as thereby altered; and this seems to me to have constituted not merely an adoption of the existing lease, but a new agreement on the part of the pursuer himself, by which all objection on the ground of minority is entirely superseded.

"I shall therefore sustain the defender's second plea in law, and assoilzie him with expenses."

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Argued for the pursuers;—I. *On the question of bar.*—The trustees had no power to transact in regard to the entailed lands without Mr Wemyss being made a party to the transaction. Their alleged agreement with the Crown was therefore void so far as these lands was concerned, and as it was impossible to treat the transaction as valid in regard to part of the lands, and invalid as regarded the remainder, it must be held void *in toto*. Further, the alleged agreement did not amount to an abandonment by the trustees of Mr Wemyss' rights, but merely to their suspension during the period of the lease. Assuming both these contentions to fail, the compromise was not binding upon the trustees, as both sides had evidently transacted in ignorance that as regarded the lands of Easter Wemyss Mr Wemyss had an express grant of the coal *infra fluxum maris*, and in the erroneous belief that his only title to the submarine coal was a simple barony title followed by possession. The case therefore did not fall within the doctrine of Stair,¹ referred to by the Lord Ordinary, for the contract of "transaction" was no more sacred than any other contract, and could be set aside on the ground of mutual error, or even error on one side.² Mr Wemyss had not adopted the transaction, for his acts in regard to the lease had been done in entire ignorance, not only of his rights, but of the fact of any compromise having been entered into.³

II. *On the merits.*—Assuming that the pursuers were not barred, they had a good claim to the coal under the sea-bed *ex adverso* of the whole united barony, although their claim was rested on somewhat different grounds in the case of each of the three ancient baronies. *West Wemyss.*—In this case there was a barony title to lands on the seashore with parts and pertinents, followed and explained by open and uninterrupted possession of the coal below low-water mark for more than the prescriptive period. It was contended, in the first place, that a simple grant of a barony with parts and pertinents was sufficient to carry the coal below low-water mark *ex adverso* of the barony lands. In the case of the foreshore, which was analogous, there was a large body of authority to support the view that it was carried as a pertinent of a barony title to lands on the seashore.⁴ It

¹ Stair, i. 17, 2.

² Kippen v. Kippen's Trustee, July 10, 1874, 1 R. 1171; Balfour v. Smith and Logan, Feb. 9, 1877, 4 R. 454; Bingham v. Bingham, 1748, 1 Vesey Senior, 126; Kelly v. Solari, 1841, 9 M. and W. 54; Beauchamp v. Winn, 1873, L. R., 6 Eng. and Irish App. 223; Cooper v. Phibbs, 1867, L. R., 2 Eng. and Irish App. 149; Huddersfield Banking Co. v. Lister & Son, 1895, L. R., 2 Ch. 273, esp. *per* L.-J. Lindley, at p. 281.

³ Cooper v. Phibbs, 1867, L. R., 2 Eng. and Ir. App. 149.

⁴ Bell's Prin. sec. 642; Innes v. Downie, 1807, Hume's Dec. 552; Campbell v. Brown, Nov. 18, 1813, F. C.; Macalister v. Campbell, Feb. 7, 1837, 15 S. 490, *per* Lord Gillies, at p. 493; Paterson v. Marquis of Ailsa, March 11, 1846, 8 D. 752, 18 Scot. Jur. 370; Lord Saltoun v. Park, Nov. 24, 1857, 20 D. 89, 30 Scot. Jur. 54; Hunter v. Lord Advocate, June 25, 1869, 7 Macph. 899, *per* Lord Kinloch, at p. 911, 41 Scot. Jur. 513; Officers of State v. Smith, March 11, 1846, 8 D. 711, *per* Lord Moncreiff, at p. 721, 18 Scot. Jur. 364, July 13, 1849, 6 Bell's App. 487, 21 Scot. Jur. 534.

was true that, in some of the cases referred to, the proprietor had proved possession of the foreshore to explain the grant, but such proof was unnecessary. Although there were *dicta* in *Agnew* to the opposite effect, there was no decision on the point,¹ which was still open. A title to lands "bounded by the sea," with parts and pertinents, carried the foreshore,² and the rule was applicable in the case of baronies which were *de facto* bounded by the sea.³ But if a barony title carried the foreshore, there was no reason for holding that it did not carry the *solum* of the sea so far as available for beneficial possession, for the right of the Crown in the *solum* of the sea, within the three mile limit, or *inter fauces terre*, was of the same character as its right in the foreshore,⁴ and as the owner of a barony bounded by the sea was the only person who could work the minerals under the bed of the sea, the presumption, arising from the public interest, was that he had the right to work them. If, however, a barony title, with parts and pertinents, was by itself insufficient to carry submarine minerals *ex adverso* of the barony lands, it could certainly do so if followed and explained by possession, such as the pursuers and their predecessors had had in this case. Such a title afforded a good foundation for prescription of *regalia minora*,⁵ such as a right of ferry,⁶ or of the foreshore, subject to the public right of use.⁷ The maxim *tantum prescriptum quantum possessum* was clearly inapplicable to the case of minerals, and it had never been applied to them.⁸ To apply it literally would be to exclude minerals from the operation of the law of prescription. Possession therefore was not the measure but the index of the pursuers' right. This principle had been applied in the case of the foreshore,⁹ and it was equally applicable to minerals below low-water mark. The right might be held to extend seawards in the case of an estuary *ad medium filum*, or until it was met by a competing right acquired from the Crown, and in the case of the open sea to the three mile limit.

East Wemyss.—There was here an express grant of a right to work the coal "*infra fluxum maris*." In construing this grant it was important to keep in mind that the Crown, having admittedly granted the foreshore, had no interest to reserve the minerals below low-water mark, as it could not work them. The most reasonable construction therefore of the words of the grant was that they meant "below the sea flood, or high-water mark." The pursuers had therefore an express grant of the submarine minerals *ex adverso* of the lands of Easter

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¹ *Agnew v. Lord Advocate*, Jan. 21, 1873, 11 Macph. 309, *per* Lord Neaves, at p. 332, 45 Scot. Jur. 214.

² *Campbell v. Brown*, Nov. 18, 1813, F. C.; *Nicol v. Blaikie*, Dec. 23, 1859, 22 D. 335, 32 Scot. Jur. 134; *Young v. North British Railway Co.*, Aug. 1, 1887, 14 R. (H. L.) 53.

³ *M'Alister v. Campbell*, Feb. 7, 1837, 15 S. 490, *per* Lord Gillies, at p. 493.

⁴ *Lord Advocate v. Clyde Navigation Trustees*, Nov. 25, 1891, 19 R. 174.

⁵ *Ersk.* ii. 6, 18.

⁶ *Duke of Montrose v. Macintyre*, March 10, 1848, 10 D. 896, 20 Scot. Jur. 317.

⁷ *Bell's Prin.* sec. 642; *Agnew v. Lord Advocate*, Jan. 21, 1873, 11 Macph. 309, 45 Scot. Jur. 214.

⁸ *Forbes v. Livingstone*, Jan. 31, 1822, 1 S. 311; *Crawford v. Durham*, June 2, 1826, 4 S. 665.

⁹ *Young v. North British Railway Co.*, Aug. 1, 1887, 14 R. (H. L.) 53.

No. 41. **Wemyss.** Alternatively they had a right to these minerals in virtue of their barony title, as explained by their prescriptive possession of the coal *ex adverso* of West Wemyss, which was part of the united barony. Where barony lands were contiguous partial possession of a subject in connection with the barony would instruct a title to the whole.¹

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Methil.—The pursuers here relied upon the effect of a barony title with parts and pertinents, followed and explained by possession. Methil was still part of the united barony, the proper means never having been taken to effect its disjunction, and the possession of the submarine coal *ex adverso* of West Wemyss applied to instruct the pursuer's title to the like coal *ex adverso* of Methil. The united barony was erected by a crown charter followed and confirmed by an Act of Parliament,² and it could not be severed without the intervention of the Crown. The general terms of the Act re-establishing Episcopacy were therefore not effectual to dissolve the united barony, and to put the Archbishop in place of the Crown.

Argued for the defender;—(1) *On the question of bar.*—The fair reading of the correspondence which resulted in the acceptance of the lease by the trustees was that there was a surrender by the trustees of the proprietary rights of Mr Wemyss, on the footing that the Crown abandoned its claim to damages on account of the working of the coal in the past. This was essentially a compromise or transaction, and it could not be set aside on the ground that one party had not been aware when he entered into it of all the grounds upon which his right might have been supported.³ But there was no true case of error in fact, for a proprietor could not plead ignorance of the terms of his own title, which was in his own possession.⁴ The cases upon which the pursuers relied were distinguishable, because in them there was no true element of compromise. The compromise was binding upon Mr Wemyss, for a minor might delegate the management of his estate to others, and Mr Wemyss had done so, and therefore could not repudiate the actings of his delegates after expiry of the *quadriennium utile*. But Mr Wemyss had done more than fail to repudiate the transaction. He had by his actings homologated and adopted it in the most distinct manner, and could not plead ignorance of his rights as a ground for now repudiating it. In its scope the compromise was not merely an arrangement to hang up the question between the parties during the currency of the lease, but was an abandonment by the trustees for a consideration of any claim to proprietary rights in the under-sea coal.

(2) *On the merits.*—*West Wemyss.*—A simple grant of barony lands with parts and pertinents was not enough to carry submarine minerals.

¹ Lord Advocate v. Cathcart, May 19, 1871, 9 Macph. 744, 43 Scot. Jur. 500; M'Douall v. Lord Advocate, April 16, 1875, 2 R. (H. L.) 49; Lord Advocate and Clyde Trustees v. Blantyre, June 19, 1879, 6 R. (H. L.) 72, *per* Lord Mure at p. 80; Lord Advocate v. Lovat, July 12, 1880, 7 R. (H. L.) 122.

² Act 1661, c. 158; Thomson's Acts, 7, 352.

³ Ersk. iii. 3, 54; M'Alister v. M'Alister's Trustees, June 29, 1827, 5 S. 871; Stewart v. Stewart, Nov. 22, 1836, 15 S. 112, June 3, 1839, M'L. & Rob. App. 401.

⁴ Haldane v. Ogilvy, Nov. 8, 1871, 10 Macph. 62, *per* Lord Benholme, at p. 71, 44 Scot. Jur. 32; Wason v. Wareing, 1852, 15 Beavan, 151; Callisher v. Bischoffsheim, 1870, L. R., 5 Q. B. 449.

The analogy of the foreshore was entirely against the pursuers' contention, for it had been distinctly laid down in the case of *Agnew*¹ that a barony title did not carry the foreshore without possession; the views there expressed had been approved in a later case,² and the point could no longer be regarded as open. The cases founded on by the pursuers merely established that the owner of a barony adjoining the sea was entitled to prevent a party having no title from encroaching on the foreshore. But even if a barony title were held to carry the foreshore, it by no means followed that it carried the *solum* of the sea below low-water mark, for the *dicta* founded on by the pursuers accentuated the difference between the foreshore and the deep sea.³ Nor had the pursuers instructed a title to the minerals below low-water mark by possession. The possession had by the pursuers' predecessors had not been apparent, and had not come to the knowledge of the officials of the Crown. Further, the *solum* of the sea was not *inter regalia minora*, but was vested in the Crown as proprietor,⁴ and a totally different class of considerations attached to these different rights. Incorporeal rights, such as the right of fishing, or the right of ferry, which was the right in question in the case of *Montrose*,⁵ might reasonably be regarded as pertinent of a barony where they had been possessed in connection with it, but the patrimony of the Crown was in quite a different category, and the *onus* lay upon the owner of the barony to shew otherwise than by possession that he had possessed the submarine coal as a pertinent of the barony, just as if he were claiming lands not mentioned in his title.⁶ The presumption was against the grant of the barony being intended to extend below low-water mark, as the Crown had very rarely made such grants. Assuming, however, that a title to the submarine coal might be instructed by possession, possession of a small part could not prove a right to the whole sea coal *ex adverso* of the lands *ad medium filum* of the estuary. The analogy of the foreshore did not help the pursuers, for that was a recognised tract of defined extent, but the limits of the territory under the sea to which a prescriptive title was claimed by the pursuers were entirely undefined. Accordingly, the maxim *tantum prescriptum quantum possessum* was the only rule which could be applied.⁷

East Wemyss.—In charter-latin *fluxus maris* was equivalent to *fluxus et refluxus maris*, and *infra fluxum maris* meant below where the sea ebbed and flowed, or, in other words, the foreshore.⁸ The right conferred upon the pursuers' predecessors, therefore, was to work the coal below the foreshore, and by the terms of the grant they were

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¹ *Agnew v. Lord Advocate*, Jan. 21, 1873, 11 Macph. 309, 45 Scot. Jur. 214.

² *Lord Advocate and Clyde Trustees v. Lord Blantyre*, Scot. Jur. 19, 1879, 6 R. (H. L.) 72.

³ *E.g. Hunter v. Lord Advocate*, June 25, 1869, *per* Lord Kinloch, at p. 911, 41 Scot. Jur. 513.

⁴ *Lord Advocate v. Clyde Navigation Trustees*, Nov. 25, 1891, 19 R. 174.

⁵ *Duke of Montrose v. Macintyre*, March 10, 1848, 10 D. 896, 20 Scot. Jur. 317.

⁶ *Lord Advocate v. Hunt*, Feb. 11, 1867, 5 Macph. (H. L.) 1, 39 Scot. Jur. 248; *M'Intosh v. Lord Abinger*, July 12, 1877, 4 R. 1069.

⁷ *Maitland v. M'Clelland*, Dec. 21, 1860, 23 D. 216, 33 Scot. Jur. 102.

⁸ *Straiton v. Scott*, 1755, 5 Brown's Suppl. 299; *Brodie v. Magistrates of Nairn*, 1796, M. 12,830.

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Methil.—Nor could that possession be used in the case of *Methil*. The Act of 1662, which restored Episcopacy, made all prior Acts which deprived bishops of property null and void. There was no special sanctity about a barony to prevent the application of the Act to *Methil*. The superiority of this barony had accordingly reverted to the Archbishop of St Andrews upon the re-establishment of Episcopacy, and the barony was consequently disunited from the united barony of Wemyss, because a barony could not be held of different superiors. Having never been reunited to West and East Wemyss, *Methil* was still a separate barony.

At advising,—

LORD PRESIDENT.—The Lord Ordinary's interlocutor, which sustained the plea of bar, was but faintly supported by the counsel for the Crown, and they invited our attention, in the main, to the merits of the cause. I do not think that the pursuers are barred by the series of events set out in support of that plea. It is clear that the rights of Mr Wemyss in the entailed estate were not effectually dealt with during his minority, for he was not so much as made a party to the transactions which touched them. Nor does it seem possible to separate the action of the trustees in regard to the unentailed lands from their action in regard to the entailed lands. The transaction purported to be one, and was one; and it is impossible to affirm the validity of part while negating the validity of the whole. Accordingly, I do not think that any rights to the coal in question were validly renounced during the minority of Mr Wemyss.

On the next question, whether the pursuer Mr Wemyss after his majority adopted the acts of the trustees, it is certain that he dealt with the Crown on the footing of his being a tenant. But, while he was thus aware of the lease, it does not appear that he knew of or considered the surrender of rights which led to the granting of that lease; and it is this surrender which he is now said to have adopted. The surrender, such as it was, is contained in letters collateral or antecedent to the lease, and not in the lease itself. Accordingly, the renewal of the lease, or the recognition of the lease, does not bring home to the pursuer Mr Wemyss more than was present in *Cooper v. Phibbs*.¹

On the merits of the question, it is necessary to distinguish between the lands of East Wemyss, West Wemyss, and *Methil*. Each formed a separate barony until the year 1651, when a crown charter purported to form them into one barony. For a reason to be afterwards mentioned it cannot be held that this union was operative during the period of prescription, so far as *Methil* was concerned; but it was operative as regards West and East Wemyss. It is necessary, however, to consider the case of each barony separately, as each is separately described in the uniting charter, and the subsequent titles, and the facts as to possession are also different.

Let us take, then, first, West Wemyss,—what of its title, and what of possession?

¹ L. R., 2 Eng. and Ir. App. 149.

There is here no express conveyance of coal, but a simple conveyance of a barony in general terms, and with no boundary seaward. There has been for the prescriptive period working of the coal under the foreshore, and beyond the foreshore under the bed of the sea, *ex adverso* of a part of these lands. The pursuer's right to the coal under the foreshore is now, although it was not at first, admitted. The question is, what is the legal result of this possession in regard to the coal under the sea?

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It was, however, in the first place maintained for the Crown that the possession had not been open. In a sense this is, of course, true, from the physical conditions. But it was not necessary to prove either that officers of the Crown had been apprised of the workings, or that they in fact knew of them. Apart from this, the evidence shews that the workings under the sea were in no sense clandestine; that they were well known in the district; that they had been the subject of public scientific discussion, and that they were inspected and reported on in the usual way by the Government Inspector of Mines.

If the principles of the law of prescription be applicable to coal, then the possession in the present case seems sufficiently regular, continuous, and open to avail for the purposes of that law. The question remains, whether the possession will apply to the barony title, so as to bring within it the coal now in dispute? This is a question of novelty, and it must be considered on principle.

"A title of barony," says Lord Wood, in a passage of recognised authority (*Duke of Montrose v. Macintyre*),¹ "is sufficient to include, without enumeration or its being expressed, every part and parcel of it, and every right and privilege connected with the barony, and naturally incident to it; everything, in short, that it may be supposed might naturally accompany and form part and pertinent of a grant of so high a character. Nor does it present any objection or difficulty to this view that the right in question may be one of the *regalia*, seeing that, as the title flows from the Crown, it is derived from a party competent to grant the right, and seeing also that there is no ground for holding that the Crown would not give out such a right to a subject,"—(a barony title) "being a title which is broad enough to cover the right, if truly intended to be given out, is capable of being cleared and confirmed by evidence of possession of the right having followed upon it, which, if continued undisturbed for forty years, affords the best evidence, and, in law, conclusive evidence, of that right being one of the unenumerated particulars contained in the grant, and conveyed under the general title of barony."

Such is the general law, and the question is, whether it is applicable to the right of working coal under the sea *ex adverso* of the barony?

Now, first of all, it is sufficiently clear that the coal in dispute was originally part of the patrimony of the Crown, and when the barony lands were granted out by the Crown, the coal might have been lawfully worked by the Crown, and was alienable by the Crown. The contrary was not maintained in debate.

It is equally certain that, as matter of fact, this coal is workable from the

¹ 10 D. 896, at p. 914.

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barony of West Wemyss, and in connection with the coal under the foreshore, which admittedly form part of the barony ; it is naturally so worked, and, what is more, the Crown, which is the only suggested competitor, could not, by physical possibility, work it without the licence of the baron.

Accordingly, it would appear to be every way natural that a right to work this coal, inaccessible to the Crown and naturally accessible to the baron, should form one of the privileges of the barony. The Crown's admission in fact, in this action, proves that, to a certain and substantial extent, the coal *ex adverso* of West Wemyss has been worked by the baron in connection with the barony colliery. That this has been done in virtue of the barony title seems to be the legitimate and necessary inference from the facts.

Accordingly, I hold that in working the coal *ex adverso* of West Wemyss the pursuers are exercising one of the rights of that barony. The Crown counsel very legitimately tested the argument of their opponents by inquiring whether any, and what, limit bounded this right seaward, and the terms of the summons fairly justify this challenge. The same magnitude and vagueness of the claim were made to constitute an argument against the application of the law of prescription to a measure of use so small in proportion to the claim.

The true answer to this objection is to be found in the limited and relative nature of the right. I do not think that the pursuers have right to any coal except such as can be wrought from the barony lands. I do not see on what sound reasoning the pursuers could obtain declarator that, let us say, some patch of coal, five miles away from Fife, in the middle of the Firth of Forth (whether isolated geologically or delimited for the purpose of controversy) was theirs, merely because it was *ex adverso* of their barony. The same objection, in point of principle, opposes the claim to a continuous right *ad medium flum* of one of the narrow seas (however great the distance), on the part of a seaboard baron, whose right to the coal depends on prescriptive use to a much more limited extent. The true inference to be drawn from the use is, that he has right to the coal which he can get by submarine workings from his lands, within the prolongation of their lateral boundaries. That the words naturally used to describe this right are very much those descriptive of a privilege is nothing against the doctrine, as is shewn by the cases in which such words have been held to embody a right of property in coal. So, I should hold that the pursuers' right being to work as much coal as they can from the barony lands, this infers a right of property in an area of coal hitherto undefined, but susceptible of definition, should the Crown sue, or shew an interest to sue, for a delimitation.

All this, of course, has little practical importance, at least in the existing means of submarine mining. But, in principle, it is necessary to place the pursuers' right upon a tenable basis, and I think that the decree he seeks is too wide, and ought to be limited by the insertion of appropriate words.

In the case of East Wemyss, there has been no possession, and the claim of the pursuers is therefore rested (1) on the terms of the title ; and (2) on the title as supported by the possession *ex adverso* of West Wemyss.

There is in the East Wemyss title, first of all, so far as coal is concerned, a grant of the coal down to high-water mark, and then a grant of the right of

working coal *infra fluxum maris*. That these words define a limited area is made sufficiently clear by realising that the contrary contention is that they mean a grant of all the coal below high-water mark, and indefinitely outwards. No precedent or authority, legal or literary, was adduced in support of this construction of the words *fluxus maris*, which seem to denote, in popular language, and according to ideas common to scientific and pre-scientific days, the flow of the tide between high and low-water marks. The words *infra fluxum maris* seem, therefore, to prescribe and limit the subject of the grant as the coal under the foreshore.

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It was, indeed, suggested that the words were intended to confer a special privilege of working the coal from the surface of the foreshore; but this does not seem tenable. Such a privilege of working coal which, *ex hypothesi*, had already been granted, would be either superfluous, or, having regard to the public uses of the foreshore, illegal.

In the construction of the East Wemyss title, which I adopt, the baron's right to coal is expressly bounded seaward by low-water mark.

The next question is, Can the possession *ex adverso* of West Wemyss be held as applicable to East Wemyss? The argument in support of the affirmative was, that the possession having taken place when the two baronies West and East Wemyss were held under a title uniting them into one barony, the possession of coal at any part interpreted the whole title, and was applicable to every part of the barony. The answer, which in my opinion is sound, was that while the charter of 1651 made the two baronies one barony, yet that writ, and all the subsequent titles, kept up the same description of the lands of East Wemyss, and thus limited the right to coal in that part of the united barony, just as much after as before the union. The express terms of the title of the united barony thus preclude the suggested extension.

In the case of Methil there is again (as in the case of East Wemyss) a twofold question, according as it is treated separately, or as it is regarded as part of the united barony which purported to be established in 1651.

If the description of Methil as a separate barony be alone regarded, the case stands thus: there is a conveyance of a barony, and of the coal of the lands of the barony. There has been no possession of the coal under the sea. The question therefore is the pure one, does a barony title without possession give right to work coal under the sea *ex adverso* of the barony? It was represented for the pursuers that this question is the same as that raised in *Agnew's case*,¹ that the opinions that possession was necessary were *obiter*, and that the weight of authority and principle were in favour of the inherent efficacy of a barony title independent of prescription. Now, even assuming that the right now in question is, for the purposes of the argument, *in pari casu* with that of foreshore, the opinions in the case of *Agnew*¹ must, I think, be held authoritative in this Court; and I was not struck with the success of the pursuers in their attempt to marshal against that decision a superior weight of earlier authority.

The other argument of the pursuers was that the West Wemyss possession might be held to interpret the title of Methil, as Methil was made part

¹ 11 Macph. 309.

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of the same united barony under the title of 1651. The answer here is different from that in the case of East Wemyss. The terms of the description of Methil present no such difficulty as arises in East Wemyss. But the fatal defect is, that the union of baronies constituted by the charter of 1651 had ceased to exist before the possession founded on took place. Now, as there is no need to amplify by mere repetition an opinion already sufficiently long, I may say that the true position of the title is stated, with perfect accuracy, in the Crown's answer to the first article of the condescendence, and that this is a complete answer to the pursuers' contention.

Turning to the summons, the following is the result of my opinion:—The coal under the foreshore was not at first, but is now (under the third head of the joint minute of admissions), allowed to belong to the pursuers. The pursuers are therefore entitled to decree under the first conclusion of the summons, varied, however, so as to treat the three baronies as separate baronies.

Under the second conclusion the pursuers seem entitled to decree of declarator that the coal lying under the sea *ex adverso* of the lands and estate of West Wemyss, so far as workable from the said lands and estate, forms part of the barony of West Wemyss. There must be absolutor as regards the other two baronies.

In accordance with the view stated in the first part of this opinion, the pursuers seem entitled to the declarator sought regarding the lease, but the reductive conclusions seem unnecessary, and may be dismissed.

LORD ADAM.—The question raised by this reclaiming note is whether the pursuers are proprietors of the coal under the sea below low-water mark *ex adverso* of their lands. These lands lie in the county of Fife, and extend for several miles along the estuary of the Forth, by which they are *de facto* bounded on the south.

It appears from the titles produced that by a crown charter of resignation in favour of the pursuers' predecessor David, second Earl of Wemyss, dated 22d July 1651, the three ancient baronies of West Wemyss, Easter Wemyss, and Methil, were thereby disposed to him, and were erected into a single barony called the barony of Wemyss.

It will be observed that this charter is a charter by progress, and that we have not the original grants in the case of any of the three baronies. It is, however, I think to be presumed, in the absence of evidence to the contrary, that they were in the terms set forth in this charter.

It will farther be observed that while the three old baronies are united into one barony, it is that one sasine may suffice for the whole, but that there is no new grant of any kind in connection with the united barony. The united barony just consisted of the three old baronies with their respective grants, privileges, and pertinents, whatever these might be.

In this charter of 1651, in so far as regards the ancient barony of West Wemyss thereby disposed, there is no mention of coal. It is neither expressly granted nor reserved. The effect of that in law would appear to be to give to the vassal the coal within the area of the barony, whatever that may be.

In so far as regards the barony of Easter Wemyss, there is a grant of

the coal-heughs of the same—and there is a farther grant “*lucrandi et effodiendi carbones et carbonaria infra fluxum maris infra bondas predictas*”—*i.e.* of the barony. I shall afterwards have to consider what the meaning and extent of that grant is.

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As regards the barony of Methil, there is a grant of the whole coal and coal-heughs of the barony “*tam subtus terra quam supra terram.*”

This union of the three baronies into the single barony of Wemyss did not long continue, because we find that David, Earl of Wemyss, having completed his title under the charter of 1651, resigned the barony of Methil into the hands of the Archbishop of St Andrews as his immediate lawful superior, and obtained from him a charter of resignation dated 9th August 1665, under which he was duly infeft; and the pursuer’s title to this barony is derived from this charter. I cannot understand how a single barony can be held under different superiors, and I think that the necessary effect of this was to dissolve the recently created barony of Wemyss.

It is maintained by the pursuers that, however that may be, the three old baronies were again united into one by the crown charter of resignation in favour of the third Earl of Wemyss, dated 17th July 1711.

The superiority of the barony of Methil had, no doubt on the abolition of Episcopacy, reverted to the Crown, and this charter contains a grant of the three ancient baronies, but they are not thereby united of new into a single barony. It is true that the charter contains a clause declaring that infeftment taken in one place should be sufficient for all the three baronies, but that has not the effect of erecting them into a single barony. The result appears to me to be, that subsequent to 1665 the pursuers’ predecessors held the ancient baronies of East and West Wemyss as one barony, and the barony of Methil as another and separate barony.

I do not think that the recent titles of the pursuers call for any particular remark. They are now infeft in the three old baronies under crown charters containing grants of coal substantially in the terms set forth in the charter of 1651.

In the case of *Agnew v. The Lord Advocate*,¹ it was held that when an estate on the shore, whether barony or not, is held under a crown charter which does not, by express grant or specific boundary, extend the right of the vassal beyond high-water mark, there is no presumption that the foreshore is a pertinent of the land, but that the charter may be shewn to include the foreshore by such long continued possession thereof as can only be ascribed to a right of property. There is no question that the pursuers are in right of the foreshore in this case, because they have obtained decree of declarator to that effect, which is not objected to by the Crown.

But the question appears to me to be, whether the possession by the vassal of coal below low water for the requisite period will be sufficient to establish his right to the coal there, just as it was held in *Agnew’s*¹ case that possession of the foreshore was sufficient to shew that it was included in the barony.

That leads to the consideration of the possession of the coal had by the pursuers and their predecessors *ex adverso* of their lands—and to the titles to which such possession is to be ascribed.

¹ 11 Macph. 309.

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As regards the possession had by the pursuers and their predecessors under their titles of the coal, there is no difficulty, because it is admitted by the parties that for more than the prescriptive period prior to 1874, the date of the lease under reduction, the pursuers and their predecessors continuously and without interruption worked the coal under the foreshore and beyond the foreshore under the sea *ex adverso* of a part of the lands of West Wemyss, and that there never was any working of the coal under the sea below low-water mark *ex adverso* of the lands of East Wemyss and Methil until after the year 1874.

The first question appears to me to be, what is the effect in law of the admitted prescriptive possession by the pursuers and their predecessors of the coal *ex adverso* of the lands and barony of West Wemyss below low-water mark. The coal and other minerals in this barony were not, as I have said, reserved by the Crown. They therefore passed to the vassal as a part and pertinent of the lands. The barony is *de facto* bounded by the sea. It is not disputed that prescriptive possession following on a barony title is sufficient to enable the vassal to acquire the foreshore and the minerals under it—or rather perhaps to shew that they formed part of the original grant of the barony. It is maintained, however, by the Crown that prescriptive possession has not this effect as regards the minerals, including coal, below low-water mark. They say that such minerals cannot in law be acquired by prescriptive possession. Had the Crown been able to plead that such minerals were inalienable in their hands, I would have seen the force of the argument. But, as we see in this case, the Crown is in use to make express grants of these minerals, just as they are in use to make express grants of the minerals above low-water mark. But as prescriptive possession is sufficient to shew that minerals above low-water mark are included in the barony though not expressly mentioned, so I do not see why it should not be sufficient to shew that minerals below low-water mark are also included therein though not expressly mentioned. I do not see that there is any difference in the nature or quality of the Crown's right to minerals above or below low-water mark. It is said that in the latter case there is no limit seaward, but that does not seem to be material, because the same objection would apply to an express grant.

In the next place, I think the possession of this coal is to be ascribed to the old barony title of West Wemyss. As I have already pointed out, the charter of 1651, which united the three baronies, contained no new grant in connection with it, or with the three old baronies. Any right, therefore, which the proprietor of West Wemyss had to the coal in that barony must have been in connection with the original grant of that barony, and it appears to me that possession of coal *ex adverso* of that barony can confer no right to the coal *ex adverso* of either East Wemyss or Methil.

But I think that the possession of the coal which has been had *ex adverso* of the barony of West Wemyss is sufficient to afford the presumption that a grant of the coal below low-water mark was contained in the original grant, and that, therefore, Mr Wemyss had a right to the coal below low-water mark *ex adverso* of the lands and barony of West Wemyss at the date of the lease.

From what I have said it follows that the pursuers have established no

right to the coal below low-water mark *ex adverso* of the barony of Methil or of East Wemyss in respect of the possession of coal *ex adverso* of West Wemyss.

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But as regards the barony of East Wemyss there is an express grant of coal "*infra fluxum maris*" as it is described in the charter of 1651, or "*within flood mark*" as it is described in the disposition in Mr Wemyss' favour of August 1879. The pursuers maintain that this includes the coal below as well as above low-water mark. I do not think so. I think it means the coal within the area covered by the flow of the sea backwards and forwards over the shore—or in other words, the foreshore. If this be so then the pursuers have not an express grant of the coal below low-water mark *ex adverso* of the barony of East Wemyss. But they have an express grant of the coal "*infra fluxum maris*," and it would be against the terms of their charter to prescribe a right "*extra fluxum maris*" as they seek to do. They have an express right to the coal within an area defined as bounded by low-water mark, and they cannot prescribe beyond that boundary. The result in my opinion is that at the date of the lease in 1874 Mr Wemyss was in right of the coal below low-water mark *ex adverso* of the barony of West Wemyss, but not *ex adverso* of the baronies of East Wemyss and Methil.

But the Crown maintains that the pursuers are now barred from disputing the right of the Crown to the coal in question by Mr Wemyss' trustees having accepted from the Crown the lease of 1874 and by his subsequent adoption and homologation of it after he came of age in 1879, and the Lord Ordinary has sustained this plea. The lease bears to be entered into between the Crown and the trustees of Mr Wemyss' father under a trust-disposition and settlement dated 21st December 1860. The lease includes the minerals of both the entailed and the unentailed lands. At the date of the lease the trustees were in the possession and management of the unentailed lands under the trust-disposition and settlement, and they were also by it appointed tutors and curators of Mr Wemyss, and were in the management of the entailed lands in which Mr Wemyss was infert. It appears to me that in order to constitute a valid lease of the coal in the entailed lands the lease should have been entered into by Mr Wemyss with consent of his curators. Mr Wemyss, however, is not a party to the lease, and it is certain that he was not consulted and knew nothing about it at the time. It may be that the trustees had power to enter into this lease without Mr Wemyss' consent as regards the coal in the unentailed lands. But I think it was not a valid lease as regards the coal in the entailed lands. And if it is not a valid lease as regards the coal in the entailed lands it cannot stand as regards the unentailed lands, as both are let as an *unum quid*. It appears to me, therefore, that the lease must be set aside unless it can be shewn that Mr Wemyss subsequently to his coming of age homologated and adopted it in the full knowledge of its effects.

Now, it is not doubtful that the lease was a part of and the result of a transaction in respect of which the Crown maintain that any rights or claims which the proprietors of the estate had or might have had to the coal in question were abandoned by them, while on the other hand the Crown abandoned any claim they might have against them in respect of the working of this coal prior to the date of the lease.

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The lease, however, does not set forth the transaction. It does set forth that in respect of the lease being entered into the Crown had abandoned their claims in respect of the previous workings; but I do not think that that was sufficient to suggest to Mr Wemyss that part of the consideration for the lease had been that the trustees should abandon any rights they or he might have to the coal, or to put him upon his inquiry.

The fact that he adopted and acted on the lease after coming of age in ignorance of the true facts does not appear to me to be sufficient to prevent him from now challenging the lease when he has come to know the true facts of the case, viz., that he had well-founded claims to the coal, and that these had been abandoned by a transaction of which he knew nothing. But it is said that Mr Wemyss' actings went farther than this, and that after he came of age he transacted directly with the Crown about the lease. He appears, it is true, in March 1887 to have applied through his agents to the Crown, and to have obtained a reduction of the royalty payable under the lease; and again in 1890 he appears to have been a party to a minute with the Crown, whereby certain alterations with regard to the working of the minerals were agreed to. These proceedings, however, do not appear to me to carry the case any farther against him. He acted in the belief, no doubt, that the lease was a valid lease, and binding on him, as he was entitled to believe in the then state of his knowledge. The Crown cannot point to any act of homologation or adoption by him after he came to the knowledge of the facts, and, therefore, I think that this plea of the Crown, which the Lord Ordinary has sustained, ought to be repelled, and the pursuers found entitled to the coal below low-water mark *ex adverso* of the barony of West Wemyss.

LORD M'LAREN.—I was not able to be present during the whole time of the first hearing of the case, and therefore my opinion is confined to the subject which was argued at the second hearing, viz., the effect of a barony title followed by possession of the coal by workings below the low-water line. On this subject I am entirely satisfied as to the soundness of the view developed in the Lord President's opinion.

It is common ground that the rule or principle which enables the proprietor of a barony to acquire extraneous subjects by prescription is not an absolute rule. The grant of a barony in Caithness would certainly not be a title of prescription to subjects in Galloway. Two limitations have been recognised. First, the property which is claimed as a prescriptive acquisition must be locally situated in such proximity to the general barony estate as to be capable of being treated in a reasonable sense as a pertinent of the barony. Secondly, and having regard to the foundation of the rule, viz., that the subject in dispute is presumed to be covered by the original grant, if this presumption is displaced by the history of the title, or is shewn to be untrue in fact, prescription will not take effect. This second limitation applies, at all events, to cases of competition with the Crown, the author of the grant, and it was, as I understand, the ground of the judgment of the House of Lords in the case of *The Lord Advocate v. Hunt*.¹

The mere fact that the barony is defined by boundaries, or even by a plan,

¹ 5 Macph. (H. L.) 1.

would not, I apprehend, be an answer to a claim of prescription founded on a grant of barony, with the usual clause of parts and pertinents, because in such a case it is open to the claimant to maintain that the subject prescribed to, although extraneous to the principal part of the estate, was originally conveyed as a pertinent of the barony, and had been possessed as such for the prescriptive period. In the case of *West Wemyss*, where alone possession for the prescriptive period is proved, I find nothing in the facts of the case which can be considered as putting the coal below the sea outside the category of subjects which may be pertinent to a barony. Discontiguity is not inconsistent with the notion of a pertinent. According to the Lord Chancellor's opinion in the case I have referred to, discontiguity is treated as being an element of difficulty only, and as throwing on the prescriptive possessor the *onus* of satisfying the Court that the subject is in fact a pertinent of the barony. But in the case of an estate which is in fact bounded by the sea or the seashore, and where the foreshore and the coal which is vertically beneath it, have been possessed by the barony title, there is no discontiguity. The coal under the sea is continuous with the coal under the land, the whole being wrought as one stratum by pits and underground passages, serving the uses of the mine as a whole.

But, again, it cannot be said that there is anything in the history of the titles which would prevent Mr Wemyss from ascribing his possession of the sea coal to his grant of parts and pertinents. Other title there is none, except the general title of the Crown to all estate which has not been granted or feued out to private owners. The only argument against the title which affects my mind is that the boundary is a geographical boundary which is capable of being precisely ascertained. But if we look to the substance of the thing, the very fact that the general estate is bounded by the sea, and that all access on the part of the Crown or its donees to coal below the sea is cut off, makes it most improbable that any chance of revenue from such sources was intended to be reserved; rather, I should say, creates a reasonable probability that such coal below the sea as could be got at through the workings connected with the land was put at the disposal of the grantee as a pertinent of the barony. This would not, of course, give Mr Wemyss a title to the sea coal in the absence of proof of possession, because there is no proof that the sea coal is a pertinent except what is derived from or connected with possession through mining. But I am here considering whether there is anything in the nature of the subject, as existing or as described in the title-deeds, which would make the claim of "part and pertinent" inappropriate, or which would disentitle the possessor to claim the coal under the description of a pertinent. Now, considering the impossibility of working the coal otherwise than by mines sunk in the adjacent lands, and taking account also of the necessary limitation from physical causes of the grantee's power of working the coal seaward, I think that the coal *ex adverso* of the barony is just such a subject as might very naturally be thrown in as a pertinent of the land with the coal contained therein. That being so, it follows, in my opinion, that the barony title is a sufficient title to which possession for the prescriptive period may be ascribed, and that Mr Wemyss has a good title to the sea coal *ex adverso* of the barony of *West Wemyss*.

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I also agree with your Lordships that the effect of such possession cannot be extended to the lands of East Wemyss and Methil, and that the decree must be limited in the terms proposed.

LORD KINNEAR.—I have had the advantage of reading the opinion delivered by your Lordship in the chair, and also that delivered by Lord Adam. I concur in these opinions, and I do not think it desirable, and it certainly is not necessary, to repeat reasons which have been already so fully explained.

THE COURT pronounced the following interlocutor :—" Recall the said interlocutor of the Lord Ordinary: Find and declare (1) that the pursuers, as proprietors of the baronies of West Wemyss, East Wemyss, and Methil, have right to the foreshore (subject to the right of the Crown as trustee for public uses), and to the coal under the foreshore of the said lands; (2) that the pursuers, as proprietors of said barony of West Wemyss, have right to the coal lying under the sea *ex adverso* of the said barony so far as the said coal is workable from the said barony: Find and declare in terms of the declaratory conclusions relating to the lease libelled, and dismiss as unnecessary the reductive conclusions relating thereto: *Quoad ultra* assoilzie the defender from the conclusions of the action, and decern," &c.

TODS, MURRAY, & JAMIESON, W.S.—THOMAS CARMICHAEL, S.S.C.—Agents.

No. 42.

WILLIAM FOX AND ANOTHER (Carruthers' Trustees), Petitioners (Reclaimers).—*Younger*.

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HENRY SYDNEY AND ANOTHER (Allan's Trustees), Petitioners.—*Macaulay Smith*.

Allan's
Trustees.

Trust—Foreign—Statute—Trusts (Scotland) Act, 1867 (30 and 31 Vict. c. 97)—English Trusts.—The Trusts (Scotland) Act, 1867, does not apply to English trusts.

Trustees under an English trust which embraced a heritable property in Scotland presented a petition to the Court under section 3 of the Trusts (Scotland) Act, 1867, for authority to sell the Scots property. The Court *refused* the petition on the ground that the Act did not apply to English trusts.

1st Division.
LdStormonth-
Darling.
Lord Pearson.

ARCHIBALD CARRUTHERS, a solicitor in London, died on 10th July 1895, leaving a last will and testament whereby he bequeathed all his property to William Fox (solicitor's clerk in London), and Hester Thomas Carruthers (residing at Westham, in Essex), in trust for his two children.

The trustees named accepted office, and obtained probate in their favour from the principal registry of the High Court of Justice in England. They prepared a statement, from which it appeared that the only asset of the trust not situated in England was a heritable property in Kirkcudbright. The liabilities of the deceased exceeded his assets, and it became necessary therefore for the trustees to realise the Scots property. The will contained no power of sale.

In these circumstances, the trustees presented an application to the Court under section 3 of the Trusts (Scotland) Act, 1867,* in which

* The Trusts (Scotland) Act, 1867 (30 and 31 Vict. c. 97), proceeds on the preamble,—“Whereas . . . and it is expedient that greater

they set forth the facts above narrated, and craved the authority of the Court to sell the Scots property. No. 42.

On 21st October 1896 the Lord Ordinary (Stormonth-Darling) refused the petition.* Dec. 11, 1896.
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The petitioners reclaimed. At the hearing the case was continued, in respect it was stated that another petition by English trustees for authority to sell Scots heritage was pending before Lord Pearson, which his Lordship proposed to report to the First Division. Allan's
Trustees.

The petition referred to was at the instance of Henry Sydney, solicitor, London, and Charles Murray, railway clerk, Selhurst, Surrey, the trustees acting under the antenuptial marriage-contract of James Allan, residing at Selhurst, Surrey, and Adelaide Murray, residing at 27 Cloudesley Square, Islington.

These petitioners stated that Mr Allan had assigned to them under the marriage-contract, *inter alia*, all real and personal property which might be left to him; that there had been left to him certain shops and dwelling-houses at Penicuik to which they had made up a title; that the subjects in question were the only item of property belonging to the trust situated in Scotland,—“The trustees are English, and so also are Mr and Mrs Allan, and as the property is in a somewhat dilapidated condition, and requires more attention than the trustees are able to give to it, they have agreed, at the request of Mr and Mrs Allan, and with their consent and concurrence, to present this petition for warrant to sell the subjects, and to grant a valid conveyance to the purchaser.”

facilities should be given for the administration of trust-estates in Scotland.”

Section 2 enacts,—“In the construction of this Act . . . the words ‘trusts and trust-deeds’ shall be held to mean and include all trusts constituted by virtue of any deed or by private or local Act of Parliament. . . .”

Section 3 enacts,—“It shall be competent to the Court of Session on the petition of the trustees under any trust-deed to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof . . . to sell the trust-estate or any part of it.”

* “NOTE.—The petitioners are English trustees under the will of an English solicitor, and the estate is situated wholly in England, with the exception of a small landed property in Scotland. The beneficiaries are the pupil children of the testator, but the estate is said to be insolvent. If so, the property in Scotland could be attached under bankruptcy proceedings in England. No such proceedings, however, have been taken, and the petitioners apply to this Court to exercise the discretionary powers conferred by section 3 of the Trusts Act of 1867, by authorising them to sell the Scottish property for the benefit of the creditors.

“It seems to me that the Act is inapplicable. Before I could grant the powers craved I should have to inquire whether these were consistent with the purposes of the trust, and expedient for its execution. I should also have to be satisfied that the petitioners themselves had no power of sale. All this would require the construction of an English will, and possibly an inquiry into English law. That is not the duty of a Scottish Judge under an Act the purpose of which is to ‘facilitate the administration of trusts in Scotland.’ The exercise of such a discretionary power is for the Court to which the trust itself is subject. If that Court were to grant the desired authority, and any difficulty were to arise in carrying out the sale, then it would be time enough to apply to this Court for its aid.”

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The marriage-contract contained no power of sale.

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The petitioners also produced documents bearing upon certain procedure which had followed on an application made to the English Courts for warrant to sell. These are dealt with by the Lord Ordinary in his opinion noted *infra*.

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On 17th November the Lord Ordinary (Pearson) reported the petition to the First Division.*

* "NOTE.—The petitioners are English trustees acting under a marriage settlement of English spouses. The only trust assets, situated in Scotland, consist of dwelling-houses and shops in Penicuik, which have been bequeathed to the husband since the marriage and fall under an *acquirenda* clause in the marriage settlement. The trustees have completed their title to the subjects by notarial instrument. They now, with concurrence of the spouses, apply under section 3 of the Trusts (Scotland) Act, 1867, for power to sell the subjects on the ground (1) that the marriage settlement does not confer a power of sale; and (2) that 'the property is in a somewhat dilapidated condition, and requires more attention than the trustees are able to give to it.'

"The Act itself empowers the Court to grant power of sale 'on being satisfied that the same is expedient for the execution of the trust and not inconsistent with the intention thereof.' The petition does not suggest any method by which the Court is to ascertain whether the statutory conditions exist in the case of an English trust. Nor do I find any sufficient ground for deciding—or rather for assuming—that these English trustees have not already a power of sale either under the trust-deed or at common law.

"It appears from documents produced that in April last the spouses applied to Mr Justice Stirling in London, under the Settled Land Act, 1882, to have the trustees of the marriage settlement appointed trustees under that Act with full power to sell and dispose of the Penicuik subjects, and they lodged an affidavit in that application to the effect that it would cost £150 to put the property in sanitary condition and tenantable repair, and that neither they nor the trustees had the money required; that there were no children of the marriage, and that the settled property was absolutely vested in the survivor of the spouses, that there was no power of sale under the settlement, and that they and the trustees concurred in desiring a sale. On 17th June the English proceedings were stayed by consent, the husband undertaking forthwith to proceed to sell the property and to account to the trustees for the price. I was informed that this course was adopted because the Judge was of opinion that he could not grant the power, seeing that section 1 (3) of the Settled Land Act provides,—'This Act does not extend to Scotland.'

"The petitioners say truly that unless the Scottish Court aids them, the trust will be greatly disadvantaged; and they refer to the English proceedings as instructing sufficiently (1) that they have not power to sell the subjects and cannot obtain it in England, and (2) that a sale is expedient for the execution of the trust, and not inconsistent with the intention thereof. I doubt whether the English proceedings fully make out either proposition; but assuming that they do, or that those conditions can be otherwise established, the larger question remains, namely—whether it is competent for the Court to empower English trustees to sell Scotch heritage belonging to the trust. It was suggested that it was not necessary to decide this question, and that a decree of Court professing to confer the power would be sufficient to satisfy a Scottish purchaser. But I do not think that a doubt as to the competency of a statutory proceeding can be thus slurred over.

"I am disposed to hold the petition incompetent under the statute, on the ground that the statute does not apply to a purely English trust. The fact that part of the trust assets is heritable property in Scotland may give

The Court then heard counsel on both petitions.

The petitioners argued ;—The petitions were competently presented, for the petitioners were proprietors as trustees of Scots heritage, and that gave the Scots Courts jurisdiction, if not over the whole subject-matter of the trusts, still in any question affecting the heritage.¹ The terms of the Trusts Act of 1867 were sufficiently wide to include such trusts as these. The object of the Act was declared to be “the better administration of trusts in Scotland,” no matter by whom held. The definition of trusts in section 1, including as it did trusts constituted by Act of Parliament, seemed to extend the scope of the Act beyond merely Scots trusts. The petitioners Carruthers’ trustees were bound to sell in order to liquidate the truster’s debts. The practice of the Scots Courts was to authorise a sale by trustees in such circumstances.² It was not necessary to get the formal opinion of the English Court that a sale was necessary. That was evident on the face of the petition. The petitioners Allan’s trustees had already applied to the English Court, but that Court held that it had no jurisdiction to order a sale, and accordingly had allowed proceedings to be stayed in order that the Scots Courts might be applied to. The present case was the converse of the case of *Lawson*,³ when the Scots Court awaited the decision of the English Court on a question of trust administration of English heritage.

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LORD PRESIDENT.—The two petitions which we have now to dispose of,—the one under reclaiming note from Lord Stormonth-Darling’s interlocutor, and the other on the report of Lord Pearson—have certain features in common, which, in my opinion, furnish adequate ground for their decision.

Both are petitions under the Trusts (Scotland) Act, 1867. In both, the trustees are domiciled Englishmen, acting under the trusts of Englishmen.

The trusts are, in every sense of the term, English trusts, except in so far as the estate in each case comprehends as part some heritage in Scotland.

Now, the first question is that put and answered by Lord Stormonth-Darling—Does the Trusts (Scotland) Act apply to such trustees to any

the Court jurisdiction over the trustees to certain effects, and may enable them to invoke the law of Scotland in matters relating to that property. But the petition, while it relates indirectly to that property, has for its primary purpose, and indeed its only purpose, to ask the Court to confer certain powers upon English trustees. Now a trustee’s powers are measured by the law of what is sometimes called the domicile of the trust, and it is antecedently improbable that the Courts of one country would be authorised, even by a common Legislature, to enlarge the powers of trustees who are answerable to the Courts of another country. At all events, I should expect it to be done in express terms, and not to be left to inference and construction. But further, I think that on a sound construction of the statute this petition by English trustees is not within its scope.

“The decisions which have been pronounced on petitions under the 12th section of the statute (*Hall and Others*, 1869, 7 Macph. 667 ; *Brockie*, 1875, 2 R. 923) go far to support this conclusion. . . .”

¹ *Charles v. Charles’ Trustees*, May 19, 1868, 6 Macph. 772, 40 Scot. Jur. 397 ; *Ashburton v. Escombe*, Dec. 13, 1892, 20 R. 187.

² *Erskine*, May 13, 1829, 7 S. 594 ; *Henderson v. Somerville*, June 22, 1841, 3 D. 1049 ; *Graham v. Graham’s Trustees*, Dec. 21, 1850, 13 D. 420, 23 Scot. Jur. 184.

³ *Hewit’s Trustees v. Lawson*, March 20, 1891, 18 R. 793.

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effect, and especially to the effect of enabling them to petition, and us to act, under section 3! In my opinion it does not.

This matter may be easily tested. The Act does two sets of things; it confers certain powers on trustees themselves, and it authorises them to apply to the Court of Session for certain other powers. Now, the 1st section tells us what kinds of trusts and trustees are meant and included by these words; and then the 2d section begins:—"In all such trusts, the trustees shall have power to do the following acts," so to say, at their own hand; it is an enlargement of the inherent powers of trustees. Now, I do not think that it can seriously be maintained that this section applies to English trustees such as are the petitioners, for this would mean that in a statute with a Scots title, Parliament had altered the common law powers of all English trustees, and had done so in the terminology of the Scots law. And yet this section says, in so many words, that it applies to all the trusts to which the Act applies. It seems to me to follow that the limitation obviously suggested by the preamble and the short title section is implied in all the enactments contained in the statute. An examination of the other sections which directly confer powers on trustees confirms the conclusion that they do not apply to English trustees.

Well now, it is, I think, perfectly plain that the trustees who are entitled to apply to the Court of Session are those trustees, and those only, on whom the other sections directly confer the other powers. The sections relating to petitions to the Court give rise, of themselves, to the same argument against their application to English trustees. For instance, if section 3, the one we have to deal with, applies to the petitioners, it would seem to follow that so would section 7, so that virtually all English trusts would be brought under the control of the Scots Courts as well as of the English Courts.

I am for adhering to Lord Stormonth-Darling's interlocutor, and refusing the prayer of the petition to Lord Pearson.

LORD ADAM.—I concur.

LORD M'LAREN.—I do not doubt that this Court has power to grant authority to trustees to sell a heritable estate in Scotland. That would be so, for example, when a sale was necessary to enable the trustees to pay debts, or if there were any other unavoidable cause of sale. Certainly, if this Court has not the power, no other Court could grant a power of sale of heritable estate in Scotland. But then it appears to me that these petitions have been brought without putting the Court in possession of the necessary material for the exercise of its jurisdiction. They are petitions under the Trusts (Scotland) Acts, and I agree with your Lordship in the chair that these Acts postulate the entire jurisdiction of this Court over the subject-matter of the case. We have no authority under the Trusts Acts to determine any question of discretion or expediency relating to an English trust by reason of a part of the trust-estate happening to be heritage in Scotland.

I should not wish to suggest that there is any insuperable difficulty in obtaining the necessary powers. If the Court which has jurisdiction over the trust should make an order to the effect that a sale was necessary, and

if the parties applied to the Court of Session, I should be disposed to give **No. 42.**
every facility for explicating the jurisdiction through our intervention.

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LORD KINNAR was absent.

THE COURT adhered in the petition of Carruthers' Trustees, and Allan's
refused the petition of Allan's Trustees. Trustees.

CONSTABLE & JOHNSTONE, W.S.—ROBERT D. KER, W.S.—Agents.

ALEXANDER MELVILLE AND ANOTHER, Pursuers (Respondents).— **No. 43.**

W. Campbell—Brown.

THOMAS PARK AND OTHERS (Noble's Trustees), Defenders (Reclaimers). **Dec. 11, 1896.**
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—*Ure—Salvesen.*

Process—Count, Reckoning, and Payment—Competency—Claim against trustees for interest in respect of failure to invest trust funds.—In an action of accounting brought against testamentary trustees jointly by certain beneficiaries, the trustees produced accounts which shewed that the trust funds had been allowed to remain in bank for a number of years on deposit-receipt. The pursuers contended that the trust-estate fell to be credited with the additional interest which would have been realised if the funds had been invested on heritable security. The defenders maintained that this was a claim for damages for breach of trust, which could not be entertained in an action of accounting. *Held (aff. judgment of Lord Kincairney)* that it was competent to entertain the question of the liability of the defenders for a higher rate of interest in the action of accounting.

Trust—Administration of Trust—Interest—Trust funds lodged in bank on deposit-receipt—Liability of trustees for higher interest—Indemnity clause.—In an action of accounting by beneficiaries against trustees it was proved that, without deliberately considering the question of investment, the defenders had allowed the trust funds to remain in bank on deposit-receipt for a period of nineteen years from April 1875, during which they yielded interest at the average rate of $2\frac{3}{8}$ per cent. It was proved that during this period safe investments affording over 3 per cent might have been obtained; but that the expense of investment was saved, that for five years the defenders required to keep money in hand to meet advances to beneficiaries, and that deposit in bank would have been necessary while investments or renewals of investments were being considered. The trust-deed provided that the trustees "shall no ways be liable for any omissions in management."

Held (diss. Lord Young, aff. judgment of Lord Kincairney) (1) that the trustees had failed to make a proper investment of the trust funds; and (2) (*alt. judgment of Lord Kincairney*) that they were bound in their trust accounts to debit themselves with interest at 3 per cent on the whole funds for the whole period.

WILLIAM NOBLE, butcher and shipowner in Fraserburgh, died in **2D DIVISION.**
1875, leaving a trust-disposition and settlement dated 9th April 1875, **Lord Kin-**
whereby he conveyed his whole estate to James Noble, coal-merchant **cairney.**
and shipowner, Thomas Park, merchant, Alexander Watson, bank
agent, all residing in Fraserburgh, and Andrew Ritchie, fisherman in
Inverallochy. He directed his trustees to pay to his widow, *inter alia*,
the interest of the residue of his whole heritable and moveable estate,
and the interest of the provisions in favour of his children who might
require a home with her. The provisions to children were payable
either on majority or marriage, or at subsequent periods, in the abso-

No. 43. lute discretion of the trustees, who had power to make advances from the capital for purposes of business and education.

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The deed contained the following clause :—" And I hereby declare that my trustees shall no ways be liable for any omissions in management, nor for the omissions and neglects of their factors, agents, or cashiers, nor for the responsibility of them or their cautioners, if caution shall be required, or for the responsibility of the debtors or others with whom my trustees may transact, but that they shall be bound to act honourably, and shall no wise be liable *singuli in solidum* or for one another, but each for himself only, and for his own personal intromissions and wilful default, and no further."

The trustees named accepted office, and entered upon the possession and management of the trust-estate.

The testator was survived by five children of a former marriage, including a daughter Sarah Noble or Melville, who died in 1878, survived by two sons, Alexander Melville and William Noble Melville. The testator was also survived by his widow, and by George Noble, the only child of his second marriage.

The trustees made payments to Mrs Noble under the provisions in her favour until January 1880, when she claimed and received payment of her legal rights.

In December 1894 Alexander Melville and William Noble Melville raised this action of count, reckoning, and payment against Thomas Park, Alexander Watson, and Andrew Ritchie, the surviving trustees.

The defenders admitted that the interests of the pursuers had become vested, and that they were liable to account to them, and they exhibited to the pursuers accounts of their intromissions from the commencement of the trust.

The pursuers lodged objections to the accounts, in which under objection 7 they stated,—“ During the whole course of the trust the trustees have had large sums of money in hand, but they have never made any investments therewith. They have allowed the money to remain on deposit-receipt or in current account with the North of Scotland Bank's branches at Fraserburgh and Invergordon, of which one of the trustees, Mr Alexander Watson, was successively agent. The sums credited in the various accounts produced for interest on deposit-receipts are as follows :—

“ 1. In the account from 23d April 1875 (the date of the truster's death) to 13th February 1880, . . .	£406	13	4
“ 2. In the account to 18th January 1884, . . .	449	5	9
“ 3. In the account to 11th February 1886, . . .	161	15	4
“ 4. In the account to 28th February 1891, . . .	193	11	3
“ 5. In the account to 20th January 1894, . . .	43	19	1

£1255 4 9

“ It was the duty of the trustees to have invested the trust funds, and if they had done so on good heritable securities interest at the average rate at the least of 4 per cent per annum could have been realised.”

The pursuers further stated that there thus remained a sum of £930, 7s. 11d. under-credited for interest on the trust funds which the defenders were liable to make good.

The defenders answered ;—“ Denied. The trustees have accounted

for all the money received by them. There is no direction given in the deed of settlement to invest the funds. The beneficiaries knew of the sums lodged in bank, and never made any objection thereto. Mrs Noble and George Noble docketed and approved of the account ending February 1891. At first, and until the widow declared her option between the provisions of the settlement and claiming her legal rights, the trustees could not do otherwise than have the money deposited in bank. Mrs Noble approved of that course. Thereafter it was convenient to have it in bank to be ready for making payments to the beneficiaries. Further, the law-agents of the trustees informed them that they could not get any suitable investment for the money. The claim for a difference of interest beyond what the trustees received is not relevant.”

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The defenders further founded on the indemnity clause of the trust-deed.

It appeared from a proof that during the periods of the five accounts the largest sums in bank on deposit-receipt were respectively £4500, £4400, £3900, £2450, £1300. Mr J. A. Robertson, C.A., Edinburgh, deponed that during the period of these accounts the rate of interest actually earned was 2½ per cent, that the funds might have been safely invested on heritable security at 4 per cent interest, and that if they had been invested in consols the average rate of interest would have been 2½ per cent, besides an increase of capital from the rise in the price of consols. Mr R. C. Millar, C.A., Edinburgh, gave similar evidence.

On 23d July 1896 the Lord Ordinary (Kincairney) pronounced this interlocutor:—“ Finds (1) that it was the duty of the trustees to invest the funds of the estate, where practicable, in safe investments profitable to the estate; (2) that there was no difficulty in so investing the said funds; (3) that the trustees failed in so investing the said funds; (4) that they thereby lost to the estate the sum of £881, 0s. 1d., as shewn in the state No. 112 of process; (5) that the said trustees are bound to make good the said sum to the estate as at 1st January 1894.”*

* “OPINION.—The principal question discussed at last debate was that raised on objection 7 to the trustees' accounts by the pursuers Alexander Melville and William Noble Melville, sons of Sarah Noble or Melville, a daughter of the truster, William Noble. The objection is that the trustees were bound to have invested the trust-estate so as to have produced an adequate return in the form of interest, and were not entitled to keep the money in bank on deposit-receipt as they had done, and were bound to debit themselves with the difference between such interest as might have been obtained from a prudent and safe investment and the interest which they have obtained from the bank. The pursuers are not said to be in any way barred or precluded from stating this objection. It is admitted that the funds were not invested, but the trustees explain on record that until the widow declared her option to claim her legal rights, they could not do otherwise than have the money deposited in bank; that it was afterwards convenient to have it in bank, that they might be ready to make payments to the beneficiaries, and that the law-agents of the trustees informed them that they could not get any suitable investment. These reasons or excuses are, however, wholly unsupported by the proof, and they were hardly maintained in the argument. I think it is clearly proved that there was no exceptional difficulty about investing, and that the greater part of the trust funds might have been invested safely at four per cent; and the witness Mr Robertson, C.A., has prepared a state purporting to shew that

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The defenders reclaimed, and argued;—(1) The Lord Ordinary had found them guilty of negligence for keeping the trust funds on deposit-receipt instead of investing them in stock. This ground of judgment was incompetent in this action. It was not found within the conclusions of the summons. The action was directed against the defenders jointly for a simple accounting. If the pursuers had wished to make them liable for negligence they should have called them as individuals.¹ The defenders were not even called conjunctly and severally, and therefore could not be found liable as individuals.² Here their only duty was to account. They had done so, but the pursuers desired to import into the action a question of breach of trust. If the income was open to objection the remedy of the pursuers was an action of damages for improper investment. The necessity of making trustees parties in their individual capacity, in order to try such questions of liability, had been already recognised.³

if the funds had been duly invested, leaving sufficient sums on deposit to meet occasional requirements, there would have been on 26th January 1894 a return of interest of £881, 0s. 1d. more than the trustees had actually drawn on the bank deposits at that date. That is to say, that that amount would have been gained to the estate. The correctness of that state has not been challenged, and it, with the evidence of Mr Robertson and Mr Millar, affords the only proof before me on the point. There appear to be no reported cases as to the liability of trustees who have simply lodged their money in bank to account for interest at the rates procurable on proper trust investments. There have been cases where trustees have been held liable for money allowed to remain in bank, and lost through the failure of the bank—*Cann v. Cann*, 33 Weekly Reports, p. 40; Lewin on Trusts, 9th ed. 315. Such cases stand on a different principle. It is, however, a settled rule that trustees who fail to invest the trust-estate shall be charged with interest at a rate not below 4 per cent—*Jones v. Foxall*, 1852, 15 Beav. 388; *Williams v. Powell*, 1852, 15 Beav. 461; Lewin on Trusts, pp. 315, 326; *McLaren on Wills*, sec. 2254. I think this rule equally applicable where the trustees have without good reason allowed the trust funds to remain on deposit-receipt. The rule as to the duties of trustees is that they are bound to manage the trust-estate with the care and prudence with which reasonable men manage their own affairs; and certainly no one managing his affairs with ordinary prudence, would allow his capital to lie in bank on deposit-receipt. I think that the rule applicable to funds which have not been invested at all is applicable in principle to the case of trust funds left, without excuse, permanently in bank. The defenders appeal to the clause of indemnity, which is no doubt wide and liberal, but still does not differ materially from the usual clause of indemnity in trust-deeds. But I think they are not in a position to avail themselves of that clause. Their neglect of the trust appears proved. There seems to have been no meeting of the trustees at all after 1880. It does not appear that they ever considered the question of investments. They left the management entirely in the hands of their factor and co-trustee, who paid no more attention to this question than they did. In these circumstances, I think that they cannot be protected by the clause of indemnity. It is, of course, always to be much regretted when gratuitous trustees are made to answer for the mismanagement of the estate, but in this case the result seems unavoidable, and I am of opinion that on this point the pursuers must succeed. . . ."

¹ *Pearson v. Houston's Trustees*, Jan. 29, 1868, 6 Macph. 286, 40 Scot. Jur. 156.

² *Carruthers v. Hall*, Nov. 25, 1830, 9 S. 66.

³ *Donaldson v. Findlay*, March 3, 1860, 22 D. 937, 32 Scot. Jur. 398; *Cochrane v. Black*, Feb. 1, 1855, 17 D. 321, 27 Scot. Jur. 139.

This was an objection of importance. The trustees had lodged a joint defence because they had the same interest as trustees to produce the sum presently in their hands, but it did not follow that their interests as individuals were identical. Their cases might be entirely separate. If a trustee had been assumed subsequent to the alleged acts of negligence it would be unjust to subject him to personal liability under a general summons. The various items of charge might raise questions of varying liability, to cover which the trustees must be called individually. When sued as a body they were only bound to account for what had actually come into their hands, and not for what might have come. (2) In point of fact, the defenders had invested the money by depositing it in bank. It was a loan to the bank which the receiver acknowledged by an obligation to repay the principal and interest thereon. It was an investment on the highest form of security, and the capital was realisable at once. In the peculiar circumstances of this trust this was a desirable feature. (3) Even if such deposit could not be regarded as an investment, the defenders were protected from liability under this head by the indemnity clause. Assuming omission to invest, or error of judgment on their part, they were specially protected against such. The pursuers relied on cases where trustees had not escaped liability in spite of the existence of an indemnity clause, but in all of these part of the capital had been lost. There were four categories under which trustees had been found liable—1. For bad investments; 2, neglect to supervise agents; 3, keeping trust funds in their own hands; 4, where no investment had been made, *e.g.*, where funds had been kept on current account. But there was no instance in which they had been held liable for the difference between a good investment and one which would have yielded a larger return. The instances cited by the pursuers were plain cases of *culpa lata*. In *Carruthers v. Carruthers*¹ the trustees had committed a breach of a distinct direction of the truster. It was doubtful if they would have been liable at common law. In *Seton*² and *Rae v. Meek*³ the trustees had been guilty of gross negligence. All these cases occupied a different region from the present. The defenders could not be convicted of *culpa lata*. They had disobeyed no direction, and they had preserved the capital entire. The point of the accusation amounted to this, that whereas they had earned 2½ per cent, they might have earned 2¾ per cent if they had invested in consols. In such circumstances, it was irrelevant to allege that the defenders had not met to discuss investments. They had been guided by the defender Watson, whose position and experience were sufficient guarantees for the course taken, and they had acted prudently in doing so. (4) Assuming liability, 4 per cent was too high a rate of interest. The defenders were gratuitous trustees, and were entitled to have liability calculated upon the lowest rate of recognised trust investment. 3 per cent had been held a reasonable rate,⁴ and in that case the trustees had improperly paid away certain of the trust funds. It was thus *a fortiori* of the present. (5) In any case, the Lord Ordinary's judgment must be

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Trustees.¹ *Carruthers v. Carruthers*, July 13, 1896, 23 R. (H. L.) 51.² *Seton v. Dawson*, Dec. 18, 1841, 4 D. 310, 14 Scot. Jur. 115.³ *Rae v. Meek*, July 19, 1888, 15 R. 1033.⁴ *Heritable Securities Investment Association, Limited, v. Miller's Trustees*, Dec. 17, 1892, 20 R. 675.

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restricted. He found that the defenders should have invested in heritable securities. This was too narrow. Further, his judgment applied to the whole estate and all the beneficiaries, whereas the action applied only to one-third of the estate, and the trustees could state a different defence against the other beneficiaries who were contented with the investment, and had docketed the accounts.

Argued for the pursuers;—(1) The conclusions were directed against the defenders as trustees, because that was the only character in which they were responsible to the pursuers. The question of liability for larger interest arose fairly in an action of accounting. The object of the action was to ascertain the balance due. That was impossible without solving the question of liability for a larger balance than the defenders offered. If the defenders' argument were sound then even in a case of embezzlement trustees would escape liability unless there were personal conclusions against them. But any question of personal liability arising in an accounting might competently be decided,¹ and in that case there were no personal conclusions. When trustees had held funds for years, interest thereon was a part of the estate for which they must account. [LORD TRAYNER.—The question was, where trustees had intromitted with funds, whether reasonable commercial profits were due by them.] There was authority in point.² Where trustees produce accounts, even though these are correct, they will not be discharged unless the Court fully approves of their course of dealing.³ (2) To lodge money on deposit-receipt was not investment. It ought to have been only a temporary deposit till investment was made. There was no contract to pay interest on the deposit, and the bank might have altered or ended interest altogether. Although the capital was thus kept safe no prudent man would have been content with such investment.⁴ Assuming it was an investment, it was only on personal security, and as such was not an investment under the Trusts Acts. (3) The indemnity clause afforded no protection to trustees who had violated a duty undertaken. Trustees must keep a *via media*. They might not select speculative investments, but they might not altogether fail to invest. Their duty was to discover a reasonable investment. Here they never had applied their minds to the question of investment, and although the terms of the clause seemed to be grammatically wide enough to secure them, the construction by the Court of such clauses was that although they conferred a certain immunity upon trustees who acted honestly, they did not protect trustees who stood by and did not act at all.⁵ (4) Where there had been violation of duty the Court would not allow the lowest rate of interest on the highest class of trust investment, but a rate of interest obtainable from a fair and reasonable investment. At anyrate after 1884 there was a very large field, and 4 per cent could easily and safely have been got. The short result of the cases appeared to be,—1. Where trustees kept money in their own hands they were liable for 4 per cent.⁶ 2. If they used money in their own business, they were

¹ Cochrane v. Black, Feb. 1, 1855, 17 D. 321, 27 Scot. Jur. 139.

² Donaldson v. Finlay, Bannatyne, & Co., March 3, 1860, 22 D. 937, 32 Scot. Jur. 398.

³ Forman v. Burns, Feb. 2, 1853, 15 D. 362, 25 Scot. Jur. 221, 3 Stuart, 194.

⁴ Kennedy v. Kennedy, Dec. 9, 1884, 12 R. 275.

⁵ Knox v. Mackinnon, Aug. 7, 1888, 15 R. (H. L.) 83.

⁶ Jones v. Foxall, 1852, 15 Beavan, 392, per Romilly, M. R.

liable for 5 per cent compound interest. 3. If *in mora* in paying No. 43; beneficiaries they were liable for 5 per cent interest.¹

At advising.—

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LORD JUSTICE-CLERK.—The question now before us is whether the trustees are liable to bring into the trust accounting a return for funds in their hands greater than the interest on deposit-receipt with which they debit themselves. I do not consider it necessary to say anything upon the argument addressed to us to the effect that the trustees being only called as such, the pursuer cannot maintain the case against him. The question now before us is truly one of the balance to be brought out in the trust accounts, on a true accounting. Are they liable, as I have said, to bring into the accounting what are the proper profits of sums in their hands? I am of opinion that the trustees are so liable. Trustees holding trust funds should invest them so as to yield an investment return. I cannot hold that they so invest them by placing them on deposit-receipt with a bank. It is true that many private individuals often keep large sums on deposit-receipt for long periods, but this cannot be called an investment in the usual sense of that term. There is no stipulated return. The interest to be paid may fluctuate at the will of the holders of the money, and it is never equal to the amount which ordinary and recognised investment yields. But had the trustees really addressed their minds to the question of investment and given it consideration, and resolved to keep the trust funds on deposit-receipt, there would have been a great deal to say for the view that if they were wrong it was an omission from error of judgment, and that they might plausibly appeal to the indemnity clause. I do not say that would have exonerated them, but at least they would have shewn intention to do their duty. But here they did not as trustees exercise their judgment. They just let matters slide for twenty years, without giving their duty any consideration. I must therefore hold that they were in breach of the duty they had undertaken in accepting the trust to manage it for the beneficiaries so as to make the capital yield a return from investment.

This being so, the question is, what in the circumstances must be held to be the return that with such management they would have obtained. On this question I am unable to hold that their liability can be tested by merely taking the investment which yields the lowest rate of return, among those investments which were open to them, viz., consols, and ascertain how much consols have yielded for the period in question. I think the question must be decided by considering what they might have got consistently with sound trust management. The Lord Ordinary has fixed the amount at 4 per cent. That, as it appears to me, is too high for the period in question. It is distinctly higher than could have been obtained during the period on first-class heritable securities. And further, the trustees say with some force that (1) the expense of investment was saved; (2) they should be credited with time for making investments; and (3) that for five years at least they required to keep money in hand, as they had large payments to make in the way of advance to beneficiaries. I would suggest to your Lordships that the justice of the case would be met

¹ Ross v. Ross, June 16, 1896, 23 R. 802.

No. 43. by their being charged with 3 per cent interest for the whole period of the trust.

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It is of course only in a question with the present pursuer, and with a view to ascertaining what is payable to him as his share, that this question is decided at present. It will be open to the trustees, in any after question with other beneficiaries, to maintain any plea of bar they may have against them, based upon their knowledge and acquiescence in what was done.

LORD YOUNG.—This is a count and reckoning brought in 1894 against the testamentary trustees of a butcher in Fraserburgh who died in 1875. The pursuers are two of the beneficiaries in the trust. The defenders admit liability to account, and have lodged accounts and vouchers accordingly. The only question argued to us and which we have to consider is that which is raised by the seventh objection by the pursuers to the defenders' accounts. It is whether testamentary trustees who deposit trust money in bank are under any circumstances, or at least under those which occur here, liable to account for more interest than the money yielded at the bank deposit rates.

I think we may take judicial cognisance of the fact that the bank deposit rate of interest is periodically fixed and published by the public banks acting in concert, and that any reduction or rise is immediately announced.

The defenders' intromissions are specified in five accounts. No. 1 embraces the period from 1875 to 1880, No. 2 from 1880 to 1884, No. 3 from 1884 to 1886, No. 4 from 1886 to 1891, and No. 5 from 1891 to 1894. We must consider the question before us on the footing that the accounts are satisfactory, subject only to that question.

The highest amounts in bank on deposit during the period of the first account, was £4500, of the second, £4400, of the third, £3900, of the fourth, £1337, and of the fifth, £1300. It is admitted that the money was all along in perfect safety, and that the defenders have well accounted for it, together with the interest (bank deposit interest) received therefor.

The pursuers' seventh objection (the only one for consideration) is that the defenders ought "to have invested the trust funds, and if they had done so on good heritable securities interest at the average rate at the least of 4 per cent per annum could have been realised." Their case, of course, (and necessarily) is that by putting and keeping the trust money in bank to the extent which they did, instead of investing it on heritable (or other) security at a higher rate of interest than bank deposit rate, they violated or failed in their duty as trustees, and so are liable for the loss or damage thereby occasioned to the trust-estate.

As the bank accounts shew exactly the sums paid in and drawn out by the trustees, with the interest allowed on the balances and credited to them, and as there is no dispute on the subject, I presume that the Lord Ordinary when he allowed the pursuers a proof in support of their seventh objection intended that they should have an opportunity of proving that the sums deposited could have been invested more profitably to the estate. As the result of the proof the Lord Ordinary has found "that there was no difficulty in so investing the said funds," and that had the trustees so invested

them they would have received interest thereon exceeding by £881, 0s. 1d. the interest which they drew from the banks on the deposits. His Lordship is of opinion that a loan to a bank on deposit at the current rate of interest is not an investment, and that a trustee who thus deals with trust money acts unwarrantably and in breach of his trust, and incurs the same personal liability as a trustee who himself uses the trust money, referring in support of this view to cases in which it was held (1) that a trustee who allows trust money to remain in his business as a trader (in which the deceased truster had been a partner) is personally responsible for both principal and interest, and (2) that a trustee who puts trust money to the credit of his own private bank account incurs the like liability. I differ from the Lord Ordinary, and think the authorities which he cites are not in point, but deal with another and quite different matter. A trustee who himself uses trust money or puts it to his own credit in bank acts in breach of his trust, and is personally liable accordingly for the principal, plus interest at the rate commonly allowed against anyone who retains the money of another. To say that a trustee who deposits trust money in bank properly earmarked as a trust deposit thereby commits a breach of trust is, I think, quite unwarrantable.

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It has not been suggested that bank deposit is objectionable as investment for trust money because it is unsafe, the bank being known as of good repute. The objection is therefore confined to the rate of interest. But the rate varies according to the rise or fall in the market value of money. At what rate then or down to what rate is bank deposit a lawful investment for trust money, and when does it cease to be? Or, if there is no rule of trust law affording an answer to the questions so put, can we announce this as the rule of law—that trustees will be held to have performed or violated their trust duty in putting and having trust money on bank deposit according to the result of a proof at large on the question whether or not they could by their diligence have invested otherwise at a higher rate of interest? I have already said that in my opinion a bank deposit at the current rate of interest is an “investment,” and we certainly know that millions of pounds sterling are thus invested by quite reasonable and prudent people. But it is, I think, immaterial whether the term “investment” is applicable or not. It is safe and yields interest, and if the interest is as high or higher than an investment in consols would be, as it may be and certainly has been, could it be rationally maintained that the trustees were in duty bound to draw out the deposit and buy consols, the deposit not being an investment?

The Lord Ordinary is of opinion on the evidence that the trustees could have procured safe investments at two per cent more interest than the deposits yielded. Your Lordship in the chair thinks at only one per cent more. I am of opinion that the objection is on the face of it bad in law, and that the proof is quite out of place. The objection is confessedly unprecedented, and so certainly is the proof, as indeed proof on an unprecedented objection was most likely to be.

The Lord Ordinary notices the clause of indemnity in the trust-deed, which, he says, “is no doubt wide and liberal,” but thinks the defenders cannot avail themselves of it because “there seems to have been no meeting

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of the trustees at all after 1880," and because "it does not appear that they ever considered the question of investments." No reason has been pointed out why there should have been a meeting of the trustees after 1880. Nor does it occur to me that the question before us would have been affected had the trustees held a meeting, or any number of meetings, at which they formally directed Mr Watson, the only man of business of the three, to do exactly as he did, that is to say, to put and keep the unspent trust money upon bank deposit. If that was misconduct inferring liability in damages it does not seem to me that its character would have been changed by meetings and resolutions. But I think it only right to add that irrespective of the indemnity clause my opinion is adverse to the pursuers.

I have characterised the liability which the Lord Ordinary has by his interlocutor imposed on the defenders as liability in damages. It can be nothing else, for the whole trust money, principal and interest, has been ingathered, accounted for, and made forthcoming. No ground for a claim of damages has, in my opinion, been proved or even averred. With respect to the defenders Park and Ritchie, I see no ground for any reflection on their conduct. They were, I think, warranted in leaving the deposited money in the charge of Mr Watson, who was in fact, and I assume to their knowledge, qualified by integrity and business good sense to be entrusted with the duty. He in fact performed it with uprightness and safety, and without complaint from anyone interested (and there were several) till this action was brought. With respect to Mr Watson himself, I appreciate what he says in his evidence (which is really more of an argumentative discussion between him and the examining counsel than evidence of facts) otherwise than the Lord Ordinary seems to have done, and I am not prepared judicially to censure his conduct, although it may be true that had he put the matter in the hands of a professional accountant like Mr Robertson he might have got more interest than he did. To hold, upon any facts proved or even averred, that he subjected himself and his co-trustees in damages for breach of trust is what I am not prepared to concur with the Lord Ordinary in doing.

LORD TRAYNER.—I think the question as to the liability of the defenders for interest on the trust funds in their hands may competently be inquired into and determined in this action. The purpose of the action is the ascertainment of the balance, on a fair accounting, which the defenders as trustees are owing to the pursuers. Such a balance cannot be struck without debiting the defenders with all sums with which as trustees they are bound to debit themselves, and it does not appear to me to be material whether such debit arises from funds once in their hands having been lost, or funds not recovered which should have been recovered, or not received which should have been received. The funds immediately in question are of the latter class. The defenders are sought to be made liable,—that is, debited in their accounts,—with interest which would have accrued on the trust funds had these funds been properly treated, and which has not accrued or been earned through the neglect or fault of the defenders in the course of their management. Whether the defenders are liable for such

interest in the circumstances of this case, is the main question. I am of opinion with the Lord Ordinary that they are. The defenders were bound to deal with the trust funds in the same way as a man of ordinary prudence would deal with his own; and I cannot think that a man of ordinary prudence would leave his fortune, or a very large part of it, lying in bank on deposit-receipt for a period of about twenty years. He would certainly seek some investment which would yield a higher return than bank deposit rate. I think the trustees here neglected their duty. It was not a mere omission in management, it was a total neglect of a duty incumbent upon them, to the direct injury of the trust-estate under their charge.

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I am not satisfied, however, that the defenders could easily have found first-class investments yielding 4 per cent for the whole period of their trust management. I think if the defenders are found liable for 3 per cent that that would represent a very fair return to the beneficiaries. In coming to this conclusion I have been partly influenced by two considerations, first, that some expense would have been occasioned to the trust by the investment of the trust funds which the trust-estate has not actually been put to; and second, that for some part of the period of administration part of the trust funds might, and probably would, have remained in bank while investments or renewals of investments were being sought.

LORD MONCREIFF.—I am of opinion that to leave money in bank on deposit-receipt is not a proper permanent investment for trust funds. It is an excellent temporary use to make of them pending selection of a permanent investment. There might even be circumstances which might warrant trustees if they applied their minds to the matter in leaving trust funds on deposit-receipt for a considerable period. If, for instance, it were necessary for the purposes of the trust frequently to uplift the funds, or if in the state of the market there were serious difficulty in getting safe permanent investments. Evidence that the trustees had honestly applied their minds to the matter might in such a case be held to free them from personal liability, although it might be thought that they had been unduly cautious.

But in the present case I think it is proved that during the whole currency of the trust the trustees did not apply their minds to the investment of the trust funds. They were bound from time to time to consider the question of investment with a view to getting for the beneficiaries as large a return as they could consistently with the safety of the capital. It is proved that they totally neglected this duty; and although it is proved that during most of the time safe investments yielding 4 and 4½ per cent could easily have been obtained, they allowed the money to remain for about twenty years on deposit-receipt. This, in my opinion, was default, not mere omission.

The only remaining question is as to the rate of interest with which they shall be debited. In charging them with only 3 per cent I think we shall impose a very moderate penalty upon them. The evidence shews that a considerably larger return than 3 per cent could have been obtained; and although an investment in consols could not have been objected to, if it had been made, as no proper investment was made we are not bound to take the lowest allowable investment as the measure of the trustees' liability. But

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No. 43. the amount of interest to be charged is a matter in the discretion of the Court, and as during the first five years of the trust there may have been some excuse for leaving the money on deposit-receipt, it may be sufficient to charge the trustees with 3 per cent over the whole period of the trust.

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Decree in favour of the pursuers will be limited to their own interest in the trust funds.

THE COURT pronounced this interlocutor:—"Recall the second, fourth, and fifth findings in the interlocutor reclaimed against, and in lieu thereof find (1) that the trustees having failed to invest the funds of the trust-estate, a loss has been incurred to the trust-estate of £353, 17s. 11d. as at 1st January 1894 through such failure; and (2) that in a question with the pursuers the defenders are bound in their trust accounts to debit themselves with said sums: *Quoad ultra* adhere to said interlocutor, and remit to the Lord Ordinary to proceed."

WINCHESTER & NICOLSON, S.S.O.—GILL & PRINGLE, W.S.—Agents.

No. 44. DAVID WILSON, Pursuer (Appellant).—*Watt—Horne.*
DONALD M'KELLAR AND MRS SARAH M'KELLAR, Defenders
(Respondents).—*M'Lennan.*

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Poinding—Unlawful intromission with poidned effects—"Summary complaint" to Sheriff—Concurrence of Procurator-fiscal—Personal Diligence Act, 1838 (1 and 2 Vict. cap. 114), sec. 30.—Held that the imprisonment provided by the Personal Diligence Act, 1838, sec. 30, is not in modum pœnæ, but only the usual means of enforcing an order of Court ad factum prestandum, and that a complaint to the Sheriff under this section is a civil process, and does not require the concurrence of the Procurator-fiscal.

2D DIVISION.
Sheriff of
Argyllshire.

DAVID WILSON, grain-merchant, Greenock, presented this petition in the Sheriff Court of Argyllshire at Dunoon against Donald M'Kellar, baker, Woodburn Place, Dunoon, and Sarah M'Kellar, his wife, and prayed the Court "to ordain the defenders, jointly and severally or severally, to restore to the premises at Woodburn Place, Kirn, the following articles, viz., a brown horse of the appraised value of £8; a set of van harness, &c., the appraised value of the whole, including the horse, being £17, all belonging to the said defender Donald M'Kellar, and in the event of the said defenders failing to restore the said articles to the said premises within such period as the Court shall appoint, to grant warrant to officers of Court to apprehend the defenders and commit them to the prison of , therein to be detained until they restore the said effects, or pay the sum of £34 sterling to the pursuer, and to find the defenders liable in expenses."*

The pursuer averred that on 12th November 1895, he obtained a decree against Donald M'Kellar for £91, 10s., with interest from 2d November 1895. Upon 13th March 1896, M'Kellar was charged upon the decree to make payment of £91, 10s., with interest thereon,

* The Personal Diligence Act, 1838 (1 and 2 Vict. cap. 114), sec. 30, enacts that "if any person shall unlawfully intromit with or carry off the poidned effects, he shall be liable on summary complaint to the Sheriff of the county where the effects were poidned, or where he is domiciled, to be imprisoned until he restore the effects or pay double the appraised value."

but under deduction of £19, 8s. 11d. paid to account, within seven days from the date of the said charge, under pain of pointing. No. 44.

Following upon the charge the articles mentioned in the prayer were pointed in the defenders' premises, and the pursuer obtained a warrant for their sale, which was served personally on M'Kellar, but when the warrant came to be executed, it was found that the pointed effects had been sold by Mrs M'Kellar with the knowledge and consent of her husband. Dec. 11, 1896.
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The pursuer pleaded;—(1) The defenders having in breach of the pursuer's pointing unlawfully sold and disposed of the articles therein embraced, the pursuer is entitled to have the defenders ordained to restore the same or to pay him double the appraised value. (2) The defenders having unlawfully intromitted with the effects pointed by the pursuer, decree should be granted as craved.

The defenders pleaded;—(2) The action is incompetent in respect that the concurrence of the Procurator-fiscal has not been obtained.

On 7th August 1896 the Sheriff-substitute (Martin) repelled the defenders' second plea in law, and allowed a proof.

On appeal the Sheriff (Wallace), on 20th September 1896, recalled this interlocutor, sustained this plea in law, and dismissed the action as incompetent.*

The pursuer appealed, and argued;—It was said that in view of the penal consequences attaching to such a complaint the concurrence of the Procurator-fiscal was necessary. This was a mistake, as he had no concern with the application. He was an officer of the Crown, and it was his duty to maintain the interests of the fisc, but in this case there was no fine which he could collect for the Crown. The imprisonment craved was not a punishment, but a compulsitor to ensure obedience to the order to restore the effects removed. The defender could prevent imprisonment, or even if imprisoned could end it at any moment by restoring the articles.¹ It was enough that the statute did not require the concurrence of the Procurator-fiscal. The Sheriff admitted this, and proceeded entirely on an alleged practice. The Summary Procedure (Scotland) Act, 1864, Schedule A, provided a form of complaint for conviction under the Act, and for imprison-

* "NOTE.— . . . As regards the second plea that the action is incompetent without the concurrence of the Procurator-fiscal, I have delayed giving judgment until I had an opportunity of ascertaining the practice in other Sheriff Courts. The result of my inquiry is that I find it to be the practice in the Sheriff Courts of Edinburgh, Glasgow, and Aberdeen, to obtain the concurrence of the Procurator-fiscal in petitions for breach of pointing, and I am not prepared to depart from this general practice. The Personal Diligence Act, section 30, under which the present application is made concluding for imprisonment until the pointed effects are restored, or payment made of double the appraised value, is silent as to whether the petition is to be brought with or without the concurrence of the Procurator-fiscal, and I had an able argument to the effect that breach of pointing is distinguishable from breach of interdict, in which latter case it is, I think, undoubted that the consent of the Procurator-fiscal is necessary where imprisonment is craved. . . . There is great force in the argument, but having regard to what appears to be the general practice and the penal nature of the conclusions of the petition, I am unable to see my way to sustain the competency of the proceedings without the concurrence of the public prosecutor. . . ."

¹ *Dickson v. Bryan*, May 14, 1889, 16 R. 673; *Kennedy v. Cadenhead*, Dec. 24, 1867, 6 Macph. 179.

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ment and forfeiture, which is competent to a private person without the concurrence of the Fiscal. But this was not a suit for a penalty, but for restoration of property. The mere fact of a conclusion for imprisonment did not make the process criminal. At common law, if goods were illegally removed the Court might order restoration, and on failure might imprison for contempt of Court. It was not necessary for the Fiscal to concur in such a process.

Argued for the defenders;—The demand for imprisonment made the application penal, and the Procurator-fiscal must concur. So in breach of interdict, where *ex hypothesi* the Court has the whole matter under its purview, such concurrence is invariable. The Summary Procedure (Scotland) Act, 1864, section 3, subsection 2, applied, and anything in the nature of a summary complaint must be brought in the form provided by the Act; and in such summary complaints the concurrence of the Procurator-fiscal was always required. [LORD TRAYNER.—These are for penalties incurred, but have we not here a crave for a penalty in case of failure to perform?] It was enough that imprisonment might follow. Cases of breach of interdict were analogous. They were highly penal, and the concurrence of the public prosecutor was necessary.¹

At advising,—

LORD JUSTICE-CLERK.—The Sheriff states that he proceeded on what he has ascertained to be the practice in the Sheriff Courts of Edinburgh, Glasgow, and Aberdeen. There may be such a practice, and if so, I suppose it has arisen from the fact that process involving imprisonment requires in certain events the concurrence of the Procurator-fiscal, and it has probably been assumed that whenever imprisonment is concluded for this concurrence is necessary. As regards the Procurator-fiscal, it is probable that in these cases the concurrence of that official was given as a matter of course, without consideration being given to the question whether it was necessary or not.

Be that as it may, in this case it is necessary to look at the form of process, and it is clear that it is not presented to obtain the punishment of the defender for a past offence, but the whole object of the petition is to have the defender ordained to perform certain acts, and if he fails to obey, to have imprisonment ordered as a compulsitor to the order pronounced. But this prayer for imprisonment is only an invocation of the power inherent in every civil Court to ordain performance of acts within its jurisdiction, and in default to commit the defaulter to prison. A criminal prosecution is of an entirely different nature. It relates to an offence which is past and proceeds *in modum pœnas* for the punishment of the offender, and “to deter others from committing the like crimes in all time coming,” as it was formerly expressed in indictments. Here a private individual complains to the Sheriff that goods which had been poinded to answer for a debt due to him have been removed from his reach by the owner, and he calls upon the Court to ordain the defender to restore the goods, and in default to commit him to prison until he obeys the order or pays a sum equivalent to twice the value of the goods removed by him.

¹ Duke of Northumberland v. Harris, Feb. 23, 1832, 10 S. 366; Usher v. Magistrates of Edinburgh, March 7, 1839, 1 D. 639.

So far as we have heard, there appears to be no authority for the view that the concurrence of the Procurator-fiscal is necessary. It is quite true that in the statute the words "summary complaint" are used, but there is no authority for the statement that these words are so appropriated to a criminal complaint for punishment of an offence that their use alone is sufficient to indicate a process of this character. No. 44.
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On the whole matter I am clear that the Sheriff has erred in sustaining the second plea in law for the defenders.

LORD YOUNG.—I am of the same opinion. I do not think it necessary in this very clear case to say more than that the judgment of the Sheriff-substitute is right and should be returned to.

LORD TRAYNER.—I concur in the view that the plea in law for the defenders which has been sustained by the Sheriff should be repelled.

In one sense this complaint is based upon the Personal Diligence Act. It seeks to vindicate by a decree the right conferred upon the pursuer by statute of demanding the restoration of the goods which were poinded for the debt due to him, but which were removed by the defenders. The application of the creditor is to be made by way of "summary complaint," but there is nothing in the statute to indicate that the complaint is to proceed at the instance of anyone except the private individual who has been injured, and who applies to the Court to have his wrong redressed. The Procurator-fiscal is not interested in the proceeding.

I quite appreciate the argument of Mr M'Lennan based upon the Summary Procedure Act, and if this were a proceeding *in modum pœnæ* it might require the concurrence of the Procurator-fiscal. But this is not a proceeding *in modum pœnæ*, but only an application to the Sheriff which asks that if the defender does not return the goods he shall be imprisoned. Imprisonment in such circumstances is not inflicted as a punishment, but is only the usual means adopted of enforcing an order *ad factum præstandum*. That such imprisonment is not punishment is clear from the consideration that the defender may at once put an end to it by restoring the goods. Indeed, he may prevent it altogether by restoration of the poinded goods before imprisonment has taken place. Accordingly it appears to me that this is a civil complaint before a civil Court, with which the Procurator-fiscal has nothing to do.

I think it is a mistake to suppose that this statute necessarily uses the term "summary complaint" in the sense in which it is employed in the Summary Jurisdiction Acts. A summary complaint such as this means rather a complaint before the Sheriff which, requiring despatch, is not required to submit to the delays which attend a case going through the ordinary roll. I think that is the sense in which it is used here.

LORD MONCRIEFF.—The only question submitted to us is whether the concurrence of the Procurator-fiscal to such an application is essential. In the Court below the defender raised no objection to the form of the application, and although in this Court he was given an opportunity of amending the record he declined to avail himself of it.

I agree with Lord Trayner that the words "summary complaint," as used

No. 44. in the 30th section of the Personal Diligence Act, 1838, simply mean a summary application for an order *ad factum præstandum* as distinguished from an ordinary action. They are used in the same sense in regard to removings in the 8th section of the Sheriff Court Act of 1838, and in the schedule of the Small Debt Act, 1837, the initial event in a civil cause is described as a "summons of complaint." The process is a civil and not a criminal process, the imprisonment concluded for being not *in modum pœnæ*, but in order to compel restoration.

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Even if such an application could be competently brought under the Summary Jurisdiction Acts, which may be doubted, it would still be a civil and not a criminal process, and might be sued by a private person without the concurrence of the Procurator-fiscal.

I agree with all your Lordships that the concurrence of the Procurator-fiscal is not essential, and that the judgment of the Sheriff should be recalled.

THE COURT pronounced the following interlocutor :—"Sustain the appeal and recall the interlocutor appealed against : Affirm the interlocutor of the Sheriff-substitute dated 7th August last, and remit the cause back to the Sheriff to proceed therein as accords."

A. C. D. VERT, S.S.C.—MILLER & MURRAY, S.S.C.—Agents.

No. 45. A B, Pursuer (Appellant).—*Lees—King.*
THE NORTHERN ACCIDENT INSURANCE COMPANY, LIMITED, Defenders
(Respondents).—*Salvesen—Cook.*

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Insurance—Insurance against accident—Blood-poisoning—Proof—Confidentiality—Medical practitioner refusing to disclose patient's name.—An insurance company granted a policy in favour of a medical practitioner whereby they agreed to compensate him if he should "sustain any bodily injury caused by violent, accidental, external, and visible means operating accidentally on the person of the insured, and capable of direct proof."

An indorsation bore that the policy "covered compensation for blood-poisoning which is the result of an accidental injury within the meaning of the policy."

In an action upon the policy for compensation, the pursuer alleged that, in operating on a patient on 14th August 1894, he accidentally inflicted a slight wound on his left hand, and that he then received syphilitic blood-poisoning.

The pursuer proved that, on 14th August, while performing a uterine operation, he scratched a finger on his left hand with the curette he was using, and that about twelve days after symptoms of syphilitic poisoning shewed themselves. Several medical witnesses deponed that they had no doubt that the place of inoculation was the wound on the finger.

The pursuer led no evidence to shew that the patient on whom he operated was syphilitic, other than his own testimony and the medical evidence that the place of inoculation was the wound. He deponed that his father had been treating the patient for syphilis, but he did not call him as a witness, and he refused to disclose the name of the patient to the defenders, on the ground that it would be a breach of professional duty for him to do so.

Held (diss. Lord Young) that the pursuer had failed to prove by the best available evidence that the patient was suffering from syphilis, and so capable of conveying the poison to him, and that the defenders were entitled to absolvitor.

In December 1894 A B, a doctor of medicine, raised an action in the Sheriff Court at Glasgow against the Northern Accident Insurance Company, Limited, for payment of the sum of £123, in respect of temporary total and partial disablement, under a policy of insurance held by him with the company, under which he was insured for twelve months from 27th April 1894.

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The policy provided for compensation being paid to him according to a specified scale, in the event of his sustaining "any bodily injury caused by violent, accidental, external, and visible means operating accidentally (*sic*) on the person of the insured, and capable of direct proof." The policy bore this indorsement,—“It is hereby declared that this policy covers compensation for blood-poisoning which is the result of an accidental injury within the meaning of the policy.”

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Condition 7 of the policy provided,—“No compensation shall be payable hereunder unless any medical or other agent of the company shall be allowed to examine the person of the insured after any alleged injury within the meaning of this policy, when and so often as the same may be reasonably required, nor unless such evidence as the directors may from time to time require shall, at the expense of the insured, be furnished within the space of seven days after demand in writing as to the statements contained in the within-mentioned proposal and declaration, or as to any alleged accident or injury on the ground of which a claim shall have been made against the company.”

The pursuer averred that, on 14th August 1894, while operating upon a private patient, he accidentally cut the middle finger of his left hand with the “curette” which he was using; that four or five days later the wound became inflamed; that this was followed by the appearance upon his body of marks indicative of the secondary symptoms of syphilis.

He also averred in cond. 10 that, as medical officer of the Magdalene Institutions at Stirling Road and Lochburn, he on 17th August examined at the former place a woman, Sarah C., whose name was given, who was suffering from syphilis, that “the disease was communicated to the pursuer by accidental inoculation through the wound on the middle finger of the left hand. This happened either at the operation at which the wound was inflicted or at the examination of the said” Sarah C., “between 14th and 19th August.”

The defenders pleaded;—(2) The pursuer having failed to produce, in terms of the policy, evidence of the alleged syphilitic poisoning through the alleged wound, the action is premature, and ought to be dismissed. (3) The pursuer’s illness not being the result of an accident in the sense of the policy, the defenders are entitled to absolvitor.

The following was the import of the evidence led at a proof:—

On 14th August 1894 the pursuer while performing a uterine operation on a private patient accidentally inflicted a slight scratch on the back of the middle finger of his left hand. Dr Dunlop was present at the operation for the purpose of administering chloroform, and confirmed the pursuer’s evidence on this point.

On 18th August a medical friend, Dr Dalziel, noticed a small inflamed sore about the size of a split pea on the pursuer’s finger, and said he should attend to it. It had then no characteristics of syphilis. About the 26th August the pursuer called on Dr Dalziel, who deponed that it had then assumed the characteristics of a primary syphilitic sore, and

No. 45. he asked Dr Fullerton to see it, and that he agreed it was very like a hard chancre. He did not then tell the pursuer his opinion, as he was not quite certain, but recommended him to go from home for a change. The pursuer deponed that he went to Dublin on 1st September, and when there consulted surgeons who pronounced the sore a primary chancre, and that a rash which had broken out over his body was a secondary rash. "There was a slight sign of this rash when I arrived in Dublin, in fact there was a slight sign of it when I left Glasgow, about the end of August or 1st September, and it was very pronounced while in Dublin."

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The evidence bearing on the question as to time when the pursuer received the syphilitic poison was to the following effect: It was proved that the pursuer did not examine a syphilitic case in the Magdalene Hospital on 17th August, but on 23d August. It was suggested that the pursuer, who had looked at the books of the hospital for the date, had mistaken the figures 17 given as the girl's age for the date of the examination. The case was thus narrowed to the question whether the pursuer received the infection on 14th August.

The medical evidence shewed that if the pursuer received the infection at that date, the primary and secondary symptoms of syphilis shewed themselves at an unusually early date. Some of the medical witnesses were of opinion that a hard chancre might be developed within eight days of infection, and that secondary symptoms might appear at the same time. Other medical witnesses said that the shortest time recognised for the former was eighteen days, and the ordinary time from three to five weeks, and that the ordinary time between the primary and the secondary symptoms was six weeks.

Dr Dalziel, Professor of Surgery in Anderson's College, Glasgow, gave the following evidence:—" (Q.) Can you say by what channel the disease was communicated to him? (A.) From the finger. I have no doubt whatever about that. My reasons for that are the characteristics of the sore as seen on the finger, and from the sequel and the secondary symptoms. At the end of August there was no doubt whatever that the sore was a typical hard chancre. (Q.) And the inoculation must have been at that point? (A.) It must have been at that point. I examined the pursuer afterwards to see if the disease had been contracted in any other way. There was no evidence whatever of there being or ever having been any syphilitic sore on any other part of his body. It was impossible there could be while this sore was on the left hand, so that the examination was quite unnecessary—just a matter of form. . . . Cross.—The shortest period [of development] I know of is eight days. That is not a case recorded in print; it is a case in my own experience. (Q.) And how could you make certain of the date? (A.) From the date of infection. (Q.) May there not have been more than one? (A.) There is always room for doubt. It is possible that patients only mention the last opportunity although there may have been earlier ones, so that we can never be quite sure that eight days is the exact period."

Dr Murdoch Cameron, Professor of Midwifery in the University of Glasgow, deponed,—“I know that pursuer is suffering from syphilis. I have seen the sore on his finger. I think there is no question but that is the initial sore or place of inoculation.”

Dr Newman, Surgeon to the Royal Infirmary, Glasgow, deponed that he crossed to Ireland in the same boat with the pursuer, and that

the pursuer shewed him his hand. "The pursuer was anxious about his hand, and I said to him at the time that I considered the sore to be a primary sore of true syphilis. The place of inoculation was on the finger. I could tell that from the sore without the least hesitation." No. 45.
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Dr Hector Cameron, Glasgow, gave evidence to the same effect.

The pursuer, in cross-examination, deponed;—"I say now it would be perfectly impossible to say from whom I got the inoculation. I think possibly I got it from the first case,—I mean from the operation on the 14th August. I think that is the most likely. (Q.) Can you say that, in your opinion as a medical practitioner, the patient was suffering from syphilis? (A.) I would say that I would treat that patient as if she was suffering from syphilis. [Question repeated.] (A.) At that time I would say no, but from the course of the symptoms afterwards I should say yes. . . . She had had several abortions during the last three years. In my opinion, that indicated syphilis. I should say I formed that opinion of the patient shortly after the operation when I commenced to develop this sore, added on to the previous history. I would not label her case one of syphilis purely and simply from the fact of her having abortions, but it is probable, and would make one think of it. (Q.) May we take it that but for the sore on your finger you would not have attributed her condition to syphilis? (A.) I should say now I would attribute it undoubtedly, because she has shewn it in another form, such as her hair falling out at present. (Q.) That is, independently of the injury to you, you are now of opinion she is syphilitic? (A.) She is on anti-syphilitic treatment, and I would not have put her on that treatment unless I believed she had it. The symptoms which indicate syphilis now are hard glands in the groin, and the hair coming out, and slight loss of voice. . . . She was on anti-syphilitic treatment, I think, about the end of October, and she is still continuing it, but prior to the operation she had been having it under my father's care. . . . I saw this patient first when I first started to practise in consultation with my father, in a confinement case. That is about eight years ago, and then for the next four years she was more or less my father's patient, and ultimately drifted under my care. I do not happen to know when my father first began giving her anti-syphilitic treatment. . . . (Q.) Give me the name and address of that patient? (A.) I have taken an oath at college not to divulge it. I decline to give the name and address of that patient, owing to the declaration and oath that I took at the University of Glasgow. On the 14th August I shewed the cut to Dr Dunlop and Mr Robertson at the moment of being cut."

Dr James Dunlop, Glasgow, deponed,—“I was assisting the pursuer at an operation in the middle of August last. I was chloroforming the patient for him. I do not remember the exact date; I took no note of it, it was a friendly transaction. I paid little or no attention to the operation, but there was one portion of it was curetting. . . . I remember distinctly his stopping when he was curetting, and holding up his hand and saying, ‘Dunlop, I have scratched my finger.’ . . .”

The defenders adduced as a witness a medical man in Glasgow, who stated that he was occasionally consulted in the pursuer's absence by one of his patients, whom he named, a respectable married woman with three or four children, that she told him that the pursuer performed an operation upon her in August 1894. That witness never

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Another medical witness, called by the defenders, deponed that in August 1894 he attended a lady of the same name, then residing at a town on the Clyde, which he named, but not permanently residing there. That she was under witness's care with a view to getting up her health before an operation to be performed by the pursuer. That he had no reason to suspect that she was suffering from syphilis in any of its forms, and that he did not make any special examination to find out what disease she was suffering from.

The pursuer declined to say whether the lady referred to by these witnesses was the person on whom he operated on 14th August 1894.

On 27th August 1895 the Sheriff-substitute (Balfour) pronounced this interlocutor :—" . . . Finds that, while performing an operation on 14th August 1894 on a lady in a private home, the pursuer cut his finger, and shortly thereafter a hard chancre appeared on the finger, followed by a rash on the body : Finds further that the pursuer was at the time largely engaged in the prosecution of his profession in obstetrical operations, and it is often impossible for a surgeon to specify distinctly the patient from whom he has received contamination : Finds that, although it has not been actually proved that the lady upon whom the pursuer was operating actually suffered from syphilis, the inoculation must have been received either from the patient in question, or from some other patient upon whom the pursuer was operating at the time : Finds that, when the rash appeared upon the pursuer's body, there was no other sore on his body save the hard chancre on his finger, and although the chancre and rash appeared somewhat early after the alleged inoculation, the medical evidence instructs that it is in accordance with experience for the chancre and rash to have followed from the inoculation on the 14th of August : Finds under the whole circumstances that, having regard to the character of the injuries, and to the kind of proof by which inoculation can be established, the pursuer has proved that the hard chancre and rash arose from external means operating 'accidentally' on the pursuer's person : Finds the pursuer entitled to the sum of £78," &c.

On appeal, the Sheriff (Berry), on 25th April 1896, pronounced this interlocutor :—" . . . Finds that the pursuer, in the course of performing an operation on 14th August 1894, cut his finger, and that about the end of the same month he shewed symptoms of syphilitic blood-poisoning, which he avers was communicated through the wound : Finds it not proved that the said poisoning was so communicated, or was the result of an accidental injury within the meaning of the policy ; therefore recalls the interlocutor appealed against : Assoilzies the defenders from the conclusions of the action."

The pursuer appealed, and argued ;—It was not said that he was affected with syphilis before August 14th. He had proved that he had accidentally cut himself on that day ; that a sore appeared at the place where the finger was injured, which, in the opinion of his brethren who examined it, was caused by the inoculation of syphilis, and that the subsequent symptoms were the ordinary symptoms of the disease. In stating that to the best of his belief he was inoculated with the disease from the patient on whom he operated on the 14th, he was giving the most probable and reasonable account which could be in such a case expected of him. In short, his evidence was

sufficient to entitle him to claim under the policy.¹ It was unreasonable to expect him to disclose the name of the patient on whom he operated. The rules of professional etiquette prevented his doing so, and had he done so he would have exposed himself to an action of damages by the lady. The defenders must be held to have contracted with him in the knowledge that the rule was one which no medical man could be called upon to disregard in any question arising out of the contract.

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Argued for the defenders;—The evidence led by the pursuer as to his having been inoculated with the disease during the operation on 14th August was insufficient to entitle him to claim under the policy. All he had done was to suggest a series of probabilities upon which he asked the Court to pronounce findings in fact in his favour. There was much to weigh against these probabilities, *e.g.*, the rapid development of the disease, and the possibility of mistaking a cauterised wound for a chancre. Even assuming that the pursuer need not be called upon to furnish “direct proof,” he must give the best proof available, and this he withheld when he refused to examine or even name the patient herself. Without her evidence the defenders could not test the pursuer’s story.

The cause was taken to avizandum on 10th June. On 23d June it appeared in the Single Bills by order, and the Court recommended the pursuer to obtain the patient’s consent to be examined.

On 14th July the pursuer lodged a minute, stating that he was willing to divulge the patient’s name to medical men to be named in order that she might be examined, and on 15th July the cause was continued in order that the defenders’ consent might be obtained to a remit to examine the patient. On 17th July the defenders having intimated that they declined to give their consent to this course, the Court pronounced this interlocutor:—“Having heard parties on the minute for the pursuer, on the motion of the pursuer, allow him further proof, and appoint the same to proceed before Lord at such time and place as he may fix, and grant diligence against witnesses and havers accordingly.”

On 3d November the pursuer lodged a minute, in which he stated that the patient upon whom the operation of 14th August 1894 was performed, “has intimated that there has been some misunderstanding as to her consenting to medical examination, and that she declines to submit thereto,” and that he now craved the judgment of the Court upon the proof and argument already submitted.

At advising,—

LORD JUSTICE-CLERK.—This case is now before the Court for decision precisely as it stood when the debate closed. The pursuer in his latest minute has intimated that he so desires it to be disposed of. It is therefore in this position, that the pursuer has failed to give to the defenders the information who it was from whom he accidentally got blood-poisoning, so as to give rise to the present claim, and to afford them the opportunity of examining into the grounds of the claim.

I desire to say that, so far as I can judge, there is no reason to doubt the *bona fides* of the pursuer, and that in refusing to disclose his patient he

¹ Ballantine v. Employers Insurance Co. of Great Britain, Limited, Dec. 15, 1893, 21 R. 305.

No. 45. is acting on his belief of the honourable duty of secrecy which the rules of his profession lay down for him to observe. But while that is so, it has in my opinion the unfortunate result for him that he does not fulfil the obligation incumbent upon him as a pursuer to make good his claim by evidence according to the contract between him and the defenders. The evidence required—the best evidence available—is not furnished, and therefore I come to the conclusion that the Sheriff was right in finding that the pursuer has not proved his case, and that the defenders must be assoilzied.

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LORD YOUNG.—I do not think it is disputed that if the facts are as averred by the pursuer, and as found by the Sheriff-substitute, the pursuer is entitled to prevail. The only question is, whether the pursuer's averments are true in fact,—that is, whether the judgment of the Sheriff-substitute on the evidence, or that of the Sheriff, is the sounder judgment.

I agree with your Lordship's remark that there is no reason for doubting the honour and good faith of the pursuer, but if that is so, then I have much difficulty in doubting his truthfulness. I think that his statement is true, and reasonably supported by reliable evidence. His medical brethren who heard his account at the time as to how he became affected with the disease which they saw upon him are clear that his account is not only probable, and in accordance with the genesis of the disease and its appearance on his body, but that no other reasonably probable account occurred to them then, or does so now; and indeed no other has been suggested, or can be suggested, without imputing to the pursuer falsehood and immorality without evidence or reason for suspicion. In fact the case presented for the defenders comes to this, that, however candid and credible the pursuer's statements may be, and however much they may be believed and supported by evidence, and although there may be no other way of accounting for his condition than what he alleges, unless you impute immoral conduct and perjury to him, his claim must be rejected, unless he is prepared to do what would confessedly be dishonourable,—that is, to disclose the name of the patient from whom he received the infection. I agree again with your Lordship that his only honourable course was to refuse to do so. It would have been dishonourable, and possibly illegal, to disclose her name. He might have been subjected to a claim of damages for doing so. We have heard lately of a case in which very large damages were awarded for a violation of professional honour, not more flagrant.

It seems to me that we are dealing very hardly with the pursuer in rejecting as insufficient the evidence he has laid before us, unless accompanied by such dishonourable conduct as is demanded of him. On the other hand, I think there is no hardship on the insurance office in holding the case proved without it. Any insurance office, when insuring a medical man against the risk of blood-poisoning, must have contemplated that he could not give them such information. No honourable medical man would insure on such terms, and no honourable insurance company would insure him only upon condition of his being bound to make to them a dishonourable disclosure.

It is conceded that this dishonourable disclosure is all that is wanting to entitle the pursuer to our judgment.

I concur with the Sheriff-substitute, who saw and heard the witnesses,

that the case is satisfactorily proved without the unprofessional disclosure demanded of the pursuer; and assuming that it is, I am of opinion that the rule of professional etiquette (or honour) so often referred to, excludes any such prejudicial presumption as may occur when the best available evidence is withheld by the party on whom the *onus* lies.

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LORD TRAYNER.—The pursuer in May 1894 entered into the contract of insurance with the defenders, the terms and conditions of which are contained in the policy before us. Under that policy the pursuer now claims to be indemnified for loss and injury sustained by him from accidental blood-poisoning, and the question is whether the pursuer has established his claim, regard being had, of course, to the terms of the policy. I have found the determination of this question attended with considerable difficulty. The Sheriff and Sheriff-substitute have differed in opinion, and there is a difference of opinion among ourselves. I cannot say that my own opinion is expressed without hesitation or doubt. It is needless to recapitulate all the facts; what is necessary for the purposes of my opinion can be stated briefly. The pursuer performed an operation on the uterus of a patient on 14th August 1894, in the course of which he cut one of his fingers with the surgical instrument he was using. Four days later,—that is on 18th August,—there was an inflamed sore on the injured finger “about the size of a small split pea,” which Dr Dalziel (who so describes it) found on the 26th August to be a primary syphilitic sore. That was followed by the appearance on the pursuer’s body of marks indicative of secondary symptoms of syphilis, and there is no doubt that the pursuer was suffering from syphilis. He attributes this to accidental inoculation arising from his injured finger having come in contact with the syphilitic poison in the course of the operation I have referred to, or otherwise by his having come in contact with the poison while professionally examining a girl named Sarah C. on the 17th of August. I put the latter case out of view. I think that it is proved that the examination of this girl did not take place until the 23d August, and that the sore was then well developed on the pursuer’s finger. The sore, besides, which was seen by Dr Dalziel on the 18th August could not have been the result of contact with the poison on the 17th even if the pursuer was right in saying (I think he is mistaken) that he examined the girl on that day. The question is therefore narrowed down to this: Has the pursuer established that he was inoculated with the poison in the course of the operation performed on the 14th August? Now, I feel the full force of the argument addressed to us on behalf of the pursuer. He was not affected, so far as is known, with syphilis on 14th August before the operation that day performed. His finger was cut or scratched during the operation, and thus rendered him subject to inoculation if his patient was syphilitic. The sore appeared at the place of the injury on the finger, and it follows reasonably as an inference that that sore and the disease which it indicated were the result of inoculation received during that operation. The inference, I admit, is not unreasonable. But the defenders say that inference is not proof; that by the terms of the policy the pursuer can only recover for the consequences of an accident “capable of direct proof”; that if direct proof is not obtainable in cases of blood-

No. 45. poisoning at least the best proof obtainable must be given ; that such proof, namely, the evidence derivable from the patient herself has been deliberately withheld by the pursuer, although frequently demanded, and the name even of the patient withheld ; that there is no proof that that patient was affected with syphilis, and no presumption that she was ; that if she was not so affected she could not have communicated the disease to the pursuer ; and that, therefore, the pursuer has failed to afford the proof necessary to warrant his claim, namely, that the patient operated upon was, in fact, affected with syphilis, and consequently in a condition to communicate it.

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After repeated consideration of the proof and whole case, I have come to the conclusion, not without hesitation as I have said, and I rather think with some reluctance, that the defenders' argument is the stronger of the two. I think the pursuer cannot prove that he was inoculated with syphilis on 14th August as averred, unless he can shew that the patient he then operated on was syphilitic. That patient we have been informed is a respectable married woman with a family. I cannot pronounce a judgment in the pursuer's favour without affirming that that respectable woman was affected with syphilis. I do not see my way to do that. The refusal on the part of the pursuer to give the name of his patient is justified on the ground of professional etiquette. I do not say one word against that professional rule which the pursuer thinks himself bound to observe. But the defenders are not bound by it, and if professional rule prohibits the pursuer from doing what is necessary to ensure success in his action, the remark of the Sheriff appears a just one, that "it is he, and not the defenders, who should suffer." Without the disclosure of the patient's name, the defenders are unable to test the accuracy of the pursuer's averment. When they ask that they shall be put in a position enabling them to do so, I think they only ask what they are entitled to get.

Since the case was last before us, we have been asked by the pursuer to decide the case as it stood when the argument for the parties was concluded, and it is on that view of it that I have proceeded. I think the appeal should be dismissed and the judgment of the Sheriff affirmed.

LORD MONCREIFF.—With great reluctance I have, after repeated consideration, come to the conclusion that the pursuer has not proved his case. No one can read the evidence without at first being impressed with the probability that infection was communicated to the pursuer at the time and in the manner suggested by him. It is proved that upon 14th August 1894, he cut the middle finger of his left hand while performing an operation on a female patient ; that shortly afterwards (about 26th August) a sore appeared upon the wound (whether syphilitic or not is a matter of dispute) ; that about 31st August or 1st September secondary symptoms appeared ; and that on the pursuer subsequently tendering himself to the defenders' medical man for personal examination no trace of any other primary sore could be found on the body.

But when the evidence is examined difficulties appear. There may be a question whether, in order to recover under this policy, the blood-poisoning must be shewn to be coincident or simultaneous with the physical injury,

e.g., that it was caused by the dirty condition of the knife or other instrument, or by the condition of the blood of the patient operated on. But it is clear that it is material to know, if possible, the time and way at and in which inoculation took place, in order to ascertain its precise connection, near or remote, with the physical injury through which the virus was absorbed. Now the defenders suggest the possibility of two other ways in which inoculation might have taken place. In the first place there is medical evidence to the effect that secondary symptoms appeared at an abnormally short interval after 14th August; and that therefore the presumption is that inoculation took place before that date. They suggest that the appearance of the sore upon the finger may have been due to caustic. They further maintain that assuming that inoculation took place through the cut, this may have occurred not at the time of the operation, but through carelessness on the part of the pursuer on some subsequent occasion, or in some way as to which there is no evidence.

In these circumstances, the case for the pursuer being at least extremely narrow, it was incumbent upon the pursuer to give the defenders and the Court every available assistance to aid them in determining as to the truth of his statements, and the correctness of his conjecture. But this he has failed to do.

He refused to give the name of the patient on whom he operated on 14th August. It cannot be said that it was not legitimate for the defenders to test the accuracy of the pursuer's statements by inquiring into the circumstances attending the operation of 14th August. On the ground of professional etiquette the pursuer declined to disclose the name. The defenders' agents then, without prejudice to the defenders' right to demand the name, asked the pursuer to obtain from Drs James Dunlop and Robertson, who were present at the operation, their opinion whether the patient operated upon was suffering from such a disease as to inoculate the pursuer with syphilis. The answer was that Dr Dunlop could not state that the patient operated upon in his presence on 14th August was suffering from any constitutional disease which might have been conveyed to the pursuer by inoculation, "although from the history of the case he thinks this by no means improbable." Dr Dunlop is examined as a witness for the pursuer, but he is not asked a question as to the condition of the patient. Evidence is led for the defenders as to a female patient upon whom the pursuer operated in August 1894. Two medical men, the witnesses William Stewart and Robert Pollock, state that, so far as they knew, the lady, a respectable married woman with a family of three or four children, was not suffering from syphilis at that time or since. These witnesses are both cross-examined for the pursuer as to the patient's symptoms, with a view, apparently, of shewing that there were symptoms of syphilis. But when the pursuer is asked whether that lady was the patient upon whom he operated on 14th August, he declines even to answer that question.

The evidence which he gives as to the patient on whom he operated is, in the circumstances, very unsatisfactory. He says that previously to the operation his father had for some time treated the patient for syphilitic symptoms. As the Sheriff points out, it would have been of the last importance to the pursuer to examine his father on this matter, but he did

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No. 45. not do so ; and then there being thus, through his own reticence and failure to adduce available evidence, no means of testing his own evidence, the pursuer proceeds to say that after the operation he formed the opinion that the patient was suffering from syphilis, and gives various distinct reasons for his opinion.

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Now, in these circumstances, I think the pursuer has not furnished evidence which should have been forthcoming in order to verify his story. It is his misfortune that he is precluded by professional etiquette from disclosing the name of the patient, but it does not follow that the defenders must suffer on account of that. But apart from that, he might and should have adduced his father as a witness. He has not done so, and he has given no explanation of his failure to do so. Therefore, however probable I may think the pursuer's story, I feel constrained to agree in the very carefully considered opinion of the Sheriff, and hold the case not proved.

THE COURT pronounced this interlocutor :—" Dismiss the appeal : Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against : Therefore of new assoilzie the defenders from the conclusions of the action."

MITCHELL & BAXTER, W.S.—SIMPSON & MARWICK, W.S.—Agents.

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ALEXANDER AITKEN, Pursuer (Respondent).—*Morison*.

ROBERT FARQUHAR, Defender (Appellant).—*Glegg*.

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Aitken v.
Farquhar.

Process—Abandonment—Appeal for Jury Trial—Judicature Act, 1825 (6 Geo. IV. c. 120), secs. 10 and 40.—Where an action raised in a Sheriff Court has been removed to the Court of Session by appeal under the 40th section of the Judicature Act, 1825, it is competent for the pursuer to abandon the action in the form appropriate to abandonment under sec. 10 of that Act and Act of Sederunt, 11th July 1828, sec. 115, as if the case had originated in the Court of Session.

1st Division.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

ALEXANDER AITKEN raised an action of damages for alleged slander against Robert Farquhar in the Sheriff Court at Aberdeen.

The Sheriff-substitute having allowed proof, the defender appealed for jury trial under the 40th section of the Judicature Act, and thereafter the pursuer lodged a minute of abandonment, abandoning the action "in terms of the statute."

On the pursuer moving the Court to appoint the defender to lodge his account of expenses, the question was raised by the Court whether the abandonment should not have been under sec. 61 of the Act of Sederunt of 10th July 1839, which regulates the power of abandonment in Sheriff Court actions.

The pursuer maintained that the minute of abandonment was in proper form, in respect that an action appealed under sec. 40 of the Judicature Act could be dealt with as if it originated in the Court of Session.¹

The COURT pronounced the order craved.

ALEX. MORISON, S.S.C.—JOHN VEITCH, Solicitor—Agents.

¹ *Cochrane v. Ewing*, July 20, 1883, 10 R. 1279.

WILLIAM THOMSON, Pursuer (Reclaimer).—*W. Campbell—Cullen.* No. 47.
 WILLIAM THOMSON JUNIOR, AND OTHERS, Defenders (Respondents).—
Shaw—Orr.

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Lease—Agreement to transfer engineer's business with plant in consideration of annuity—Implied right to occupy premises—Rent—Summary removal.—In January 1894 A, an engineer, by written agreement assigned and transferred to B “the business of engineer presently carried on” by him in certain premises named which belonged to him, “and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises whether, fixed or unfixed.” B, on the other hand, agreed to pay to A an annuity of £250 during his life, A having a right to resume possession of the business in the event of his annuity remaining unpaid at any time for six months. It was further provided that B should not be entitled to sell the business or any part of the plant during A's lifetime.

Part of the plant consisted of heavy fixed machinery which could not be removed except at great expense and loss of time, and the business had been carried on in the same premises for upwards of twenty years.

A having brought an action of summary removal against B, *held* that, as in a question between A and B, the agreement imported a lease of the premises during A's life, the rent though not specifically stated being covered by the annuity, and the defender *assolviéd*.

On 22d January 1894 William Thomson, engineer, Glasgow, as ^{1st Division.} first party, entered into an agreement with his two sons, William Thomson junior and John Thomson, and his son-in-law, Charles Davidson, as second parties, which contained, *inter alia*, the following clauses:—“Whereas the first party has for a number of years carried on the business of an engineer at 57 Smith Street, Kinning Park, Glasgow, and whereas the first party has resolved to hand over said business and whole stock, funds, assets, rents, and goodwill thereof, and machinery and appliances used in connection therewith, to the second party on the terms and conditions after specified: Therefore the parties have agreed and do hereby agree as follows, *videlicet*:—(First) The first party hereby assigns and transfers, as at the date hereof, to the second party, equally among them, the said Charles Davidson as representing and for behoof of his said wife, Marion Stark Thomson or Davidson, the business of engineer presently carried on by the first party at 57 Smith Street aforesaid, whether in his own name or under the style or firm of William Thomson & Company, and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises, whether fixed or unfixed, belonging to the first party. (Second) The first party shall forthwith insert a notice in the *Gazette* . . . that he has transferred his business to the second party. The first party shall, however, remain as consulting engineer in connection with the business, at such salary as may be agreed upon from time to time, and the second party shall be bound to take the advice of the first party on all points connected with the practical management and development of said business . . . but the first party shall not be responsible in any way for the advice so given, and he shall only give such time and attention to such points as he may think proper. (Third) The second party bind and oblige themselves to pay the whole debts and obligations of the first party in connection with said business at the date hereof. . . . (Fourth) In respect of the assignation of said business and stock, funds, assets, rents, and good-

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will thereof, and machinery and appliances, the second party hereby bind and oblige themselves . . . to pay to the first party an annuity of £250 per annum during all the days and years of his life. . . . (Fifth) In the event of the said annuity remaining unpaid at any time for the period of six months, it shall be in the power and option of the first party, on giving one month's previous notice in writing . . . to enter into the possession and management of said business and stock, funds, assets, rents, and goodwill, and machinery and appliances, as if these presents had never been granted. . . . (Sixth) The second party shall not be at liberty to dispose, sell, or transfer said business, or any portion of the plant or stock and others, during the lifetime of the first party. . . ."

On the completion of the agreement, the second parties entered into possession of the premises, and carried on the business of engineers, under the name of William Thomson & Company.

At the date of the agreement, the title to the premises stood in name of William Thomson's wife, Mrs Isabella Thomson, the step-mother of the sons and daughter mentioned in the agreement, and her husband held a lease from her dated in 1883 for twenty years from that date. The agreement made no reference to this lease.

Disputes having arisen between the father and his sons, the present action was raised, on 3d June 1895, in the name of Mrs Thomson, against the second parties, concluding for decree ordaining them to remove summarily from the premises.

The defenders pleaded that the pursuer had no interest or title to sue, as the subjects had been conveyed to her husband,* and on 10th January 1896 he was sisted as pursuer in her room and place, and certain additional statements and pleas were added to the record.

The pursuer averred that the defenders had been called upon to remove from the premises, but they refused to do so, and continued to occupy them without any right or title.

He also averred,—“The defenders have failed to carry out the obligations incumbent upon them under the said agreement. They have not paid to the pursuer the stipulated annuity. Further, they have declined to consult the pursuer with reference to the business in terms of article 2 of the said agreement. They have even excluded him from the premises by force, and have refused to allow him to do any of the matters specified in the said article of the agreement. The defenders have also, with the view of defeating the pursuer's rights, refused to agree upon the amount of salary to be paid to him in terms of the said article of the agreement, and have paid nothing to the pursuer in name of salary since the date of the said agreement.”

The defenders stated,—“When the agreement above referred to between the said pursuer and the defenders was signed, he represented himself as proprietor of the buildings and whole subjects. He has now become heritable proprietor of the subjects. Since the date of said agreement, the defenders have been in possession of said pre-

* In February 1894 an action had been raised by the judicial factor on Mr and Mrs Thomson's marriage-contract trust-estate against Mr Thomson and his wife for declarator that the subjects in question belonged to the pursuer. Mr Thomson defended the action, and stated that he had purchased the subjects, and had made a donation of them to his wife, which he revoked. It was subsequently arranged, in November 1894, that Mrs Thomson should convey the subjects to her husband, and this was done in January 1896.

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mises, and have continued to carry on and develop the said engineering business. They have observed the whole conditions of the said agreement in reference to the said pursuer, and the latter has repeatedly intimated in writing to the defenders that he insisted on the fulfilment by defenders of its terms. The defenders have paid pursuer's debts and obligations, in terms of article 3 of the agreement, amounting to £183 or thereby. They have also paid to the pursuer, on account of his annuity, the sum of £297, 8s. 3d. or thereby, up to Whitsunday 1895. They have also uplifted and retained, with the knowledge of and without challenge from the pursuer, the rents payable by the parties who occupy part of the foresaid land and premises, namely, Messrs Muir & Houston and James Boag. The defenders, in the belief that they would continue to have undisturbed possession, have considerably increased the capital in said business since the date of the agreement, and they have spent considerable sums in keeping up and improving the stock, machinery, and plant. It was the intention and in the contemplation of all the parties that defenders should carry on the business in the said premises, where it has for a long time been established. These are suitable for the purposes of the business, which could not be transferred elsewhere, unless the defenders succeeded in securing a suitable site, and built new premises thereon, and in any case the expense and delay and loss of business involved in such a transference would be very serious, if not ruinous, to the defenders."

The pursuer pleaded;—(1) The defenders having no right or title to occupy the said subjects, the pursuer is entitled to decree in terms of the conclusions of the summons. (3) The defenders are not entitled to found upon the said agreement between them and the pursuer William Thomson, in respect that they have failed and refuse to perform the obligations incumbent upon them in terms of the said agreement.

The defenders pleaded;—(10) This action, at the instance of William Thomson senior, is against the good faith of the agreement between him and the defenders, and the actings of parties subsequent thereto. (11) The defenders are entitled, as in a question with the pursuer, William Thomson senior, to continue in occupancy of the said premises, and the present action at his instance is unfounded and untenable.

Proof was led. The import of the evidence sufficiently appears from the opinions of the Court and the Lord Ordinary.

On 14th July 1896 the Lord Ordinary (Stormonth-Darling) sustained the tenth plea in law for the defenders, and in respect thereof, assolizied them.*

* "OPINION.—This is an action of summary removing brought for the purpose of ejecting the defenders from certain workshops and offices in Smith Street, Kinning Park, Glasgow, which they have occupied since January 1894. When the action was raised, the formal title to the property stood in the name of Mrs Thomson, the defenders' stepmother; but, *pendente processu*, it passed to their father, who was therefore sisted in room of his wife, and is now the sole pursuer.

"The turning point of the case is a written agreement between the pursuer and the defenders, dated 2d January 1894, whereby the pursuer transferred to the defenders the business of an engineer, which, as the deed narrated, he had carried on for many years in these very premises. The transaction bore on the face of it to be a family arrangement, because the

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The pursuer reclaimed, and argued ;—(1) The pursuer was proprietor of the subjects, and was entitled to remove the defenders summarily, unless they were able to shew some title of possession. They had none. They suggested that the agreement was equivalent to a lease, but it was not. It was silent both as to rent and as to duration, and contained no term which conferred a right to occupy the heritable subjects. Besides (2) the defenders had themselves broken an important condition of the agreement; it was therefore no longer binding on the pursuer.

Argued for the defenders ;—(1) At the date of the agreement the pursuer was *de facto* proprietor of the subjects. Any defect in his title as such had now been cured. In any view he was not entitled, by acquiring a different interest in the subjects, to break his contract regarding them. The agreement implied a right to occupy the

transferees were not only his two sons, who are practical engineers, but his son-in-law, who is a rate collector, and was introduced into the business as representing his wife, the only other child of the pursuer's first marriage. The subjects transferred were 'the business of engineers, presently carried on by the first party at 57 Smith Street aforesaid, . . . and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises, whether fixed or unfixed, belonging to the first party.' In respect of this assignation, the defenders undertook to pay to the pursuer an annuity of £250 during his life. They also took over the whole debts and obligations of the business. There was a provision enabling the pursuer in the event of the annuity remaining unpaid for six months to enter into possession and management of all the subjects transferred; and the defenders were prohibited from disposing of the business or of any portion of the plant or stock during the pursuer's lifetime. There was also an ill-considered and unworkable stipulation to the effect that the pursuer was to remain as consulting engineer in connection with the business 'at such salary as might be agreed upon from time to time'; and that the defenders were to take his advice upon all points connected with the practical management of the business. These are the chief heads of the agreement, which certainly contains no express provision with regard to the business premises. The question is whether any such provision is implied, at all events to the effect of barring the pursuer from summarily ejecting his transferees. The question with him is thus essentially different from what it might have been with his wife.

"At the date of the agreement the pursuer was ostensibly tenant of the premises under a lease from his wife for twenty years from Whitsunday 1883 at a rent of £40. I say ostensibly, because he was to all intents and purposes proprietor. He had erected the buildings and the fixed machinery at his own cost; he had regularly paid the ground-annual, just as a proprietor would have done; and he had paid no rent to his wife. But on paper he was tenant merely. It followed from this that he could assign his right of occupancy down to Whitsunday 1903, validly enough so long as his wife did not object. It followed also that the machinery which he had erected and affixed to the soil had become a part of the heritable property belonging to his wife, subject only to his power of restoring its moveable character by removing it at or before the termination of the lease—(*Miller v. Muirhead*, 21 R. 658). The right to remove it was one which he could also assign, and he undoubtedly did so by assigning the fixed machinery itself. But the natural inference, as it seems to me, from his so assigning it, was that he did not intend the removal to take place until the end of the lease, and, if so, that he intended his assignees to remain in occupation of the premises till that period arrived.

"Another stipulation in the agreement which points strongly in the

premises,¹ and was equivalent to a lease. The duration was the pursuer's lifetime. The rent was included in the annuity. If effect were given to the pursuer's contention, then the agreement *quoad* the business would continue, but the occupancy of the business premises would be terminated. Such a result was extravagant. The fixed plant would have to be left, and the remaining assets would be practically valueless. It was obviously contrary to the intention of parties that the business should be carried on outwith the premises in Smith Street. It was not necessary to consider what the effect of the agreement would be in a question with a singular successor. (2) The defenders had duly implemented their part of the agreement.

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same direction is the assignation of 'rents.' The pursuer in his evidence was not at all candid about this, but it is clearly enough established what these rents were. They were small payments made by Muir and Houston and Boag in respect of their occupation of stores in the Smith Street premises. Previous to the agreement these were drawn by the pursuer; since the agreement they have been drawn by the defenders till the present question arose. If any meaning at all is to be given to the word 'rents,' it is one which necessarily, I think, implies that the defenders were to be middlemen in the occupation of the premises, and therefore in a position to draw the rents.

"Again, there is the assignation of 'goodwill.' I do not say that every assignation of goodwill implies a right to occupy the premises in which the business is conducted. But this business had been conducted there for nearly twenty years. It was a business according to the evidence requiring for its success a situation in that locality. It was a business also requiring heavy fixtures—a steam hammer and the like,—which could not be removed and re-erected except at a large expenditure of time and money. If the profits are only £400 a year, as the defenders say they are (and the pursuer says nothing to the contrary), out of which the pursuer himself was to receive £250, it seems out of the question to suppose that the parties intended that new premises might at any moment have either to be bought or leased, and the fixed machinery torn up and removed there. My firm belief is that the parties intended nothing of the kind, and that the annuity of £250 was to be the consideration not only for the assignation of the business and the stock and machinery, but for the right to occupy the premises, or in other words, was to include the rent of the premises so long as the pursuer could give that right. He is now in a position to give it for the full period during which the annuity is to run, *i.e.*, for the remainder of his life; and I think he is bound to do so, so long as the annuity is regularly paid. I arrive at the conclusion, both on a construction of the agreement as a whole, and also on the evidence of the conduct of parties, for I cannot otherwise explain the forbearance to demand any other rent than the £250 for a period of nearly two years on the part of one so little disposed as the pursuer seems to be to forego any of his supposed rights.

"An attempt was made to shew that the defenders had broken the agreement by not employing the pursuer at a salary as consulting engineer. There is evidence that the father and sons were on deplorably bad terms, and there may have been faults of temper on both sides. But I do not find that the fulfilment of so loose and unbusinesslike a stipulation was ever brought to a proper test, and I cannot therefore hold that the defenders committed any breach of their contract in this respect. They have regularly paid or tendered the annuity, which was the main thing.

"I shall therefore sustain the tenth plea in law for the defenders, and *assolzie* them, with expenses."

¹ Ewart v. Cochrane, March 22, 1861, 4 Macq. 117.

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LORD ADAM.—The question at issue between the parties depends upon the construction of an agreement, dated 22d January 1894, entered into between the pursuer and defenders, and the question appears to me to be whether that agreement contains *in gremio*, either expressly or by reasonable implication, a lease to the latter of the premises as in a question between them.

At the date of the agreement the title to the premises stood in the name of Mrs Thomson. The pursuer Mr Thomson was in possession of them, and carried on in them the business of an engineer.

He held a lease of them from Mrs Thomson for twenty years from Whitsunday 1883 at the rent of £40, but he was at the same time maintaining that he was the proprietor, having purchased them with his own money and made a gift of them to his wife, which he had revoked. That, and other matters, became the subject of litigation between the husband and wife, which resulted in an agreement, dated 4th November 1894, by which, *inter alia*, it was stipulated that Mrs Thomson should grant a valid title to the pursuer of the subjects in question. That was subsequently done, and the pursuer was, on 10th January 1896, sisted in her room and place as pursuer of this action.

It will be observed that the agreement of 22d January 1894, to which I have now to direct attention, contains no reference to the lease which at the time the pursuer held from his wife. It does not profess to assign that lease, or to grant a sublease, but all the stipulations contained in it proceed on the footing that the pursuer was in a position effectually and validly to contract as to them—(His Lordship then quoted the agreement).

This agreement has been duly implemented. The defenders are in possession of the premises, stock, plant, &c., under it. They have paid the debts of the pursuer in connection with the business at its date, and they have paid him the stipulated annuity. Nevertheless he now seeks to remove them summarily, on the ground that they have no lease or other title to possession of the heritable subjects.

It seems to me to be clear that the agreement was primarily one for the transfer of the pursuer's business as an engineer to the defenders. The business which was so transferred is described in the agreement as the business carried on by the pursuer at 57 Smith Street aforesaid, *i.e.*, the premises in question—and looking to the nature of the business of an engineer—and that part of the plant transferred consisted of heavy fixed machinery which could not be removed except at great expense and loss of time, and that the business had been carried on in the premises for twenty years, and had necessarily acquired a certain goodwill—it appears to me that it was clearly the intention of the parties to the agreement that the business should be carried on in the same premises as theretofore. If that be so, it was and is necessary that the defenders should have a right to the occupancy of the premises for that purpose. I therefore think that the agreement contains an implied lease of the premises to the defenders for the period of its duration,—that is, the lifetime of the pursuer.

But it is said that there can be no lease without a rent stipulated for, and that there is none here. That might, no doubt, create a difficulty in a case

with a singular successor, but in this case I think the rent formed part of the sum agreed to be paid by way of annuity and is included in it. As between the parties it was not necessary to distinguish in respect of what particular obligations the annuity of £250 was payable. Indeed, it appears to me that if it had not been intended that the business and premises should be inseparable during the currency of the agreement, there would have been a separate sum stipulated for as the rent of the premises.

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It cannot have been intended that the defenders should pay to the pursuer the same amount of annuity whether they were or were not in possession of his premises. I think, therefore, that we find in the agreement a lease of the premises for a definite period, viz., the lifetime of the pursuer, and at a rent which, although the amount thereof is not definitely fixed, is yet included in the annual sum payable by the defenders to him, and that, I think, is sufficient to give them a valid title to the possession of the subjects as in a question with the pursuer.

I concur in the Lord Ordinary's observations as to the inference arising from the assignation of the "rents" and "goodwill," to which I have nothing to add.

The result at which I have arrived might possibly have been different if Mrs Thomson had continued to be the pursuer of the action. In that case various pleas stated on record as against her would require to be disposed of. But I do not think it necessary to do so, because we have now only the present pursuer to deal with, and whether he was or was not *de facto* proprietor of the subjects when he entered into the agreement, he has now become proprietor, and is bound to do all he can to implement that agreement, and to do nothing to invalidate it; and it appears to me that the case must be dealt with in the same way as if he had been proprietor of the subjects when he entered into the agreement.

But the pursuer further maintains that the defenders are not entitled to found on the agreement, because they are themselves in breach of it. This refers to the clause in the agreement by which it was stipulated that the pursuer should remain as consulting engineer, and that the defenders should take his advice as to the practical management of the business, and so on. Of this it is alleged the defenders are in breach. I agree with what the Lord Ordinary says as to that matter, and have only to add that, even if it were true that the defenders had failed to implement the contract in this respect, it would not give rise to an irritancy of the lease, and the consequent removal of the defenders, if I am right in thinking that there was a lease.

I observe that the Lord Ordinary has sustained the tenth plea in law for the defenders, which is to the effect that the action is against the good faith of the agreement. I think that ground of judgment is somewhat vague, and I should prefer to rest the judgment on the ground that the action is contrary to the terms of the agreement.

On the whole matter I am of opinion that the defenders should be assoilzied.

LORD M'LAREN.—The first question for consideration is, what is the true meaning of the agreement between the pursuer and the defenders so far as

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relates to the occupation of the heritable property in which the business was carried on which is the subject of sale. Now, this is not the case of a sale of a commercial business carried on in a shop and warehouse where the migration to other premises would involve nothing more serious than the removal of the stock in trade from one building to another.

The business was the manufacture of certain descriptions of ironwork, and it was carried on in buildings and sheds specially arranged for work of this description, and with the aid of a steam-hammer and other machinery, partly fixed and partly moveable. It is in evidence that it would not be easy to find a suitable site for such a work in the locality where the Thomsons' business has been carried on, and where it is necessary that it should be carried on if the business connection of the firm is to be maintained. Moreover, even if a site were obtained, the removal of the fixed machinery and plant, and the erection of the buildings and sheds which are necessary for its accommodation, could not be accomplished without the expenditure of several hundred pounds, while it is the fact, and it was necessarily known to the pursuer, that his sons at the time of the agreement had no means, and could not possibly have taken over the business if it were to be carried on elsewhere than in the premises in which it was then placed. These considerations make it clear that a transference of the business to other premises was not in the contemplation of either of the parties to the agreement. The defenders could not have met the expense of establishing a new workshop, the pursuer would not have got his annuity, and the whole arrangement would have been a meaningless form.

But this is not all. The heritable property was purchased in the name of the pursuer's wife, who was the defenders' stepmother, and while the pursuer held the subjects under a lease terminating in 1903, he never paid any rent: It is not disputed that the cost of erecting the buildings and providing the machinery and plant was defrayed by the pursuer, and it is in evidence that the pursuer claimed the land in property as having been purchased with his money. In these circumstances the pursuer entered into an agreement with his sons, under which he assigned to them the whole stock, assets, &c., of the business described as carried on by him at Smith Street, Kinning Park, Glasgow, in consideration of an annuity for life of £250 and certain other advantages. I think this was a conveyance in general terms of every right which the pursuer had in relation to the business, and that it is no objection to the generality of such a conveyance that heritable estate is not specially mentioned in it.

It follows, in my opinion, that the assignment carried with it such a right to the occupation of the subjects during the pursuer's life as he was able to give, and that the annuity and other considerations were intended to include the rent which would otherwise be payable to the pursuer if he was proprietor, or the rent which the pursuer had agreed to pay to his wife if he were only a leaseholder.

It was of no consequence to the defenders to know what the precise title of their father was, because they were willing to take the premises and business with such right as their father was able to give them, which, as they calculated, was sufficient for their purposes.

Again, it is equally plain that there is nothing in the conditions of the

bargain making it improbable that the pursuer should have so bound himself. I mean there is no such improbability and no such inequality in the bargain as ought to influence a Court of law to depart from the plain natural meaning of the words used, and to cast about for some more restricted kind of conveyance in order to remove difficulties which do not exist.

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The rights of the pursuer were fully protected by the clause which empowered him to resume possession if his annuity were not punctually paid. In other respects the terms of the agreement are such as are usual and suitable to the case of the head of a firm retiring from business, and desiring to be secured in a moderate income and to be relieved from the trouble and anxiety incident to the conduct of a business which depended on personal supervision.

Now, in the absence of words of special conveyance of the tenant's right, or words of special grant of a new leasehold right, it would not be consistent with principle to hold that the premises in Smith Street were warranted absolutely. I think, however, that there was an implied warranty of a more limited character, which imported this much, that the pursuer could not by abandoning the existing lease, and acquiring the land in property from his wife, defeat the rights of his assignees. Whatever title he might acquire to the land would, in my opinion, be burdened by the right of his assignees to possess the property so long as they were able to fulfil their engagements.

These considerations, as I think, suffice for the disposal of the case. I ought also to say that I agree with the Lord Ordinary in holding that the clause in the agreement assigning the rents of certain small subjects which the firm were in use to let is evidence that in the intention of the parties the defenders were to be the principal tenants of the subjects as a whole. It is not disputed that the defenders have regularly paid the annuity, and I think that the Lord Ordinary's observation regarding the employment of the pursuer as consulting engineer is well founded, viz., that this condition has never been brought to a test, because it has not been proved that the defenders have had occasion for the services of a consulting engineer.

While we may not admire the conduct of the defenders to their father, as brought out in the evidence, we have in this case only to consider the question of civil right, and I am of opinion that the pursuer is not entitled to the decree of ejection which he claims.

LORD KINNEAR.—I have thought this case one of some difficulty. We cannot add a term to a written contract, and the plea which the Lord Ordinary has sustained appears to me to rest the defence not on any direct contractual obligation but upon some indefinite understanding or principle of good faith which is supposed to arise partly from the intention of the contract, and partly from extrinsic facts. I should not be disposed to concur in sustaining that plea, but upon consideration I have come to agree with your Lordships that a better ground of judgment may be found in a fair construction of the contract itself.

The purpose of the agreement is to transfer a going business from the pursuer to the defenders, and in carrying out that intention the pursuer assigns to the defenders the business of engineer carried on by him in the premises in question, and the whole stock, funds, assets, rents, and goodwill

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thereof, together with the whole machinery or plant, whether fixed or unfixed, belonging to him. The material points seem to me to be that at the date of this agreement the pursuer was in fact, as he is now in title also, the owner of the premises in question, that he had carried on his business for many years in these premises, that he had erected the buildings and fixed machinery for the purpose of the business, which, as the Lord Ordinary says, required a situation in that locality, and also required the use of heavy fixtures which could not be removed and re-erected except at the expenditure of a large amount of time and money. I think that by this agreement the defenders undertake to carry on the business as it was at this date. It is for this purpose that the fixed machinery is transferred to them. They have no right to remove that machinery during the subsistence of the agreement any more than to sever any other part of the heritable subjects from the remainder, but are bound to make use of it for the purposes of the business within the pursuer's premises. I think that an agreement of this kind for the transfer of the assets, goodwill, and plant of the business imports and carries with it a licence to the transferees to occupy the premises for the purpose of the business and during the subsistence of the agreement, provided they fulfil the obligations which they have undertaken in consideration of the rights conferred upon them.

I agree with Lord Adam, therefore, that the agreement contains the terms that are necessary to the personal contract of lease. It is not necessary to consider what might be the defenders' rights in a question with singular successors, but during the pursuer's life I think that he is not entitled to turn them out of the premises, so long as they continue to carry on the business and perform the stipulations in his favour.

The LORD PRESIDENT was absent.

THE COURT varied the interlocutor reclaimed against by deleting therefrom the words "sustain the tenth plea in law for the defenders, and in respect thereof," and *quoad ultra* adhered.

CARMICHAEL & MILLER, W.S.—GEORGE INGLIS & ORR, S.S.C.—Agents.

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JOHANN JJACKO LOUIS SOEDER, Pursuer (Reclaimer).—*Shaw—A. S. D. Thomson.*

MRS JANE SOEDER, Defender (Respondent).—*Baxter—Orr.*
WILLIAM SHAW, Co-Defender.

Husband and Wife—Divorce—Adultery—Relevancy—Latitude as regards time.—In an action of divorce by a husband against his wife on the ground of adultery the pursuer averred that the defender had committed adultery with persons named "during" periods which extended over from one year to three years, but specified no precise date or occasion within the several periods. The Court (*aff. judgment* of Lord Stormonth-Darling) refused to allow a proof of these averments.

1ST DIVISION. THIS was an action of divorce on the ground of adultery at the instance of Johann Jjacko Louis Soeder against his wife, and also against William Shaw as co-defender, there being a conclusion for payment of £500 in name of damages against the co-defender.*

* Mr Shaw died during the dependence of the action.

The condescendence contained thirty-five articles, and in some of these the pursuer specified the date, and the place of alleged acts of adultery committed by the defender. No. 48.

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Articles 11, 15, 24, and 25 were as follows:—(Cond. 11) "During the said years 1893, 1894, and 1895 the defender was in the habit of visiting the said co-defender Shaw at his said shop at No. 2 . . . Edinburgh, and she then within his said shop on the occasion of such visits committed adultery with him. These visits were made for the sole purpose of obtaining drink and for immoral purposes. On such occasions the defender was shewn into Shaw's private room in his said shop, where she remained with him for hours. They frequently left this shop and went to the house of a Mrs M. at No. 4 . . . , and the pursuer avers that they committed adultery there." (Cond. 15) "During the year from July to December 1893, and during the year 1894, and from January to April 1895, Shaw used frequently to meet the defender at the house of a Mrs B., tenanted by her at No. 11 . . . Street, Edinburgh, from Whitsunday 1893 to Whitsunday 1894, and subsequently at No. 38 . . . Street there, which she occupied from Whitsunday 1894 to Whitsunday 1895, and which houses were well-recognised houses of ill-fame, and well known as such to the defender, and were frequented by men and women for immoral purposes. On the occasion of all such visits the said defender committed adultery with Shaw." (Cond. 24) "The pursuer avers that the defender and [a man] Berthout were in the habit of frequently meeting at the house of the said Mrs B., at No. 11 . . . Street aforesaid, during the years 1893 and 1894 while she resided there, and that the defender then committed adultery with him." (Cond. 25) "The pursuer further avers that the said Berthout, during the year from Whitsunday 1894 to Whitsunday 1895, frequently met the said defender at B.'s house at . . . Street aforesaid, and that she committed adultery with him there. The pursuer reserves all claims of damages competent to him against the said Berthout."

On 25th November 1896 the Lord Ordinary (Stormonth-Darling) allowed parties a proof of their averments in twenty of the articles of condescendence and relative answers, but not of, *inter alia*, the averments in articles 11, 15, 24, and 25.*

The pursuer reclaimed, and argued;—The latitude taken was not too wide. The allegations were to the effect that the defender had been living a life of habitual adultery and frequenting brothels. In such a case it was not necessary to specify precise dates and particular occasions.¹ Besides, with reference to the specific averments of

* "NOTE.—I have refused to allow a proof of certain articles of the condescendence, because they are in my view much too vague to be admitted to probation. With regard to articles 15 and 24, inasmuch as the averments refer to visits by a married woman to a house of ill-fame, I should have been disposed to allow proof if the pursuer had been able to assign a good reason for taking so great a latitude in point of time as two years, but he has not done so, and I am not satisfied that he has taken the usual and proper means of ascertaining what evidence is available to him, and thereby of making his averments as specific as possible. Indeed, I have never seen the condescendence in an action of divorce for adultery so vague and discursive in its whole scheme."

¹ Walker v. Walker, July 20, 1871, 9 Macph. 1091, 43 Scot. Jur. 477; Graves v. Graves, Dec. 15, 1842, 3 Curtis, 235; Smith v. Smith, Nov. 3, 1859, 29 L. J. Matrim. Cases, 62; Steel v. Steel, July 10, 1835, 13 S. 1096.

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which a proof had been allowed, the proof of these would be facilitated by the evidence led to establish the more general averments, for these would shew clearly the relations of parties.

Argued for the defender;—Proof had been allowed of twenty articles of the condescendence, some of which contained averments of specific instances of adultery, and it was difficult to see what benefit the pursuer could take from proving the general averments. But, in any view, the latitude of time taken was far too wide. Notice to the defender of what she really had to meet was entirely wanting. The rule was that the averments must be as precise and pointed as they could be made,¹ and that rule was not followed here. The averment in *Walker's* case² was that the parties met clandestinely during nine months. In *Smith's* case,³ it was said that the parties were living together in the same house. In *Graves' case*,⁴ the charge was of habitual criminal intercourse for four months. These cases did not therefore support the pursuer's contention.

LORD M'LAREN.—It is the usual, though by no means the invariable, practice, when a summons is held relevant, to allow to each party a proof of his averments. Such an order does not imply that everything averred is relevant or a proper subject of probation, and where the averments are remitted to proof generally it is always understood that evidence as to particular facts may be objected to on the ground of non-relevancy or insufficient notice on the record.

These qualifications of the effect of a general allowance of proof seem to be especially necessary in divorce cases, which are of a nature cognate to criminal proceedings. But I think it is primarily a matter for the discretion of the Judge making the order for proof whether he is to make a general order, reserving such questions as I have alluded to for determination at the proof, or whether he should limit the proof to those matters as to which he thinks a relevant averment has been made.

Now, the pursuer comes into Court with a condescendence consisting of thirty-five articles directed to the establishment of a case of adultery against his wife, and he has so little confidence in his case that he wishes to be allowed to prove those charges that are objected to on the ground of indefiniteness in preference to those which are clear and specific. This seems eminently a case for the revision of the record by the Lord Ordinary with a view to extracting from it the proper issuable matter. The Lord Ordinary has done so in the present case with great care, specifying the articles which he thinks not objectionable, and giving his reasons for rejecting one or two where there might be a question. I am of opinion that the Lord Ordinary has dealt properly with the action in limiting the proof as he has done. If he had limited it still more probably we might not have differed, but his Lordship has proceeded on the principle of giving the pursuer leave to prove every fact which is stated with the latitude of place and time allowed in criminal proceedings.

¹ *Tulloch v. Tulloch*, Feb. 22 and 28, 1861, 23 D. 639, Lord Justice-Clerk Inglis, at p. 644, 33 Scot. Jur. 314.

² 9 Macph. 1091.

³ 29 L. J. Matrim. Cases, 62.

⁴ 3 Curtis, 235.

LORD ADAM.—I am of the same opinion. I think the Lord Ordinary has No. 48.
 allowed the pursuer a very large latitude as regards time by the interlocutor
 reclaimed against. The particular articles of the condescendence of which Jan. 5, 1897.
 the pursuer now seeks to be allowed a proof are 11, 15, 24, and 25. Soeder v. Soeder.
 Article 11 covers a period of three years without specifying a single date
 or any one particular occasion on which an alleged call was made. Now to
 allow a proof of so vague and general a statement would be very unfair to
 the defenders, and I am certainly not disposed to allow a proof of it. The
 other articles in question appear to me to be open to the same objection,
 that they fail to specify any one particular date or a single occasion so
 that the defender can be in a position to meet any evidence that may
 be led in support. I therefore agree that the reclaiming note should be
 refused.

LORD KINNAR.—I agree.

The LORD PRESIDENT.—I agree.

THE COURT adhered.

MARCUS J. BROWN, S.S.C.—BUCHAN & BUCHAN, S.S.C.—D. HILL MURRAY, S.S.C.—
 Agents.

JOHN FLEMING AND OTHERS, Complainers (Reclaimers).—*Jameson—* No. 49.
Clyde.

THE LIDDESDALE DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF Jan. 6, 1897.
 ROXBURGH AND OTHERS, Respondents.—*Shaw—Graham Stewart.* Fleming v.
 Liddesdale

Police—Burgh—Special Lighting District—Oil as an illuminant—Burgh
Police Act, 1892 (55 and 56 Vict. cap. 55), sec. 99.—Section 99 of the Burgh
 Police Act, 1892, enacts,—“The Commissioners shall make provision for
 lighting in a suitable manner all the streets and all other places within the
 burgh, which in their judgment should be lighted at the public expense,
 and shall provide . . . lamps . . . and cause to be lighted such
 lamps by means of gas or such other light of an improved kind, subject to
 the provisions of the Electric Lighting Act of 1882, or any Act or Acts
 amending or superseding the same, as they may find expedient.”
 District Committee.

Held that the use of oil as an illuminant is not excluded by the terms of
 the section.

When a District Committee of a County Council, which had adopted
 section 99 of the Burgh Police Act, 1892, for a special lighting district,
 proposed to light a village within it by oil lamps, interdict against their
 doing so *refused*.

Per Lord M'Laren,—“It seems to me that in a measure of this kind,
 intended to apply to large towns and small, and even to mere villages, the
 District Committee would be taking a very inadequate view of its powers
 and duties if it merely approached the subject of lighting from the point of
 view, which is the best of all known illuminants? They have to consider
 which is the most suitable for the requirements of their district.”

ON 11th February 1896, the Liddesdale District Committee of the 1st Division.
 County Council of the County of Roxburgh, upon consideration of a re-Ld Stormonth-
 quisition from the Parish Council of Castleton in terms of subsection 1 Darling.
 of section 44 of the Local Government Scotland Act, 1894, formed the
 Parish of Castleton into a special district for the purpose of lighting,
 and resolved that sections 99, 100, 101, and 105 of the Burgh Police

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(Scotland) Act should be adopted within the said special district, and appointed a Lighting Committee. Section 99 of the Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 99, enacts,—“The Commissioners shall make provision for lighting in a suitable manner all the streets and all other places within the burgh which in their judgment should be lighted at the public expense, and shall provide . . . lamps . . . and shall light, or shall enter into contracts for lighting, and cause to be lighted, such lamps by means of gas, or such other light of an improved kind, subject to the provisions of the Electric Lighting Act, 1882, or any Act or Acts amending or superseding the same, as they may find expedient.”

The Lighting Committee having proposed to light the village of Newcastleton with oil lamps, John Fleming, farmer, Roan, Newcastleton, and others—persons liable to be assessed as occupiers in the district—presented this note of suspension and interdict against the Liddesdale District Committee and the Lighting Committee, praying the Court to interdict “the respondents from lighting, or entering into contracts, or otherwise making provisions, for the public lighting of the special lighting district of the parish of Castleton, or any part thereof, by oil lamps, or by lamps other than gas lamps, or lamps lit by means of light of an improved kind, subject to the provisions of the Electric Lighting Act, 1882, or any Act or Acts amending the same.”

The complainers stated;—(Stat. 5) “The respondents, the said Lighting Committee, with the sanction and approval of the said District Committee, do not propose to light any part of the said special district except the said village of Newcastleton. . . . The respondents, however, propose to carry out their lighting scheme by means of the same oil lamps which have been in use for the last fifteen years in the village. For this purpose they have acquired by donation, or for a merely nominal price, the said lamps, and are about to light and maintain the same at the expense of the whole district, and are about to acquire additional lamps of exactly the same kind in order to extend the lighting of said village. The said lamps are ordinary oil lamps, without any improvement or modern contrivance, but of the kind which were in use prior to the introduction of gas lighting; they are of the commonest pattern, and not capable of giving any light of an improved kind. In windy weather they are blown out or become so blackened as to give almost no light. At the best, the light they produce is greatly inferior in every respect to that given by ordinary street gas lamps or by electric light. The said oil lamps are not in any sense ‘light of an improved kind,’ nor is it possible to apply to them the provisions of the Electric Lighting Act, 1882. The complainers object to the respondents carrying out the lighting scheme in said special district in a manner which is inconsistent with the terms of said section 99 of the Burgh Police (Scotland) Act, 1892. . . .”

The respondents answered;—(Ans. 5) “Admitted that the respondents propose to light certain parts of the parish with the oil lamps formerly in use and some additional lamps of a similar character. *Quoad ultra* denied.” The respondents further stated that the light given by the lamps in question was equal to that given by an ordinary gas street lamp, and that they were willing to use annular burners, which gives a light of from 40 to 45 candle power. “There are no works in the parish for the manufacture of gas or electric light, and hitherto

the place has been lighted by paraffin lamps. The respondents have received these lamps in gift, and the whole cost of lighting per annum will be about £15, while if gas or electric light were to be employed the expense would be infinitely greater, without any corresponding benefit."

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The complainers pleaded;—The scheme of lighting the said special district by means of oil lamps being illegal and contrary to statute, and particularly to the terms of section 99 of the Burgh Police (Scotland) Act, 1892, the complainers are entitled to interdict as craved.

On 15th December 1896 the Lord Ordinary (Stormonth-Darling) allowed parties a proof of their averments.

The complainers reclaimed, and argued;—(1) Having regard to the terms of sec. 99 of the Burgh Police Act, 1892, it was illegal to light with oil lamps. Permission to use oil was not given by the statute, and the words "such other light of an improved kind" must mean such other illuminant of an improved kind. The section contemplated the use of gas or electric light, and any new illuminant which might be discovered or invented. This view was supported by the terms of section 126 of the Police Act of 1862 (25 and 26 Vict. c. 101), which gave power to light by means "of oil or gas, or such other light of an improved kind as they may find expedient." The word "oil" there included was omitted in the Act of 1892 now in force. (2) In any view the proof should be restricted. A general proof would be unworkable—there ought to be some finding as to the meaning of "light of an improved kind."

Argued for the respondents;—The Burgh Police Act did not exclude the use of oil. The word "improved" must not be too strictly construed; what was meant was some superior light suitable for the locality, and of the suitability the committee were to be the judges. To confine the lighting to gas or electricity would mean enormous expense to a small community like this.

At advising,—

LORD M'LAREN.—This is a reclaiming note against an interlocutor of the Lord Ordinary allowing proof, and under the reclaiming note we have raised the question of the limitation of proof, and also the question of the relevancy of the defences. It is difficult to consider this question without considering also the relevancy of the note of suspension under which the question has been brought before us. The note craves an interdict against lighting the parish of Castleton "by lamps other than gas lamps, or lamps lit by means of light of an improved kind, subject to the provisions of the Electric Lighting Act, 1882, or any Act or Acts amending the same," quoting the clause of the Burgh Police Act condescended on.

Now, the Court in general will not grant an interdict which is merely an echo of a statutory provision. An interdict must be directed against some specific act which is alleged to be in contravention of the statute, and not merely against doing anything which is contrary to the statute, and the reason is obvious. The party interdicted must be told plainly what are the acts which he is enjoined not to do, in order that he may regulate his conduct in conformity with the interdict. Therefore I do not think that in any view we could grant interdict against lighting the streets of New-castleton otherwise than by gas or "other light of an improved kind."

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But we are also moved to grant interdict against lighting this town or village by means of oil. The complainers' argument is rested on the 99th section of the Burgh Police Act, 1892, as made applicable by the Local Government Act of 1894, and it proceeds on the narrative that the parish of Castleton has been formed into a lighting district under the provisions of this statute, and that the district authority has determined to put in force the powers of this 99th section. We are asked to find that the system of lighting which has been introduced is contrary to the powers conferred by this section. The provision of the statute is,—“The Commissioners” (*i.e.*, the District Committee) “shall make provision for lighting in a suitable manner all the streets and all other places within the burgh” (*i.e.*, the parish or parishes) by erecting lamps, and shall “cause to be lighted such lamps by means of gas, or such other light of an improved kind.” I pause here to say that while only one illuminant is mentioned, other lights of an improved kind are permissible, and it is quite evident from the generality of the expression that it was not considered desirable to limit the powers of the administration of the district to any particular kind of light, but rather to give them a discretion to substitute any suitable equivalent. Then the statute proceeds,—“subject to the provisions of the Electric Lighting Act, 1882, or any Act or Acts amending or superseding the same.”

Now, this expression is perhaps somewhat elliptical; for electric lighting had not been mentioned in the antecedent part of the clause, but we must take it that, if electric light were adopted, it would be subject to the provisions of that Act of 1882. Then come the words, “as they may find expedient,” which I cannot help thinking are words governing the construction of the whole antecedent part of the clause. There is a general reference to the question of expediency, and the decision of such questions is left to the governing body constituted by statute for the purpose. Of course it might happen that some antiquated or perverse system of illumination was adopted by a Local Authority, it might be for the purpose of defeating the intention of the Act. In such a case I have no doubt that the Court has jurisdiction to say that the powers conferred by the clause had not been fairly exercised, and that the resolution was invalid. But before we can pronounce the resolution to light the streets of Castleton by oil lamps of the character described to be null, we must be satisfied that a radical case of excess or abuse of power is alleged. Because, if the necessary averments do not come up to an abuse of the power, I am afraid the question whether oil is an improvement or not is a matter of opinion, and that is just the thing which is referred to the District Committee under the general reference of the expediency of the particular illumination.

It seems to me that in a measure of this kind, intended to apply to large towns and small, and even to mere villages, the District Committee would be taking a very inadequate view of its powers and duties if it merely approached the subject of lighting from the point of view, which is the best of all known illuminants? They have to consider which is the most suitable for the requirements of their district.

The argument was directed against the use of oil, and, as I understood it, was to the effect that oil light was not within the powers conferred by the statute, because it could not be described as an improved method of

illumination. Following up that argument, I suppose that gas and electric light, being the things mentioned in the statute, are what are intended to be universally introduced, or at most these two coupled with some unknown illuminant, which may be hereafter invented. I am unable to agree with that construction of the statute. If, for example, it were proposed to establish a system of electric lighting for a small community like this, it would be difficult to resist the argument that that was a perversion of the powers of the statute by the introduction of a light too expensive and unsuitable for the locality. That is not the subject of consideration, but I am unable to find anything in the words of the Act which prohibits the District Committee from illuminating by oil, if they can find a system of oil illumination which satisfies the general words of the Act, as being of an "improved kind."

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I adopt the observation made by Mr Shaw that such expressions are not to be tested by rigid rules of criticism. The language is popular, and "improved light" just means any good and efficient quality of light, of which the District Committee are to be the judges.

The chief difficulty in disposing of this case consists in the curious position in which the parties have been placed with reference to the question of proof. The ordinary case is that a proof is moved for by the pursuer, who has to establish his case by evidence, while the defender resists. But here the Lord Ordinary has allowed a proof, and the complainers have reclaimed against that order, with a view to appealing to the Court either to restrict it or to give a judgment without any proof at all. I am not sure in what way it is sought to restrict the proof, for if the proof is to enable the Court to interpret the statute, and find out what is an improved description of light, it would be very difficult to limit it at all. The defenders, again, while not expressing any enthusiasm for the proposed inquiry, have not directly moved us to disallow a proof.

It appears to me that as the complainers under their reclaiming note have raised the whole question of proof, and as they have satisfied me that this is not a case in which the construction of the statute can be aided by evidence, the whole matter of proof or no proof is before us. My own opinion is that it is a very doubtful principle to allow a proof in order to construe a statute. It might be necessary where there is a patent ambiguity, but it is one which we are not familiar with, and which I should hesitate to pronounce competent at all. In the present case, my view is that proof is entirely unnecessary, because upon the facts as stated the District Authority has not exceeded its powers as defined by the statute. While the complainers have satisfied me upon their first proposition, they have failed to convince me that under no circumstances can oil be used as an illuminant within the meaning of the Act. It appears to me that it is entirely within the discretion of the committee to introduce a system of lighting by oil which in their opinion is an improvement,—that is to say, a system of lighting as good as can be obtained consistently with economy and the requirements of the case. It follows, in my opinion, that the note should be dismissed.

LORD ADAM.—The complainers here seek to have the respondents interdicted from lighting the special district of the parish of Newcastleton

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But we are also moved to grant interdict against lighting this town or village by means of oil. The complainers' argument is rested on the 99th section of the Burgh Police Act, 1892, as made applicable by the Local Government Act of 1894, and it proceeds on the narrative that the parish of Castleton has been formed into a lighting district under the provisions of this statute, and that the district authority has determined to put in force the powers of this 99th section. We are asked to find that the system of lighting which has been introduced is contrary to the powers conferred by this section. The provision of the statute is,—“The Commissioners” (*i.e.*, the District Committee) “shall make provision for lighting in a suitable manner all the streets and all other places within the burgh” (*i.e.*, the parish or parishes) by erecting lamps, and shall “cause to be lighted such lamps by means of gas, or such other light of an improved kind.” I pause here to say that while only one illuminant is mentioned, other lights of an improved kind are permissible, and it is quite evident from the generality of the expression that it was not considered desirable to limit the powers of the administration of the district to any particular kind of light, but rather to give them a discretion to substitute any suitable equivalent. Then the statute proceeds,—“subject to the provisions of the Electric Lighting Act, 1882, or any Act or Acts amending or superseding the same.”

Now, this expression is perhaps somewhat elliptical; for electric lighting had not been mentioned in the antecedent part of the clause, but we must take it that, if electric light were adopted, it would be subject to the provisions of that Act of 1882. Then come the words, “as they may find expedient,” which I cannot help thinking are words governing the construction of the whole antecedent part of the clause. There is a general reference to the question of expediency, and the decision of such questions is left to the governing body constituted by statute for the purpose. Of course it might happen that some antiquated or perverse system of illumination was adopted by a Local Authority, it might be for the purpose of defeating the intention of the Act. In such a case I have no doubt that the Court has jurisdiction to say that the powers conferred by the clause had not been fairly exercised, and that the resolution was invalid. But before we can pronounce the resolution to light the streets of Castleton by oil lamps of the character described to be null, we must be satisfied that a radical case of excess or abuse of power is alleged. Because, if the necessary averments do not come up to an abuse of the power, I am afraid the question whether oil is an improvement or not is a matter of opinion, and that is just the thing which is referred to the District Committee under the general reference of the expediency of the particular illumination.

It seems to me that in a measure of this kind, intended to apply to large towns and small, and even to mere villages, the District Committee would be taking a very inadequate view of its powers and duties if it merely approached the subject of lighting from the point of view, which is the best of all known illuminants? They have to consider which is the most suitable for the requirements of their district.

The argument was directed against the use of oil, and, as I understood it, was to the effect that oil light was not within the powers conferred by the statute, because it could not be described as an improved method of

illumination. Following up that argument, I suppose that gas and electric light, being the things mentioned in the statute, are what are intended to be universally introduced, or at most these two coupled with some unknown illuminant, which may be hereafter invented. I am unable to agree with that construction of the statute. If, for example, it were proposed to establish a system of electric lighting for a small community like this, it would be difficult to resist the argument that that was a perversion of the powers of the statute by the introduction of a light too expensive and unsuitable for the locality. That is not the subject of consideration, but I am unable to find anything in the words of the Act which prohibits the District Committee from illuminating by oil, if they can find a system of oil illumination which satisfies the general words of the Act, as being of an "improved kind."

I adopt the observation made by Mr Shaw that such expressions are not to be tested by rigid rules of criticism. The language is popular, and "improved light" just means any good and efficient quality of light, of which the District Committee are to be the judges.

The chief difficulty in disposing of this case consists in the curious position in which the parties have been placed with reference to the question of proof. The ordinary case is that a proof is moved for by the pursuer, who has to establish his case by evidence, while the defender resists. But here the Lord Ordinary has allowed a proof, and the complainers have reclaimed against that order, with a view to appealing to the Court either to restrict it or to give a judgment without any proof at all. I am not sure in what way it is sought to restrict the proof, for if the proof is to enable the Court to interpret the statute, and find out what is an improved description of light, it would be very difficult to limit it at all. The defenders, again, while not expressing any enthusiasm for the proposed inquiry, have not directly moved us to disallow a proof.

It appears to me that as the complainers under their reclaiming note have raised the whole question of proof, and as they have satisfied me that this is not a case in which the construction of the statute can be aided by evidence, the whole matter of proof or no proof is before us. My own opinion is that it is a very doubtful principle to allow a proof in order to construe a statute. It might be necessary where there is a patent ambiguity, but it is one which we are not familiar with, and which I should hesitate to pronounce competent at all. In the present case, my view is that proof is entirely unnecessary, because upon the facts as stated the District Authority has not exceeded its powers as defined by the statute. While the complainers have satisfied me upon their first proposition, they have failed to convince me that under no circumstances can oil be used as an illuminant within the meaning of the Act. It appears to me that it is entirely within the discretion of the committee to introduce a system of lighting by oil which in their opinion is an improvement,—that is to say, a system of lighting as good as can be obtained consistently with economy and the requirements of the case. It follows, in my opinion, that the note should be dismissed.

LORD ADAM.—The complainers here seek to have the respondents interdicted from lighting the special district of the parish of Newcastleton

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"with oil lamps," and so on. As I read that interdict, it means an interdict against lighting with oil lamps of any kind whatever. There are observations of an unfavourable character made as to the oil lamps used or proposed to be used by the respondents in the lighting of Newcastleton. But this interdict does not strike at the use of any particular oil lamps. The real question is, are the respondents entitled or not to use oil lamps, it may be of the best description, to light the village?

Mr Clyde maintained that they were not so entitled, because upon a construction of section 99 of the Burgh Police Act, 1892, it was *ultra vires* of the respondents to use oil lamps at all. His construction was that the only competent light would be by means of gas, or some kind of illuminant, such as electric light, of an improved kind as compared with gas. He says oil is not an illuminant of an improved kind, and therefore the respondents have no power to use it.

But I do not agree with that construction of the statute at all. I do not think that these words were meant to institute a comparison between gas and electric light on the one hand and oil light on the other. I think the words mean no more than light of an efficient kind, of a good kind, of a modern kind; it may be an improved kind with reference to the use of oil itself,—the use of an oil as compared with the oil used before the introduction of modern oils and methods of burning it.

Therefore I think that it was quite within the powers of the District Committee—and it is to them that discretion is given—to employ oil lamps if they thought proper, and it would be a very serious matter if we were to hold anything else. According to the complainers' view, no village can be lighted at all unless you are to establish a gas manufactory or an electric installation. How could a small village afford an expensive establishment of that sort, upon pain of being left in total darkness?

I think therefore that the interdict ought to be refused.

But Mr Clyde went on to say that, in any view, he objected to the proof allowed here. He was quite right in that contention. But he did not say what proof he desired, or what the limitation should be. I quite agree with him that a proof at large is out of the question. But I go a step further than Mr Clyde, and I agree with Lord M'Laren that, the whole question being open, there should be no proof, and that we should decide this case upon the construction of the statute alone in favour of Mr Shaw's clients.

LORD KINNEAR.—I am of the same opinion.

The LORD PRESIDENT.—I concur.

THE COURT recalled the interlocutor of the Lord Ordinary, and dismissed the note of suspension and interdict.

STRATHERN & BLAIR, W.S.—TURNBULL & HERDMAN, W.S.—Agents.

MISS CATHERINE M'ELROY AND OTHERS, Pursuers (Respondents).— No. 50.
Watt.

THE LONDON ASSURANCE CORPORATION, Defenders (Reclaimers).
 —*Ure—Clyde.*

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Insurance—Fire—Agreement to Insure—Occurrence of fire before premium paid—Payment to Agent—Relevancy.—In an action brought against an insurance company to recover loss arising from a fire which took place in May, the pursuer averred that in April he “insured with the defenders’ agent A certain subjects, that a policy was duly prepared by the defenders, and the premium due thereunder was paid to A as defenders’ agent, who has remitted the sum to them less the usual commission allowed for obtaining the insurance and collecting the premium as the agent of the defenders.” The Court dismissed the action as *irrelevant* on the ground that the pursuer did not aver that the policy had been delivered or that the premium had been paid prior to the fire, and that A was authorised to receive payment on behalf of the company.

Observations on the effect of delivery of a policy without payment of a premium, and of payment of a premium without delivery of a policy.

ON 22d June 1896 Misses Catherine, Mary, and Agnes M'Elroy, ^{1ST DIVISION.} residing in Glasgow, raised an action against the London Assurance Corporation concluding for a decree against the defenders for payment of £80. <sup>Lord Kin-
cairney.</sup>

The pursuers averred;—“(Cond. 2) In or about the end of April 1896 the pursuers insured with the defenders’ agent, Mr Thomas M'Elroy, writer in Glasgow, against loss by fire for one year from that date the household furniture and personal effects belonging to them within said dwelling-house, for the sum of £700, and a policy of insurance was duly prepared by the defenders, and the premium due thereunder was paid to the said Thomas M'Elroy, as defenders’ agent, who has remitted the same to them, less the usual commission at 15 per cent allowed for obtaining the insurance and collecting the premium as the agent of the defenders.”

They further averred that in the end of May a fire occurred which resulted in the destruction of furniture and other effects belonging to them to the value of £80, and that the defenders refused to indemnify them for the loss.

The defenders stated;—“(Stat. 1) On 29th April 1896, the defenders’ inspector casually met Mr Thomas M'Elroy, who is a brother of the pursuers, and was asked by him, on behalf of his sisters, to prepare a policy of fire insurance for £700 in names of the pursuers over their furniture, &c., . . . The said Thomas M'Elroy was not an agent of the defenders’ company, he held no appointment as such, and he could not in any way bind the defenders’ company. . . . (Ans. 1) Admitted that the insurance was instructed by Mr M'Elroy (who is pursuers’ brother) through the defenders’ inspector. *Quoad ultra* denied. Explained that, both at the meeting when the insurance was instructed, and previously, the defenders’ inspector had solicited the said Thomas M'Elroy to secure insurances for the defenders, as an agent for the company, on the understanding that he would be paid the usual agent’s commission. (Stat. 2) The policy was duly prepared, and on 2d May 1896 the defenders wrote to the said Thomas M'Elroy, stating that it would be sent to him on payment of the premium. (Ans. 2)

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The policy and letter* are referred to for their terms, beyond which no admission is made. . . . Explained that said policy is dated 1st May 1896, and that the insurance thereunder took effect from that date. (Stat. 3) The said Thomas M'Elroy and the pursuers, so far as the defenders are aware, took no notice whatever of the letter; and, at all events, the payment of the premium was not made to the defenders at the date of the alleged fire, and the policy is still in the hands of the defenders. . . . (Ans. 3) Believed to be true that said policy is in defenders' hands. *Quoad ultra* denied. Explained that in said letter from the defenders to the said Thomas M'Elroy, the defenders state,—(Letter of 2d May 1896 quoted). Said commission is allowed to agents for obtaining the insurances, and for trouble in collecting the premiums thereunder; and it was so allowed in the present case to the said Thomas M'Elroy. Explained further that, upon 6th June 1896, the said Thomas M'Elroy wrote a letter to the defenders' manager in Glasgow, sending him 12s., being the said premium, less his commission as agent. Upon 8th June 1896 the defenders' said manager replied as follows to said letter:—'Glasgow, 8th June 1896.—Dear Sir,—2 Spring Gardens—We are in receipt of your favour of 6th inst., enclosing postal order for 12s., being the amount of premium, less commission, for the insurance of £700 over furniture in this dwelling-house. We shall forward a policy in a few days. Meanwhile, pending delivery of that document, we hand you covering note to keep matters in order.†—Yours faithfully, T. S. BROWN, District Manager.' Explained further, that it was only after the fire in question had occurred, and also after the said Thomas M'Elroy had remitted the said premium, less commission, that the defenders, for the first time, intimated that the policy had been cancelled."

The defenders pleaded;—(1) The action is incompetent as laid, or otherwise, *separatim*, the action is excluded by the arbitration clause in the policy. (2) The pursuers' averments being irrelevant and insufficient in law to support the conclusions of the summons, the defenders should be assoilzied therefrom.

On 4th December 1896 the Lord Ordinary (Kincairney) repelled the first plea in law for the defenders, and before further answer allowed a proof.‡

* Mr T. S. Brown, District Manager, to Mr Thomas M'Elroy,—“Dear Sir,—We have prepared this policy in accordance with your instructions, and shall be glad to receive the premium as undernoted at your convenience, when the policy, which is the receipt of the first year's premium, will be sent you,—14s., less 15 per cent commission, 2s. = 12s.”

† The covering note was in the following terms:—“8th June 1896.—Misses Catherine, Mary Annie, and Agnes M'Elroy having this day made a proposal to insure the sum of £700, and having paid the sum of 14s. as premium, the property as described in the proposal shall be held insured by this receipt for a period not exceeding thirty days from the date hereof.”

‡ “OPINION.—This is an ordinary petitory action for £80. It is explained on record that it is the estimated damage sustained by the pursuers through a fire by which the pursuers' furniture and personal effects were destroyed or injured. It is averred that the furniture and personal effects were insured against fire with the defenders.

“The defenders pleaded that the action was incompetent, because there was no conclusion for declarator that the subjects had been insured, and because the amount of the damage fell to be ascertained by reference. I

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The defenders reclaimed, and argued;—(1) The action was incompetent. The summons proceeded on the assumption that there was a contract of insurance. That was disputed. No policy had been issued. There should have been a declaratory conclusion. Moreover, the amount of damage—if the action were to be taken as limited to that question—fell to be ascertained by arbitration. (2) The action was irrelevant. It was not said on what date the premium was paid, or that it had been paid prior to the fire. Before the issue of a policy—and none was issued here—or the payment of a premium, there was no concluded contract.¹ The description of Thomas M'Elroy merely as defenders' agent was insufficient. The scope of his authority should be stated. The Lord Ordinary had mistaken the purport of the letter to which he referred.

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Argued for the pursuers;—The action was competent. The only remedy open to the pursuers was to sue for the loss sustained. The policy was not in their hands, and they could not know its exact terms and conditions, but they were willing to refer the amount of damages, and had at once offered to do so. (2) The statements in cond. 2 were a relevant averment of an agreement by the defenders to insure, and that the pursuers had duly paid the premium of insurance to the defenders' agent. The cases cited for the defenders were not in point, for they were decided on the ground that there had been a change of circumstances before the payment of a premium; but in this case it was impossible to read cond. 2 except as meaning that the premium had been paid before the fire took place.

LORD ADAM.—The pursuers of this action aver that they insured the furniture in their dwelling-house against loss by fire with the defenders, the London Assurance Corporation; that a fire took place causing damage to the extent of £80, and that they have raised this action to recover that sum. The defenders meet their claim with sundry objections, the objection giving rise to the most serious consideration being set out in the defenders' second plea in law, viz., that the pursuers' averments are irrelevant.

The only material averment bearing on this question is contained in cond. 2—(Quotes it).

see no necessity for a declaratory conclusion, and think it sufficient that the contract of insurance should be averred on record. It may be that the amount of the damage must be referred to arbitration, and the pursuers had no objection that it should be so ascertained. But it must, in the first place, be decided whether there was a completed contract of insurance, and if that be decided in the affirmative, then it may be that the amount to be paid may be adjusted by agreement. I am therefore of opinion that the defenders' first plea is bad.

"As to the relevancy I have more difficulty, but think that the safer course is to allow a proof before answer. I might not have done so but for the letter of the defenders' manager, printed on record. He there accepts a premium. The defenders say that that was a premium for a new policy about to be made out, and not for the policy which had been made out in the beginning of May. That, however, seems to involve a question of fact."

¹ Canning v. Farquhar, 1886, L. R., 16 Q. B. D. 727, Lord Esher, M. R., at p. 731; Sickness and Accident Assurance Association, Limited, v. General Accident Assurance Corporation, Limited, July 12, 1892, 19 R. 977.

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I agree with the comment which has been made on that averment, that it is clear that the alleged policy was never delivered to the pursuers. There is no averment that it was. All that is said is that a policy was duly prepared by the defenders. I infer from that that it was not delivered. Arising from the fact that there is no averment of delivery, a subsidiary objection was taken by the defenders to the form of action. They maintain that the action should not have been a simple petitory action for a sum of money, but that it should have been for delivery of a policy, and failing delivery, for damages. I understand, however, that the defenders do not now desire to press that objection, as the result—whatever was the form of action—would be the same.

Taking the averments above quoted, even though the policy were still in the hands of the Corporation, I should be disposed to take a more favourable view of the pursuers' case if there were any relevant or proper averment that payment had been made by them of the premium to Mr M'Elroy as agent for the defenders, and duly authorised to receive such premium, and that the payment had been made before the fire took place. But that is where the blot on this record lies. There is no such averment. If it be the fact that a premium was so paid, then it is a fact entirely within the knowledge of the pursuers, and they were bound to make a clear averment of it.

If, however, we are entitled to assume that the payment of the premium was not made before the fire took place, then I am of opinion that the defenders were quite within their right to resile from the proposed insurance.

The Lord Ordinary, I gather, would have taken that view but for a certain letter written by the defenders' district manager to Mr M'Elroy. That letter is referred to on record, and when we examine it we find that it is plainly not an acceptance of the premium in question. On the contrary, the district manager accepts the sum enclosed, but at the same time sends a covering note which shews quite clearly that he accepts the premium for a new risk running from the 8th June. It may be that the manager had no right to accept and keep the money sent to him on these terms, on the ground that it was not sent to him for that purpose. But if that be so, it only means that he is bound to return it when asked. Accordingly, as there is no averment that the premium was paid before the fire took place, I am for recalling the interlocutor of the Lord Ordinary, and dismissing the action.

LORD M'LAREN.—Under this action the pursuers sue an insurance company on a claim to be indemnified for loss arising from fire, and the question which we have to consider at this stage of the case is, whether there is set out a relevant statement of a contract of indemnity under which the pursuers are entitled to sue.

As I have always understood,—indeed I think it is perfectly settled in the law of Scotland,—a contract of insurance can only be made in writing. It is true that in the somewhat parallel case of cautionary obligation a practice had grown up of allowing parole evidence in proof of mercantile guarantees,—a practice which was afterwards corrected by statute. But

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there was no such practice in regard to insurance, and no argument or decision was offered to the contrary. Either a policy or some informal writing followed by *res interventus* is requisite. A policy is the proper mode of constituting the contract, and I rather think that, as such a policy is a stampable instrument, the interest of the Revenue makes it necessary that there must always be a policy. But the parties may be bound by a preliminary contract in terms of the formal deed which is afterwards executed. If the insurance company delivers a policy without requiring immediate payment of a premium, they incur responsibility for the risk, because having delivered the policy, they are held to have given credit for the premium. That is constantly done, *e.g.*, in marine insurance a running account is kept by the brokers, in which the premiums are noted on one side of the account and the losses on the other. But, then, the company are not bound to deliver a policy without payment of the premium. If they accept a premium before delivering a policy, I should be disposed to hold that the acceptance of the premium and the delivery of a receipt therefor was sufficient to create the obligation to issue a policy. The question is not likely to occur, because, as I understand, the practice is, whenever a premium is paid in advance, to issue what is called in this branch of insurance a covering note—a slip as it is called in marine insurance—by which the party is insured until the insurers have time to consider whether they will accept the risk. It is, then, essential to a relevant averment of a contract under which this company can be made liable that it should be stated either that a policy was delivered, credit being given for the premium, or that the premium was paid and unconditionally accepted. I do not find either statement in this record. There is only a general statement that the pursuer is insured. There is also a statement that a premium was paid, but then that statement is consistent with the hypothesis (I do not say fact) that the payment was made subsequently to the fire, and that the premium was declined. The Lord Ordinary apparently was induced to allow a proof only because of the letter of 8th June, to which we have been referred, because he says,—“I might not have done so but for the letter of the defenders’ manager printed on record. He there accepts a premium.” That letter, it was explained to us from the bar, is the letter of 8th June. I think the Lord Ordinary must have proceeded on the view that writing of some kind was necessary to constitute the contract, but when we examine the letter it is impossible to put the construction on it which the Lord Ordinary has done. The letter bears to be the acceptance of a premium under reference to a covering note, and when that note is read it is seen to have reference to a new insurance commencing at a date subsequent to the occurrence of the fire. We had the same element in the case of the *Sickness and Accident Assurance Association*,¹ in which one insurance company sued another for contribution. The question in the case was whether the insurance had been completed before the casualty occurred. The party proposing to be insured sent the premium, but the latter was not received until two days after the accident, and in answer to the letter sending the premium, the defendant company accepted the payment as for an insurance

¹ 19 R. 977.

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commencing the day after the accident occurred. We held that, while the company might not be entitled to alter the conditions of the proposed contract, as the parties were not agreed as to the terms, there was no contract. So when we examine the letter of 8th June along with the enclosed "covering note," we find that it is absolutely contradictory of the pursuers' averment. The effect of it, if any, would be to create a contract which the pursuer repudiates, and not to support the conclusions of the present action.

I concur with Lord Adam in holding that the action should be dismissed.

LORD KINNEAR.—I agree. The pursuers' case is that, although no policy was issued, a valid insurance was effected by reason of the pursuers having tendered and the defenders having accepted payment of a premium in performance of a contract to insure. I assume that that may be a good ground of action, but to entitle us to sustain the action on that ground, it must be relevantly averred, first, that the premium was paid to and accepted by the company before the fire took place, and second, that it was paid to and accepted by the company, or by an agent duly authorised by the company to accept it, and so to bind them. I find neither of these averments on record.

There is no specific averment of the date when the premium was paid, but it is said that we can gather, on a fair construction of the statements, that the pursuers intend to say that the premium was paid in the end of April. I do not think the pursuers are entitled to ask the Court to draw an inference with regard to such a matter, for this fact, which is indispensable to support their case, is within their own knowledge, and they should have no difficulty in setting it out in clear and unambiguous terms. Even assuming that it is reasonable to get at the fact by way of inference, I am hardly able to draw the conclusion that the pursuers did so intend, for all I find stated is—(Quotes cond. 2). I see no suggestion there from which I should infer that the premium had been paid before the occurrence of the fire.

The second material fact is not averred sufficiently by the mere use of the word agent, as describing M'Elroy. That is an extremely vague and indefinite word, and may cover many varieties of authority. What it was really necessary to aver was that M'Elroy had due authority to accept the premium and to bind the company.

I agree that the attention of the Lord Ordinary seems not to have been sufficiently directed to the exact terms of the letter which his Lordship refers to, for the Lord Ordinary reads that letter as if it were an acceptance by the company's manager of a premium for a policy about to be issued as for the 30th April; whereas it is clear, when the letter is read along with the covering note to which it refers, that the risk was to run from the 8th June. The matter appears to me to involve not a question of fact but the construction of correspondence, and on that I think no doubt can arise.

LORD PRESIDENT.—I concur.

THE COURT recalled the Lord Ordinary's interlocutor, found that the averments of the pursuers were not relevant, and dismissed the action.

PATRICK & JAMES, S.S.C.—J. A. CAIRNS, S.S.C.—Agents.

REV. MATTHEW GARDNER, Minister of Peebles, Pursuer.—*Constable.* No. 51.

DAME ANNE HAY AND OTHERS (Sir D. E. Hay's Curators) AND

OTHERS, Heritors of Peebles, Defendants.—*Pitman.*

Jan. 8, 1897.
Minister of
Peebles v.
Heritors of
Peebles.

Teinds—Augmentation—Procedure where dispute as to the existence of sufficient free teind.—In a process of augmentation the heritors admitted the existence of free teind, but denied that it was sufficient to meet the augmentation craved, and moved for an order on the minister to lodge a condescendence of the free teind which he alleged to exist. The Court granted the augmentation craved, leaving the question whether sufficient free teind existed or not to be determined in the process of locality.

In a process of augmentation raised by the minister of Peebles against the heritors, the pursuer moved for an augmentation of five chalders to the stipend, and of £5 to the allowance for communion elements. TEIND COURT.

Dame Anne Hay and others (Sir D. Hay's Curators), and other heritors, opposed an augmentation of more than three chalders, and denied that there was sufficient free teind to meet an augmentation of five chalders. They moved the Court to order the minister to lodge a condescendence of the free teind which he alleged to exist in the parish.

Argued for the minister;—A condescendence was only ordered when the heritors denied the existence of any free teind. What the Court required was that the minister should make out a *prima facie* case.¹ Here the admission of the heritors that there was free teind sufficient to meet three-fifths of the augmentation craved shewed that the minister had a *prima facie* case. That being so the Court should grant the augmentation craved, leaving the question of the existence of free teind to be determined in the locality. That was the course followed in the *Banchory-Devenick* case,¹ and in the cases cited by the defenders.²

Argued for the defenders;—The invariable practice was to order a condescendence when the heritors denied the existence of free teind. Here the amount of free teind alleged by the minister was disputed, and the same order should be pronounced. In the cases cited, although the question of the existence of free teind was ultimately left to be determined in the locality, a condescendence had in the first instance been ordered.² In the case of *Banchory-Devenick*¹ founded on by the minister, it was only after there had been first a remit to the Lord Ordinary to examine and report whether there appeared to be any free teind, and then a condescendence lodged by the minister, that the Court held that the minister had made out a *prima facie* case.

THE COURT granted an augmentation of five chalders, and £5 additional for communion elements, "and remit to the Lord Ordinary to prepare a locality, but declaring that this modification and the settlement of any locality thereof shall depend upon its being shewn to the Lord Ordinary that there exists a fund for the purpose."

J. B. M'INTOSH, S.S.C.—J. & F. ANDERSON, W.S.—Agents.

¹ Minister of Banchory v. The Heritors, July 1, 1863, 1 Macph. 1014, 35 Scot. Jur. 586.

² Frood v. Earl of Stair (Glenluce case), Nov. 9, 1874, 2 R. 76; Minister of Bonhill v. Orr Ewing, Feb. 22, 1886, 13 R. 594.

No. 52. THE DUKE OF DEVONSHIRE AND OTHERS (the Duke of Hamilton's Trustees), AND OTHERS, Pursuers (Respondents).—*Sol.-Gen. Dickson*
—*Deas.*

Jan. 9, 1897.
Duke of
Hamilton's
Trustees v.
Woodside
Coal Co.

THE WOODSIDE COAL COMPANY AND ANOTHER, Defenders (Reclaimers).
—*D.-F. Asher—W. Campbell—Ross Stewart.*

Process—Proof—Refusal of diligence to recover writings.—When a Lord Ordinary had allowed a party a proof of his averments, *held* that the Lord Ordinary was not entitled to refuse a diligence for the recovery of documents on the ground that the averments remitted to probation were irrelevant.

1ST DIVISION. THE DUKE OF DEVONSHIRE AND OTHERS, the Duke of Hamilton's
Ld. Kyllachy. testamentary trustees, and as such proprietors of the estate of Netherburn, in the county of Lanark, and William Barr & Sons, their tenants in the minerals of Netherburn, raised an action against the Woodside Coal Company, and Joseph Hutchison, the only known partner of the company, concluding for payment to the pursuers of £2000 and £12,000 respectively.

Mr Hutchison was the proprietor of the estate of Woodside, which adjoined Netherburn.

The pursuers averred that the defenders had, in working out the minerals in Woodside at a place where it marched with Netherburn, made encroachments on and worked out the minerals in a triangular area of ground forming part of Netherburn.

The defenders admitted that the manager of the Woodside Coal Company had made encroachments. Mr Hutchison stated that these were made without his authority, and that he had only recently come to know of them.

The defenders further made a detailed statement of encroachments, which they alleged the pursuers and their authors had made on the Woodside minerals. "By the acts of the pursuers above condescended on, or some of them, the pursuers induced the defenders' manager to believe that he was entitled to take minerals from the Duke of Hamilton's estate, in places where such minerals could be most conveniently or only worked from Woodside, and he accordingly made the encroachments upon the triangular area referred to in the present action. The minerals in that area were, and are, not workable to profit except from Woodside. The defenders' manager acted in good faith, and in accordance with the system of working established by the pursuers." "The defenders are about to raise an action against the pursuers in respect of the encroachments and illegal actings above referred to."

On 10th November 1896 the Lord Ordinary (Stormonth-Darling) closed the record, and allowed the parties a proof of their averments.

Thereafter the case was transferred to Lord Kyllachy.

The parties subsequently lodged specification of documents, and moved for a diligence for their recovery.

It was not seriously disputed that the documents covered by the defenders' specification were in the main relevant to the averments contained in the defenders' statements.

On 18th December 1896 the Lord Ordinary (Kyllachy) granted diligence in terms of the specification for the pursuers, and refused the defenders a diligence in terms of their specification, and granted leave to reclaim.

The defenders reclaimed, and argued ;—The question raised by the interlocutor was really the relevancy of the defence. The Lord Ordinary had doubts about its relevancy, and had therefore refused the diligence *de plano*. But the defence had been remitted to probation, and the defenders were therefore entitled to prove it in the ordinary way. It was incompetent for the Lord Ordinary to reconsider the matter of relevancy.¹ The interlocutor allowing proof had been acquiesced in. The pursuers did not now seek to have it reviewed, even if that were competent.

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Argued for the pursuers ;—The defence in its essential features was irrelevant, and the Lord Ordinary was right in refusing the diligence. It was always open to the Court to limit the scope of an inquiry by refusing to allow evidence to be led about an irrelevant topic, and that was what the Lord Ordinary had done. He was entitled to refuse the diligence altogether, even though some of the articles in the specification were relevant.² The defenders were really taking advantage of the general allowance of proof to obviate the necessity of raising the separate action which they had threatened.

LORD ADAM.—This is an action brought by the proprietor of certain lands and his mineral tenants in these lands. These lands, as I understand, adjoin and are bounded by lands belonging to the defender Hutchison, and the allegation upon which the action is founded is that the defender, who also through a tenant or manager works the coal on his side of the march, has trespassed upon and removed coal from a particular area of ground, the property of the pursuers. The action is to recover the loss and damage so occasioned.

The defence is not a denial of the fact that the defender has, through his tenant or manager, here encroached upon and removed coal from the ground in question, but the defenders set up a distinct and substantive defence, in support of which they make a series of statements of fact which culminate in pleas to the following effect : that the defenders not having authorised the encroachments complained of, they are not liable in damages, and that in the circumstances stated the pursuers are barred by their actings from claiming damages in respect of the said encroachments.

Now, the record was closed upon these averments. There seems to have been no discussion on the relevancy of the defence set up, and upon the 10th November 1896 the Lord Ordinary closed the record, and allowed parties a proof of their averments on a day to be afterwards fixed. That allowance of proof was not brought before us by reclaiming note. The question was raised before us, whether the present reclaiming note entitles us to consider the interlocutor of 10th November, but no motion has been made to us by the Solicitor-General on the part of the pursuers in any way to modify or alter that interlocutor, and it appears to me that we must dispose of the question before us—namely, whether or not this specification should be granted, on the footing that the defenders are entitled under that interlocutor to prove all their averments—I mean all the averments relevant to support the distinct and substantive case which they have set up. For

¹ Barr v. Bain, July 17, 1896, 23 R. 1090.

² Silver v. Great North of Scotland Railway Co., Jan. 23, 1894, 21 R. 416.

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myself, if the matter of the relevancy of these averments in defence had been brought before us, it might or might not have been my opinion that one or more of them should not have been remitted to probation, but we are not in that position. The question now is, whether in the present position of the case we are entitled to assume that the whole of these averments are irrelevant—for that is what it comes to—and ought not to have been remitted to probation. I cannot say that that is so. If in the course of the defenders leading evidence in support of their case, any particular piece of evidence, whether oral or written, should not be relevant to support that case, that question is reserved under the ordinary procedure. But that is not the matter which we have now to consider; and in the position in which we are placed it appears to me that the Lord Ordinary was not entitled altogether to refuse this specification *de plano* as being unwarranted and inadmissible. I think the case ought to go back to him to adjust the specification.

LORD M'LAREN.—This is an action of damages for encroachment by a mineral proprietor and his tenants against an adjoining proprietor, and the Lord Ordinary before whom the case was first taken made an order—I presume because he was not asked to take any different course—allowing to both parties a proof of their averments. Now, it is perfectly clear that such an allowance of proof leaves all questions of relevancy open to further consideration, and that the words “before answer,” which are often inserted for the purpose of reserving questions of law and relevancy are unnecessary. It seems to me that, looking at the matter very strictly, as the relevancy is reserved, the question of relevancy might be raised at any subsequent stage of the case, and even on a motion for a diligence. At the same time it is clear enough that that is a very inconvenient mode of starting a legal question, and that if the question is to be raised before proof or trial, the proper time for raising it is when the Lord Ordinary is moved to make an order for proof. In this case the action had been transferred to Lord Kyllachy from another Judge, and his attention having been called to the defences, it was explained to us that his Lordship thought that the special defences were altogether irrelevant, and that there was no question for consideration except the amount of damages. In that view, as I understand, his Lordship rejected the specification. It appears to me that that was practically reversing the judgment of the Lord Ordinary who had already allowed a proof; at all events it amounts to a different mode of exercising the discretion which a Judge has before the trial of dealing with the relevancy.

A motion for a diligence is as I have said an inconvenient motion for raising questions of this kind, and I therefore agree with Lord Adam that the refusal of the defenders' specification on this ground cannot be maintained, and I am prepared to grant the diligence, subject to adjustment, which counsel said could readily be done. I am the more disposed to take this course because the granting of the specification does not necessarily make the documents evidence in the case. It will still be open at the proof to object to any documents being put in evidence; and according to my view a document may be objected to upon the ground of want of relevancy,

because if the Lord Ordinary has power, as he undoubtedly has, to dispose of any question of law or relevancy in giving judgment upon the case, it must be within his competency, if he has a clear opinion on the question, to exclude matter in the course of the proof, thereby keeping the case within proper bounds, and making his duty more easy when he comes to consider the effect of the evidence which he has allowed.

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LORD KINNEAR.—I agree with Lord Adam. I think that the interlocutor of the Lord Ordinary has decided, and for the purposes of this question finally decided, that the averments contained in the defenders' statement of facts are to be admitted to probation. Whether the interlocutor by which he remitted the whole averments of both parties to probation could be competently brought under the review of this Division now, if the pursuers had taken advantage of the defenders' reclaiming note and maintained that that brought up the previous interlocutor, it is unnecessary to consider, because, whether it could be so brought up or not, we have had no motion put before us to review that interlocutor, and therefore for the purposes of the present question it must be considered final.

I think that that interlocutor determines the question of relevancy in this sense, that it decides that the averments of both parties on record are to be remitted to probation. It may still be a question, assuming them to be proved, what the effect of the facts set forth by the defenders ought to be upon the pursuers' claim. Whether it is open to the Lord Ordinary or not to decide that upon the merits the averments which he has remitted to proof are relevant or not relevant to affect the pursuers' claim, it would certainly be open to this Court to do so, because I presume that there can be no question that a reclaiming note against a final interlocutor would bring up all the previous interlocutors. Therefore it appears to me that the question on the merits is unaffected by any decision we pronounce now, and that the question of what averments are to be remitted to probation is finally decided by an interlocutor which we are not asked to review. Upon that ground I think we must recall the Lord Ordinary's interlocutor refusing to allow the specification altogether. It will of course be open for his Lordship to determine what documents are recoverable by diligence on the assumption that the case alleged by the defenders has been sent to proof.

The LORD PRESIDENT concurred.

THE COURT recalled the interlocutor reclaimed against so far as it refused diligence to the defenders in terms of their specification, and remitted to the Lord Ordinary to adjust the specification, &c.

TODD, MURRAY, & JAMIESON, W.S.—DRUMMOND & REID, S.S.C.—Agents.

JOSEPH DAVIS, Pursuer (Respondent).—*Rankine—Ralston.*
ANNA MARGARET CADMAN, Defender (Reclaimer).—*Sharro—Cook.*

No. 53.

Jurisdiction—Reconvention—Foreign.—C., a domiciled Englishwoman, brought a note of suspension to have D., the holder of a bill which bore to be accepted by her, interdicted from noting, protesting, or charging upon it. She stated that she was afraid that D., if not prevented, would pro-

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Davis v.
Cadman.

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test the bill, and having registered the protest and taken out a certificate of registration in terms of the Judgment Extension Act, 1868, would proceed to attach her effects in England. In her condescendence and pleas she set forth various objections to the validity of the bill.

D. having brought an action against C. for the amount of the bill, she pleaded "no jurisdiction."

Held (diss. Lord Adam, rev. judgment of Lord Kincairney) that the defender had not rendered herself liable to the jurisdiction of the Court *reconventionne* in respect that she had brought the note of suspension of necessity, to protect herself, and with the object of excluding the jurisdiction of the Court.

Process—Summons—Action founded on bill of exchange—Court of Session Act, 1850 (13 and 14 Vict. cap. 36), section 1, and schedule A—A. S. 31st October 1850.—Held (by Lord Kincairney, Ordinary) that where an action is founded on a bill of exchange, the bill must be set forth in the conclusions of the summons.

Opinion by the Lord President to same effect.

1st Division.
Lord Kin-
cairney.

THIS was an action raised in April 1896 by Joseph Davis, Edinburgh, against Anna Margaret Cadman, of Trinity Lodge, Grove Park, Denmark Hill, in the county of Surrey, for payment of £200.

The amount sued for was alleged to be due under a bill, dated 10th July 1895, drawn by the pursuer upon and accepted by the defender and her sister, Mary Loetitia Cadman. The bill was not mentioned in the conclusions of the summons.

The pursuer, *inter alia*, averred;—(Cond. 6) "On 14th January 1896, the present defender and her said sister raised proceedings in the Supreme Courts of Scotland, against the present pursuer, seeking to interdict him from doing summary diligence under the said bill, and the said proceedings are still in dependence. In virtue thereof the defender is subject to the jurisdiction of the Supreme Courts of Scotland *ex reconventionne*. In answer to the defender's explanation, the proceedings in said note of suspension and interdict are referred to. It is denied that the question of the defender's liability for the sum contained in said bill is competently raised and can be determined in said process."

The pursuer pleaded, *inter alia*;—(1) In respect the present defender and her sister raised proceedings in the Supreme Courts of Scotland against the pursuer, seeking to interdict him from doing summary diligence under the said bill, and the said proceedings are still in dependence, the defender is in virtue thereof subject to the jurisdiction of the Supreme Courts in Scotland *ex reconventionne*.

The defender stated that she was a domiciled Englishwoman, and pleaded;—(1) No jurisdiction. (2) The action is incompetent.

The note of suspension referred to had been raised by the defender and her sister in January 1896. The prayer was for interdict against the respondent "noting, or protesting, or charging upon, or taking any steps to enforce by diligence the payment of the sum of £200, bearing to be contained in, and alleged to be due by the complainers under, a bill for the sum of £200, bearing to be dated the 10th day of July 1895, and bearing to be drawn by the respondent upon the complainers."*

In support of their application for interdict the following state-

* The grounds of suspension set forth in the note as presented in the Bill-Chamber are given in Lord Adam's opinion. The statements and pleas which follow are taken from the closed record in the Court of Session.

ments were made by the complainers:—Bills previously granted by the complainers to the respondent's firm of J. Davis & Sons, Limited, of which he was manager, had been protested. The protests had been extracted and registered, and a certificate of registration issued in terms of the Judgment Extension Act of 1868. These certificates had been presented in pursuance of said Act, for registration in England, and upon the registration being effected the respondent's firm had, without notice to the complainers, taken steps for the purpose of attaching their furniture. After certain proceedings in England on 4th December 1895 a compromise was effected, which the complainers understood to include all claims against them. (Stat. 4) "Upon 6th January 1896 the complainer Anna Margaret Cadman received an intimation from the respondent that an alleged acceptance by herself and her sister to him for £200 became due upon the 13th inst., and was payable at No. 4 George Street, Edinburgh. The complainers have ascertained that the said acceptance bears to be dated 10th July 1895, and to be signed by them, but it contains the name of no drawer. . . . At the hearing of this note before the Lord Ordinary on the Bills, on 1st February 1896, the respondent voluntarily and deliberately produced said bill, founded upon it in support of his pleas, and lodged it in process as one of his productions. The Lord Ordinary on the Bills, after renewed discussion upon the terms of the bill, passed the note without caution, in respect that the bill was not signed by the person giving [*sic*] and the respondent reclaimed against this judgment. He again founded upon the bill, which was still unsigned by any drawer, and was again unsuccessful. It cannot now be completed. It is not, and never was, a valid document of debt. The complainers received no value for said bill, and the whole of the indebtedness by them, or either of them, to the respondent's company was extinguished at the time when said compromise was effected. No sum has ever been received by the complainers, or either of them, from the respondent in loan, and no sum is now due by them, or either of them, to the respondent. Looking to the past conduct of the respondent's firm (which is entirely controlled and directed by him, and in which he has a large interest) the complainers fear that if steps are not taken to prevent him, the respondent will protest the alleged acceptance and proceed to levy execution upon it without notice or intimation to them, as in the case of the previous acceptance before referred to, and they are accordingly under the necessity of making the present application for interdict in order that the respondent may be interdicted from proceeding to do diligence upon the said acceptance."

The complainers' pleas were, *inter alia*:—The respondent ought to be interdicted from proceeding to do diligence upon said alleged acceptance in respect—(a) that he is now seeking to enforce his rights under it by ordinary action; (b) that it was produced by the respondent in judgment while unsigned by him or any alleged drawer; (c) that it does not comply, and cannot now be made to comply, with the provisions of section 20 of The Bills of Exchange Act, 1882; (d) that *ex facie* of the alleged bill the respondent has no right thereto; (e) that no value was received by the complainers for said bill; and (f) that no sum is due or payable by the complainers, or either of them, to the respondent.

In respect of an undertaking by the pursuer not to proceed by summary diligence on the bill, the note of suspension was on 5th June 1896 refused by Lord Kincairney.

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In the present action the Lord Ordinary on 28th July 1896 pronounced the following interlocutor:—" (1) Finds that this Court has jurisdiction to entertain the question raised in this action, in respect of the dependence when it was brought into Court of an action at the instance of the defender, and of Miss Mary Loetitia Cadman, against the pursuer, in reference to the bill the contents of which are now sued for; (2) repels plea 1 . . . for the defender; (3) finds that the action is raised on a bill, and that the said bill is not set forth in the conclusions of the summons, in conformity with schedule A of the Act 13 and 14 Vict. c. 36, and allows the pursuer to amend the summons so as to bring it into conformity with the said schedule." *

* "OPINION.—The pursuer in this case is a money-lender carrying on business in Edinburgh. The defender is an unmarried lady resident in England, and the pursuer seeks to recover from her the sum of £200 said to be due by a bill signed by the defender's sister, Mary Loetitia Cadman, now bankrupt, and herself. The pursuer's averment is that he advanced to Mary Loetitia Cadman £175 upon the bill; that she agreed to get the name of the defender to the bill as her surety; that the defender signed the bill and handed it back to her sister, Mary Loetitia Cadman, 'with authority to put the same in circulation and hand it to the pursuer, and which was so done.' Neither counsel was able to explain what was meant by the words 'to put the same in circulation.' The question on the merits is whether the defender is liable to pay the sum in the bill to the pursuer.

"Several preliminary questions of considerable difficulty and of some importance have been raised by the defender.

"The first plea is 'no jurisdiction,' the defender being an Englishwoman. This is met by the plea that the defender is 'subject to the jurisdiction of the Supreme Courts in Scotland *ex reconventione*.' I am not sure that this plea is quite correctly expressed, but the grounds of it are distinctly stated. It is rested on a note of suspension and interdict by the Misses Cadman against the present pursuer, in which they crave that the pursuer should be interdicted from noting or protesting, or enforcing by diligence, the bill which is now in question. In that case the note was passed in the Bill-Chamber without caution, and the case was afterwards brought into Court, and a record was made up and closed. It was in dependence when this action was brought, but the note was afterwards refused on the undertaking of the pursuer, Davis, not to proceed by summary diligence on the bill. I understand it is now out of Court.

"Now, the defender maintained that this action could not warrant the plea of reconvention. It was submitted that an action of reconvention was only permitted for the protection of a native defender in the primary action brought by the foreigner, and that here Miss Cadman was in substance the defender although nominally the pursuer of that action, because the action was of the nature of a suspension of a threatened charge. But I think that was not so, for Davis had not protested the bill, and had never threatened to use diligence on it. I think the present defender must be held to have been one of the pursuers of that action, as she appeared on the face of the petition to be. Further, the defender contended that the plea of reconvention only arose where the two actions were of the nature of cross actions, and where the one claim could be set against the other. No doubt the plea of reconvention usually arises in such circumstances.

"Now, it does at first sight seem rather paradoxical to say that an action brought to prevent the enforcement of a bill by the pursuer should enable him to raise an action in this Court for the bill. The consequence was, I daresay, not contemplated by the defender.

"I am of opinion, however, in this case, that the plea of no jurisdiction

The defender reclaimed, and argued;—*On the question of jurisdiction.*—Reconvention was an extension of the doctrine of compensation, and was a protection given to a defender. It was founded upon the equity that a foreigner who appealed to a Scottish Court must submit to the jurisdiction of the Court in such actions raised by the native defender as were necessary to enable the Court to do justice between the parties.¹ In every case the Court would consider whether it was fair that the foreigner who had come to this Court for redress should be made subject to its jurisdiction in all matters *ejusdem generis*. In the present case, the defender had not convened the pursuer to this Court to have the question of her liability under the bill decided, but in order to prevent him attaching her effects in England. A protest once registered was a judgment of the Scots Court, and the English Court would not inquire into its validity. The defender's object in bringing the suspension was accordingly to exclude the jurisdiction of the Scots Court, and she had really been

is bad, and that the Court has power to entertain this action, and that in respect of the dependence of the former action when this action was brought into Court.

"If the former action had raised no other question than whether summary diligence could proceed on the bill, there might have been a good deal to say for the argument that it could not support jurisdiction in this action. But if the record be referred to it seems plain that it did more than that, because the whole questions on the merits were raised in that action, just as they are raised here. There was, no doubt, another question, viz., whether the bill could warrant summary diligence. But the whole merits were raised, and the question whether the Misses Cadman were liable on the bill was submitted to the Court by the Misses Cadman themselves. That is to say, the present defender, being one of the pursuers of that action, submitted to the Court the question whether she was liable for £200 under this bill. That is the question on the merits submitted in this action by Davis, the pursuer. The two actions are not about similar or connected matters, but about precisely the same matter, and I conceive that the defender, having submitted to the Court that question, cannot now turn round and plead no jurisdiction when the same question is submitted by the pursuer. The case stands the test expressed by Lord Kinloch in *Thomson v. Whitehead*, 25th January 1862, 24 D. 331, 349, where he says,—'I should be disposed to limit the admissibility to the case where there is such contingency as would make it proper that actions should be conjoined.'

"In *Morison and Milne v. Massa*, 8th December 1866, 5 Macph. 130, the Lord President says,—'The broad principle is this, that a party appealing to the jurisdiction of the Court renders himself amenable to that jurisdiction, and eminently so in reference to the same matter of dispute.' It might be contended that the present defender, by her pleadings in the former action, had prorogated the jurisdiction of the Court to try the question of her liability under the bill, and there is high authority for the view that jurisdiction by reconvention is a species of prorogated jurisdiction,—per Lord Deas, in *Morison and Milne v. Massa*, and in *Thomson v. Whitehead*. It does not greatly signify by what name the power of the Court to entertain the question is expressed.

"I am of opinion, on the grounds expressed, that the defender is barred

¹ *Thompson v. Whitehead*, Jan. 25, 1862, 24 D. 331, 34 Scot. Jur. 163; *Morison and Milne v. Massa*, Dec. 8, 1866, 5 Macph. 130, 39 Scot. Jur. 57; *Allan v. Wormser, Harris, & Co.*, June 8, 1894, 21 R. 866.

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in the position of defender in instituting that process. There was no equity in subjecting her to the jurisdiction of the Scots Court, as she had various defences to the pursuer's claim which would require the presence of witnesses resident in England. The present was not a cross action raising a counter claim to one previously made by the defender.

Argued for the pursuer;—*On the question of jurisdiction.*—The doctrine of reconvention was in part founded on the principle of implied consent.¹ The defender in the present action had, in the suspension, raised the question of the validity of the bill as a document of debt, and the proceedings were clearly cognate the one to the other. The contingency of the processes was such that it would have been appropriate to conjoin them, and to such cases the principle of reconvention was clearly applicable.²

At advising,—

LORD PRESIDENT.—The defender is a domiciled Englishwoman; and, unless she has in some way subjected herself to the jurisdiction of this Court in the matter of the present action, her plea of no jurisdiction must be sustained. The Lord Ordinary has repelled the plea in respect of the dependence when this action was brought into Court of an action at the instance of the defender and of Miss Mary Loetitia Cadman against the pursuer in reference to the bill the contents of which are now sued for.

Now, it is clear that the soundness of this reason must depend on the nature of the original action, for it cannot be affirmed as a general proposition that the mere fact that the first action had reference to the ground of action of the second will support the jurisdiction in the second. We must see why the foreigner applied to this Court,—was it of choice or of necessity? and what was it she asked the Court to do about this bill? The

from objecting to the jurisdiction of the Court to decide the very question which she herself submitted in the previous case.

"It does not signify that the former action is, or may be now, out of Court.—*Allan v. Wormser, Harris, & Co.*, 8th June 1894, 21 R. 866.

"I have felt a little difficulty arising from the statement by the pursuer on the record,—‘It is denied that the question of the defender's liability for the sum contained in said bill is competently raised, and can be determined in said process,’ meaning the action of interdict. That is rather a plea in law than a statement of fact. It is extremely adverse to the pursuer's plea of reconvention, and I should have had much difficulty on the question of jurisdiction had I thought the proposition sound. But I do not think it sound. I think the question of the defender's liability could have been determined in the action of interdict, although I doubt whether the pursuer Davis could have got an efficient remedy in that action.

"2. The defender pleaded that the action is incompetent, because it is an action on a bill, and because the action is not in the form of schedule A of the Court of Session Act, 1850. I am satisfied that the action is laid on the bill. It has no other ground. No contract between the pursuer and defender other than that constituted by the bill is averred. The action is not in terms of schedule A, as it ought to have been, and must be. But the summons may be amended so as to make it conform to the schedule, as was done in *Milne's Trustees v. Ormiston's Trustees*, 14th May 1893, 20 R. 523. . . ."

¹ Thomson v. Whitehead, 24 D., per Lord Deas, at p. 355; Morison & Milne v. Massa, 5 Macph., per Lord Deas, at p. 137.

² Thomson v. Whitehead, 24 D., per Lord Kinloch, at p. 349.

answer to these questions is to be found in the prayer of the note of suspension. The note asked the Court to interdict, prohibit, and discharge the present pursuer from noting or protesting this bill, or charging upon it, or taking any steps to enforce it by diligence. The reason for making this application, as set out in the statement of facts, was that, in relation to other bills, the present pursuer had noted and protested them in Scotland, had got the protests extracted and registered in the Books of Council and Session, and then taken out a certificate of registration in terms of the Judgments Extension Act, and had proceeded to seize the defender's furniture in England.

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Upon this I observe, first, that the proceedings of the defender in coming to the Scotch Courts was purely defensive and protective; and, second, that she came to the Scotch Courts, not by choice to try the question of her liability under the bill, but by necessity, because no other Court was competent to disarm her opponent of the weapon of summary diligence by stopping the Scotch procedure of noting, protesting, and registering in the Books of Council and Session. It is quite true that, being in the Scotch Court, the defender stated the pleas she had got against the validity of the bill; but this does not alter the nature of her suit. Indeed, the nature of the proceeding was finally adjudged by this Court, which, so soon as the pursuer judicially stated that he did not intend to do summary diligence, found it unnecessary to proceed with the action, and, on that ground, dismissed it.

Well, now, where is the ground for holding that the dependence of a proceeding of this character at the time when the present action was raised precludes this Englishwoman from having her liabilities under this bill tried in the Courts of her own country, according to the ordinary rule of international law?

I do not think it is fair that this lady, obliged to come to the Scotch Courts to stop an illegal use of their process, because she went on to say that the bill was bad, and would be bad even in an action, should be caught hold of as having "submitted to the Court" those questions, or as having "appealed to its jurisdiction" on the merits of this bill, for these are the phrases used by the Lord Ordinary. Accordingly, even assuming that the defender would be liable to our jurisdiction in the present action, if in the former action she had come into Court in order to get the validity of the bill decided, and her action had somehow miscarried, I do not think that in fact she did so.

Again, it cannot be said that owing to the institution of the former action complete justice cannot be rendered if the ordinary rule be given effect to. No equity will fail if the action is tried in England, or would be furthered if it were tried in Scotland.

None of the cases cited by the pursuer seem to me to apply, and the principles laid down in the elaborate discussion of reconvention in *Thompson v. Whitehead*¹ are, in my judgment, opposed to his argument.

I hold, therefore, that there is no jurisdiction; and in this view there is no room for the consideration of the other pleas discussed by the Lord Ordinary. It may be convenient, however, on a matter of practice, to note that the summons as it stands is clearly incompetent, as the bill is not

¹ 24 D. 331.

No. 53. libelled, the incompetency arising from the combined effect of 13 and 14
 Jan. 13, 1897. Vict. cap. 36, schedule A, and the Act of Sederunt, 31st October 1850,
 Davis v. passed in virtue of sec. 1 of that Act. The proper course, as I conceive,
 Cadman. had there been jurisdiction, would have been to allow the pursuer to state
 what amendments if any he proposed to make on the summons, and not to
 have disposed of any pleas (other than that of jurisdiction) before the sum-
 mons was put in competent form.

LORD ADAM.—The defender, with her sister, presented a note of suspen-
 sion and interdict craving the Court to interdict the present pursuer from
 “noting or protesting or charging upon, or taking any steps to enforce by
 diligence, the payment of the sum of £200 bearing to be contained in” the
 bill referred to. It is material to observe the grounds upon which the note
 was presented, and these are to be found in the fourth statement of facts for
 the complainers, where they say: “The complainers have ascertained that
 the said acceptance appears to be dated 10th July 1895, and to be signed
 by them, but the complainers have no recollection of signing said accept-
 ance, and they believe and aver that said acceptance is not genuine and was
 not signed by them. In any event they received no value therefor, and the
 whole of the indebtedness by them, or either of them, to the respondent's
 company or to himself was extinguished at the time when said compromise
 was effected, and no sum is now due by them or either of them to the
 respondent.” The pleas to support the prayer of the note were: “The
 respondent ought to be interdicted from proceeding to do diligence upon
 said alleged acceptance, in respect (a) that it was not executed by the com-
 plainers; (b) that no value was received by them therefor; (c) that all
 claims and demands at the instance of the respondent or his said company
 were discharged under the compromise referred to upon record.”

It is material to my mind to observe that the complainers by their note of
 suspension raised the whole question of the validity of the bill, and it is
 clear to me that any judgment against the present pursuer sustaining any of
 these pleas would have been conclusive as to the validity of the bill. Now,
 that being the case as brought, and the grounds on which it was brought,
 what took place was, that after certain procedure which it is unnecessary to
 mention, the Lord Ordinary, on 6th March 1896, passed the note, and so
 the note of suspension became a pending action in this Court, and all these
 pleas became pleas in that action. Now it is quite true that although the
 bill might be a good and valid bill, it might not be a bill upon which sum-
 mary diligence could be done, and accordingly to avoid this difficulty, and
 to bring the whole matter before the Court, the present pursuer brought the
 present action for payment of the amount alleged to be due under the bill.
 It appears to me that this is the material time to consider whether this
 Court has jurisdiction or not. If there was jurisdiction then, I do not
 think that the complainers can claim that anything which was done after-
 wards by which the note was dismissed can alter or affect the jurisdiction of
 the Court. That being so, I humbly think that the Lord Ordinary was
 right in the conclusion at which he arrived. As I have said, the suspension
 and the action relate to the same subject-matter, namely, the liability of the
 defender on the bill, and beyond doubt there is the closest contingency

between the two processes, and I think that that is enough to establish jurisdiction against the present defender. **No. 53.**

With reference to the other pleas disposed of by the Lord Ordinary, ^{Jan. 13, 1897.} as **Davis v. Cadman.** it is to be held that this Court has no jurisdiction, I have nothing to say in regard to them.

LORD M'LAREN.—It is admitted that, apart from the effect of the previous action, the Court has no jurisdiction to try the question of the liability of the defender under this bill of exchange, and the action will fall to be dismissed unless it can be maintained on the principle of reconvention.

Now, let me ask what is the meaning of reconvention? I do not understand that there is any dispute as to the nature of the jurisdiction so constituted. It means just this, that where a pursuer or complainer, being a foreigner, takes proceedings in the Court of this country, and thereby submits the matters in dispute to the judgment of the Court, he is not allowed to plead want of jurisdiction in any counter action which may be necessary for completely determining the rights of the parties which are in dispute. That being so, it does appear to me that there is no room in this case for jurisdiction on the ground of reconvention. Miss Cadman applied to this Court for protection against proceedings which were to be made effectual against her in England through the medium of a charge upon a warrant issuing from the Register of Deeds in Scotland. If an action had been brought against her in this Court she might have appeared and pleaded that the Court had no jurisdiction against her because she was resident in England. The contract was made in England, and nothing had been arrested to found jurisdiction against her. But the holder of the bill did not propose to proceed by way of action, but by summary execution. It appears to me that in taking this protective proceeding Miss Cadman was in exactly the same position as if she had appeared and pleaded want of jurisdiction in defence to an ordinary action. No doubt other pleas were stated in the note of suspension which she was prepared to argue in case her objection to the jurisdiction had failed, and if after stating her plea to the jurisdiction she had waived it and had gone on to discuss the merits of the dispute between her and the present pursuer, I do not say that the principle of reconvention might not have been applicable to any consequential action that might be found necessary. But as she was entitled to have the diligence stopped on the ground that the Court of Session and its extractor of decrees had no authority to issue summary diligence, it must be taken that the question of jurisdiction was the only question which could competently be tried. It was the question which the Lord Ordinary and the Court had to consider first in order, and when the conclusion was reached that the Court or its extractor had no power to grant a decree against the complainer, the process of suspension attained its object and necessarily came to an end.

In these circumstances it seems to me that to apply the principle of reconvention to the new action is an impossible view, because it amounts to this, that if a person comes to this Court protesting against an attempted exercise of jurisdiction against him, he is by that very act held to have admitted the jurisdiction. I am unable to admit the validity of the reason-

No. 53. ing that leads to this result, and I think, for the reasons stated, that the circumstances upon which Lord Adam has founded his opinion do not really exist in the case.

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LORD KINNEAR.—I agree with your Lordship in the chair that to sustain the plea of reconvention here would carry the doctrine further than it has ever been carried in previous decisions, and further than, I think, would be justified by any general principles laid down in these decisions. As I understand the authorities cited, the plea of reconvention only arises when it is necessary to do full justice between parties already litigating. On that principle it has been laid down by a very high authority that a summary process would not form a basis for sustaining jurisdiction which cannot otherwise be supported on the mere plea of reconvention; and I agree with your Lordship in the chair and Lord M'Laren that the note of suspension, which is said to found the plea here, is a mere summary process to stop summary diligence. I sympathise in the difficulty felt by Lord Adam, arising from the fact that the statements appended to the note of suspension raise questions as to the validity of the bill, which might properly form the subject of an ordinary action. But then I think the statement of these questions was quite relevant to shew why summary diligence should not be allowed to pass on the bill. It was not necessary to discuss them, but only to say,—“These questions should be decided before summary diligence is allowed to pass on the bill”; but then it did not follow that these questions should be tried here, since it was competent for the respondent to bring an action in the Court to whose jurisdiction the complainer was subject.

On the whole matter, I agree with your Lordship that the plea of reconvention should not be sustained.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the first plea for the defender, and dismissed the action.

MARCUS J. BROWN, S.S.C.—PRINGLE & CLAY, W.S.—Agents.

No. 54. GEORGE WATSON NEISH AND OTHERS (Mr and Mrs Neish's Marriage-Contract Trustees), First Parties.—*Chisholm.*

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GEORGE WATSON NEISH AND OTHERS (William Neish's Trustees),
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MISS JANE AMELIA NEISH AND OTHERS, Third Parties.—*Macfarlane.*

Marriage-contract—Discharge—Construction.—Under a marriage-contract the marriage-contract funds fell to be paid by the marriage-contract trustees on the death of the spouses to the children of the marriage equally in absolute fee.

The husband survived his wife, and died leaving a trust-disposition and settlement, under which his estate fell to be divided equally, one share to be paid over to each of his sons in absolute fee, and one share to be held for behoof of each of his daughters in liferent and her children in fee, with a clause of survivorship in the event of the failure of a daughter's children in favour of the testator's other children.

At the time of his death the father was indebted to the marriage-contract trustees in the sum of £16,000, which constituted the whole of the marriage-

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contract estate. After his death his children, six sons and two daughters, who were all *sui juris*, granted a deed of discharge under which, on the narrative that they had agreed to renounce their rights under the marriage-contract to the effect that the funds falling under the same might be retained and administered by the testamentary trustees as part of the testamentary trust-estate, they requested the marriage-contract trustees to discharge the testamentary trustees of their father's obligation, and they themselves discharged their whole claims under the marriage-contract. The marriage-contract trustees, by separate deed, discharged the testamentary trustees accordingly.

The two daughters thereafter called on the testamentary trustees to pay over to them £2000 each, as being their equal share of the marriage-contract funds, maintaining that the discharge was revocable by them in so far as it inferred a gratuitous surrender of their rights to payment in fee under the marriage-contract.

For the determination of this question a special case was presented by (1) the marriage-contract trustees, (2) the testamentary trustees and the sons, and (3) the daughters, in which it was stated that the object of the discharges was to release the marriage-contract trustees, because there was no cash available for the £16,000, and it was thought expedient to obviate the necessity of a forced sale of the testator's estate.

Held that the discharge by the daughters was irrevocable, and that the £16,000 which remained in the hands of the father's testamentary trustees fell to be administered as part of the father's testamentary estate.

WILLIAM NEISH of Clepington was married to Miss Margaret Ann Watson, daughter of the late George Watson of Calcutta, in 1848. By antenuptial contract of marriage between Mr Neish and Miss Watson, he, on his part, assigned to the trustees thereby appointed a sum of £8000 out of the first and readiest of his means and estate, to be paid at the first term of Whitsunday or Martinmas which should happen six months after his decease; and directed the trustees to pay the annual income thereof to Mrs Neish in the event of her surviving him; and after her death, or in the event of him surviving her, at the first term of Whitsunday or Martinmas which should happen six months after his death, to pay "the said principal sum of £8000 to the child or children of the marriage, and the heirs of their bodies *secundum stirpes* equally, or in such proportions if more than one child, and with and under such conditions and restrictions as the father shall have directed by any writing under his hand, and failing which, as the mother may direct in the event of her surviving him."

Miss Watson, on her part, conveyed to the trustees her rights under her father's settlement, directing that they should pay the income from the sum thus accruing (which amounted to £8000) to her "in liferent for her liferent use only, and after her death shall pay the principal to her children in such proportions as she may appoint by any writing under her hand, and failing such appointment, to her children equally on their respectively attaining twenty-one years of age,—and in the event of her dying without issue, shall pay the same to her heirs or otherwise as she may direct by any will or writing under her hand."

In 1854 Mr Neish borrowed the sum of £8000 from the marriage-contract trustees, and granted a bond and disposition in security over his estate of Clepington for that sum in favour of the trustees.

Mr Neish died in 1886, predeceased by his wife. There were six sons of the marriage, and two daughters, who all survived their father, and were all *sui juris* at the time of his death. One of the daughters was married and had children; the other daughter was unmarried.

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Mr Neish left a trust-disposition and settlement under which the trustees were directed to hold the trust-estate for the testator's children in equal shares; but so far as the shares of the testator's two daughters were concerned, they were directed to pay the income only to each daughter during her life, and after her death to hold the capital and income in trust for her issue, whether children or remoter descendants, payable "at such age or time, in such manner, and if more than one in such shares, as each such daughter shall appoint," or failing any appointment, for such daughter's children equally; and in the event of any daughter dying without leaving issue, then the capital of such daughter's share was appointed to accrue to the testator's other children, sons and daughters, but so that the further share accruing to each such daughter should be retained and held by the trustees subject to the like trusts and powers as were thereinbefore declared concerning the original share of that daughter.

During his life Mr Neish did not do anything beyond granting the assignation contained in his marriage-contract towards paying or securing the provision of £8000 appointed to be paid at the first term of Whitsunday or Martinmas which should happen six months after his decease; and the bond granted by him in 1854 was undischarged at the date of his death.

A discharge dated 29th September and 3d and 10th October 1886, was executed by all the children of Mr Neish, on the narrative of the marriage-contract, and on the further narrative that the funds of the marriage trust consisted of—(1) the sum of £8000 contained in the bond and disposition in security granted by Mr Neish; and (2) the provision of £8000 which, under marriage-contract, Mr Neish bound himself to provide for his wife and children; that the trustees acting under said contract of marriage would, in the due execution of the trust created by said contract, fall to obtain payment from the testamentary trustees and executors of Mr Neish of the sum due under the foresaid bond and disposition in security, as well as of the foresaid provision of £8000, and to pay over the same to the children of Mr Neish, they having all attained majority, and there being no children who had died leaving issue, in terms of the directions contained in said marriage-contract; "and considering further, that we, the whole granters hereof, in place of requiring fulfilment of the provisions in our favour contained in the said contract of marriage, have agreed and resolved to request and authorise the trustees acting under said contract not to require repayment of the sum due under said bond and disposition in security or payment of said provision, and we have further agreed and resolved to renounce and discharge our whole claim, rights, and interests under said marriage-contract, to the effect that the funds falling under same may be retained and administered by the testamentary trustees of the said late William Neish as part of his testamentary trust-estate: Therefore we, the whole granters hereof, do hereby (*first*) request, authorise, and desire the foresaid trustees acting under said contract of marriage to discharge the foresaid bond and disposition in security and the foresaid provision of £8000, made and undertaken by the said William Neish under said contract of marriage; (*second*) discharge and renounce the whole provisions in favour of us, or any of us, contained in or falling to us in virtue of said contract of marriage in any way, as well as the said contract of marriage itself, whole tenor, contents, and clauses thereof."

In connection with this discharge, and partly as authorised by the

provisions thereof, an additional discharge was executed of the same dates by the trustees original and assumed acting under the marriage-contract for themselves and their own right and interest, and at the special desire and request of, and as authorised by, the whole sons and daughters of Mr Neish, as the beneficiaries under the contract of marriage, by which deed, and, *inter alia*, upon the narrative that no consideration had been paid to them, the said trustees, for executing the same, the granters discharged (*first*) the said bond and disposition in security for £8000 and all interest due thereon, and they declared to be redeemed and disburdened thereof, and of the infestment following thereon, All and Whole the lands and others thereby conveyed in security; and (*second*) All and Whole the provision of £8000, which under said contract of marriage Mr Neish had bound himself to provide, from payment of which provision it was by said additional discharge declared the testamentary trustees and executors of Mr Neish should be for ever freed and discharged.

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On 31st October 1896 a special case was presented for the determination of questions as to the effect of these discharges upon the rights of the two daughters under the marriage-contract.

The first parties were the marriage-contract trustees. The second parties were the trustees under Mr Neish's trust-disposition and settlement, his six sons, and the children of Mrs Gordon, his married daughter. The third parties were the two daughters of Mr Neish, and Mr Gordon, the husband of the married daughter.

The case stated:—"The object of the discharges was to release the then trustees of the contract of marriage, because at that time there was no cash fund available for payment of these two sums of £8000 each, and it was thought expedient to obviate the necessity of a forced sale of part of the testator's estate. The trustees of his will have now in their hands funds amply sufficient to satisfy the daughters' shares of the said two sums."

The following question of law was stated (besides others directed to points not now reported):—" (4) Assuming that, by virtue of the said discharges, the said two sums of £8000 each were transferred to the trustees acting under the will of Mr Neish, and to be administered as if they formed portions of his testamentary estate, is this transfer, so far as effected by the third parties, revocable by them?"

The third parties maintained, as regarded both these sums;—The discharges, on being read together, imported no more than the creation of a trust in the testamentary trustees of Mr Neish, but which was capable of being recalled or revoked by the third parties, each of whom now claimed payment from the testamentary trustees of £2000 forming her share of the said sum of £16,000.

The first and second parties maintained;—Any right to the capital of the two sums belonging to the third parties was effectually discharged by the deeds of discharge, to the effect and subject to the condition that their share of the aggregate sum of £16,000 should be retained and administered by the testamentary trustees of Mr Neish as part of his testamentary trust-estate, which by the terms of his will, so far as the third parties were beneficially interested therein, was bequeathed to them in liferent and to their children equally in fee, and subject to the further direction that in the event of either of the third parties dying without issue, then her share was to accrue to the testator's other children.

Argued for the first and second parties;—There was no question

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here of reducing the discharges; the only question was as to their meaning and effect, the contention of the third parties being that the only effect of the discharges *quoad* them was to create a voluntary trust in their father's trustees, which they might revoke at any time, just as if they had each handed over £2000 to their father's trustees, and told these trustees to administer that money subject to their respective directions. There were two answers to that contention. In the first place, the daughters handed over no money to their father's trustees. They had merely assented to their father's estate being disburdened of certain obligations, and as they had done so without reserving any rights of their own the necessary result was that their father's trustees were bound to administer his estate according to the trusts of his will freed absolutely of the obligations discharged. Then, secondly, even assuming that the effect of the transactions was the creation of a trust by each of the daughters, it was not a mere trust *in suam*, for the children of the daughters *nati et nascituri* took a *jus quasitum* under it.

Argued for the third parties;—If the contention of the other parties was sound, it was clear that the daughters had, without any consideration whatever, surrendered valuable rights in favour, not merely of their own children, but also of their brothers. Such a result was certainly not to be presumed, and was not the necessary result of the discharges here. The legal effect of the discharges was just as if the daughters had each received payment of £2000 from the marriage-contract trustees, and handed it over to their father's trustees, with directions to hold it for themselves in life, and to pay the fee on their death to their children, and failing children to their brothers. Such an arrangement was purely testamentary and revocable at least as regarded the brothers. Possibly the children of the daughters—at least the children of Mrs Gordon, who were in existence—might have a *jus quasitum*; but even as regarded them, it was to be borne in mind that the discharges were not marriage-contracts, or contracts of any sort except as between the parties discharging and the parties discharged; and because the daughters had concurred in discharging the marriage-contract trustees in order to facilitate arrangements of purely family convenience, it was not to be inferred that they had gratuitously surrendered rights which they enjoyed under the marriage-contract. In order to reach such a result words of positive and unequivocal obligation were necessary, and there was nothing of that sort here.¹

LORD YOUNG.—This case appears simple enough, and the law regarding the rights of the parties, as to which it is very proper that the trustees should be informed, is, I think, not difficult, and capable of being stated without direct reference to the questions put in the case.

Mr Neish died in 1886 leaving a family of six sons and two daughters. He had entered into an antenuptial marriage-contract in 1848 with Miss Watson, and by that marriage-contract he came under an obligation that his executors after his death should pay over £8000 to the marriage trustees. The lady whom he married conveyed to the same marriage trustees—of

¹ Mackenzie v. Mackenzie's Trustees, July 10, 1878, 5 R. 1027; Wightman v. Costine, March 20, 1879, 6 R. (H. L.) 13; Byres' Trustees v. Gemmell, Dec. 20, 1895, 23 R. 332.

course by the same contract—all that she should be entitled to under the will of her father, Mr Watson. Mr Neish left a will, and the trustees under his will are nearly identical with the trustees under the marriage-contract. He had borrowed the sum of £8000 from the marriage trustees, being the sum which they had received from the wife's father's estate under her marriage-contract obligations. He never implemented his obligation to pay £8000 over to the marriage-contract trustees, so that at his death he was indebted to the marriage-contract trustees in these two sums of £8000 each, the one of them being his marriage-contract obligation to pay that sum to the trustees, and the other being his bond for the £8000 which he had borrowed from these trustees. His estate was so situated, though it turned out very well ultimately, that it appeared to his family of six sons and two daughters that it would not be desirable that any part of the testamentary estate should be sold for these two sums, and to avoid that they entered into a deed whereby they requested and authorised the marriage trustees to discharge the bond and disposition in security and the provision of £8000, and they then renounced all their rights under the marriage-contract. The marriage trustees, as so requested and authorised by the only persons who had an interest in the marriage-contract, and who were *sui juris*, did discharge the testamentary trustees of these two sums, and it was explained to us that there was no other marriage-contract estate. The one sum of £8000 was that under the husband's obligation, the other £8000 was that which had been paid under the wife's obligation, and had been lent to the husband subsequently. By the same deed by which these discharges are granted, the parties thereto say, really in terms, that they will be satisfied to take under their father's will—his testamentary disposition. Well, none of the children have suffered from this, because the testamentary estate consists of more than £16,000, only the sons benefit a little at the expense of the daughters, for the daughters are limited to a *lifereit*, with a fee to their children. One of the daughters has two children, and therefore the fee will go to them if they live. The other is unmarried, and therefore has only a *lifereit*, and if she dies unmarried and without children that share of hers—about £2000 I think it was stated—will go to the brothers, and if the married daughter dies childless,—that is to say, if her existing children die,—her share will also go to the brothers.

The question which we have to deal with is the question whether this authority given to the trustees to discharge the debtors to the trust, and whose debts constituted the whole trust-estate, and which was acted on, was valid and effectual, and is now binding, and I am very clearly of opinion that it was, and is valid and effectual, that the marriage trustees have well discharged these claims,—and I think that was not disputed by Mr Macfarlane,—and that to that extent it is quite good.

But then Mr Macfarlane argued that “Notwithstanding of that, and notwithstanding that there is no marriage-contract estate, I am entitled,—or we, the daughters, are entitled,—to have the testamentary estate under the will of the deceased, to the extent of our shares under the marriage-contract, administered, not according to the will under which they are trustees, but according to the marriage-contract, which is at an end, and our rights under which are discharged, and under which there is no estate.” Now, I cannot

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assent to that argument. I am of opinion that, notwithstanding the apparent, not great but still stateable, hardship to the daughters, they must stand by what they have done, and that they must take from the testamentary trustees according to the provisions of the testament, and not according to the provisions of the marriage-contract.

LORD TRAYNER concurred.

LORD MONCREIFF.—I also concur. The discharge blocks the way. Owing to the shape which that transaction took, it is now too late to separate the marriage-contract funds from the testamentary funds of Mr Neish. Therefore the parties must take under the will and in terms of the will.

The LORD JUSTICE-CLERK concurred.

THE following interlocutor was pronounced :—"Find and declare that the discharge dated 29th September and 3d and 10th October 1886 is valid, binding, and irrevocable ; that the whole children of the late William Neish have thereby renounced and discharged their whole claim, rights, and interests under the marriage-contract of the said William Neish and his wife ; and that the funds which fell under the said marriage-contract fall to be administered by the testamentary trustees of the said William Neish as part of his said testamentary trust-estate : Find and declare accordingly, and decern : Find the whole parties to the case entitled to their expenses as the same may be taxed out of the testamentary trust-estate of the said William Neish."

HENDERSON & CLARK, W.S., Agents.

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THE ELECTRIC CONSTRUCTION COMPANY, LIMITED, Pursuers
(Reclaimers).—*Salvesen*—Constable.

HURRY & YOUNG, Defenders (Respondents).—*Sol.-Gen. Dickson*—*Clyde*.

Contract—Construction—Contract to supply dynamo.—A maker of dynamos contracted to supply to an electrical engineer "a No. 3 dynamo giving 115 volts, 40 ampères, at approximately 1070 revolutions."

In an action for the price, the purchaser pleaded that the dynamo delivered was disconform to order. The import of the proof was as follows :—

The dynamo (which was used for lighting) when started at 1020 revolutions produced 115 volts, but as it became heated the voltage declined until the maximum heat was attained, when the loss of voltage was 10 per cent. The maximum heat was attained about three hours after starting the machine, and the voltage then became constant, but the light was insufficient.

When the dynamo was started at 1070 revolutions it produced at first 125 volts, and when the maximum heat was reached 115 volts, but the initial voltage injured the lamps.

There was evidence to shew that in a good machine the loss of voltage would not have exceeded 4 per cent, and that this would not have seriously affected the light.

The pursuers proved that the dynamo could be regulated so as to produce a constant voltage of 115 volts in two ways, either (a) by starting the dynamo at 1020 revolutions and by raising the speed once or twice during the three hours till the maximum heat was attained ; (b) by starting the dynamo at 1070 revolutions, and introducing a regulator termed a shunt

resistance, to prevent undue pressure on the lamps, till the dynamo attained its maximum heat. The regulator would have required adjustment occasionally till that point was reached, when its use became unnecessary. The objection to the first alternative were that alteration of the speed of the driving-engine was injurious to it, and that an attendant was necessary; to the second, that it required an additional appliance, and that adjustment was necessary during the first three hours after lighting.

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Opinion per cur. (1) that the contract was to be construed as a contract to supply a dynamo to produce 115 volts when started, with no greater fall in voltage than was usual in well-constructed dynamos; and (2) that the fall in voltage in the machine delivered was excessive, and that the machine was not conform to order.

Sale—Disconformity to contract—Rejection—Right to retain goods and set up breach of warranty in extinction of price—Sale of Goods Act, 1893 (56 and 57. Vict. cap. 71), sec. 11, subsec. 2, and secs. 35 and 53.—Held (1) that where the purchaser of a machine intimated rejection of it as disconform to contract, and thereafter continued to use it for three months, he was not entitled to found on his alleged rejection; and (2) (*diss.* Lord Kinnear) that the purchaser having elected to reject was not entitled thereafter to fall back upon the alternative remedy provided by the Sale of Goods Act of retaining the machine and claiming compensation on the ground that the seller had failed to perform a material part of the contract.

Observations by Lord Kinnear as to the correct measure of damage where a purchaser retains goods sold and claims damages.

ON 22d September 1894 Messrs Hurry & Young, electrical engineers and contractors, Edinburgh, ordered from the Electric Construction Company, Limited, London, "one No. 3 dynamo, giving 115 volts, 40 ampères, at approximately 1100 revolutions, with extra bearing and slides for lightening belt, and also balance wheel about 1 cwt. (compound-wound) as per quotation, £57, 16s., of the 10th and 13th September."

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The Electric Construction Company accepted the order by letter dated 24th September, and the dynamo was forwarded to Messrs Hurry & Young on 11th October, and was put up by them in the premises of Messrs Latimer, jewellers, Lothian Road, Edinburgh, for whom it had been ordered. In consequence of complaints by Messrs Latimer as to the working of this dynamo, it was removed by the Electric Construction Company, and a new one was supplied in February 1895, stamped 1070 revolutions.

Messrs Latimer having made complaints as to the working of the new dynamo, the Electric Construction Company supplied a new armature on 11th April 1895. Complaints, however, continued to be made to the effect that after running for some hours there was an excessive loss of voltage, and that consequently the lights lost brilliancy and became too dim for the proper lighting of the shop, and after some correspondence Messrs Hurry & Young wrote to the Electric Construction Company, on 14th September 1895,—“We have been in communication with experts *re* fall of pressure in Latimer's dynamo, and now definitely tell you that if you cannot make the machine work without a loss of more than 4 volts, you will have to remove it, as both Messrs Latimer and ourselves are satisfied that the machine is not right. You may take what action you care to, and we will do our best to defend ourselves in the matter.”

The Electric Construction Company refused to admit that the machine was disconform to contract, and left it in the premises of Messrs Latimer, who continued to use it.

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On 18th December 1895 the Company raised an action against Messrs Hurry & Young for payment of the contract price of the dynamo.

The pursuers averred that the dynamo was conform to contract, and pleaded;—(2) *Separatim*, the defenders having failed timeously to reject said dynamo, and having retained and used it, are not entitled to found on any alleged disconformity to contract.

The defenders denied that the dynamo was conform to contract, and averred that its disconformity rendered it of no value to them, as they would not be able to dispose of it, and further, that they had suffered damage, which they estimated at £500, through the pursuers' failure to implement their contract.

The defenders pleaded;—(2) The pursuers having failed to implement the contract between them and the defenders, the price of which is sued for, by delivering a dynamo conform to the defenders' order, the defenders are not liable in payment of said price, and should be assoilzied from the conclusions of the action. (3) The defenders having suffered loss and damage to an extent greatly exceeding the sum sued for in consequence of the pursuers' failure to implement their contract as aforesaid, are entitled to absolvitor.*

Proof was allowed. The result of the evidence as to the quality of the dynamo supplied sufficiently appears from the opinions of the Lord Ordinary and Lord M'Laren, and was to the effect that the dynamo was disconform to contract.

On 18th June 1896 the Lord Ordinary (Low) sustained the second and third pleas in law for the defenders, and assoilzied them from the conclusions of the action.†

* Section 11, subsection 2, of the Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), enacts:—"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

Section 35 enacts:—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

Section 53 enacts:—" (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price, or (b) maintain an action against the seller for damages for the breach of warranty. . . . (5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act."

Section 62 enacts:—" (1) In this Act, unless the contract or subject-matter otherwise requires . . . As regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract."

† "OPINION.—The first question is, whether the dynamo supplied by the pursuers to the defenders was conform to contract.

"The original contract was for a 'No. 3 dynamo, giving 115 volts, 40

The pursuers reclaimed, and argued ;—(1) The machine was not disconform to contract. (2) The defenders were barred from now rejecting the machine by delay, and by having continued to use it after knowledge of its alleged defects, and after intimating their rejection of it. The Sale of Goods Act was a codifying statute, and accordingly the law remained the same as before it was passed, except in so far as expressly altered. But prior to that Act it was settled that a buyer was not entitled to use goods which he had rejected,¹ nor a seller to use an article rejected by a buyer,² if he did not accept the rejection, the principle being that a man was not entitled to use an article which was the property of another. (3) The contract contained no warranty, and no material part of the contract could be specified which had not been fulfilled. A material part was not the same as a material term or condition of a contract. The case was one of total breach or nothing, and therefore the sections of the Sale of Goods Act upon which the defenders founded were inapplicable. Further, the alleged defect in the machine was known to the defenders in Febru-

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ampères, at approximately 1100 revolutions.' I think, however, that the contract may be held to have been varied to the not very important extent of substituting 1070 revolutions for 1100, because the dynamo now in question is a second dynamo which was supplied by the pursuers upon complaints being made in regard to that which was sent in the first instance, and the number of revolutions stamped upon the second dynamo is 1070. No objection was taken at the time to that number of revolutions, nor is anything now founded upon the fact that it was somewhat below the number originally contracted for.

"The objection taken to the dynamo is that the fall of voltage is excessive. Thus, if it is set agoing at a speed which produces 115 volts, and the same speed is maintained, there is a fall in from three to five or six hours of at least 10 volts, with the result that the lights become dim and insufficient.

"The pursuers' contention is (1) that the fall in voltage is not excessive for a dynamo of the size of that in question, and which has not been specially constructed so as to ensure that the fall shall be smaller; (2) that the fall of voltage during the first few hours of working such a machine requires to be counteracted, either by increasing the speed as the dynamo becomes heated, or by using what is called a 'shunt resistance'; and (3) that when the dynamo has attained its maximum heat, 1070 revolutions or thereby will thereafter maintain a constant voltage of 115. The pursuers further say that the number of revolutions specified in the contract or marked upon the machine denotes the number necessary to give the required voltage after the dynamo has attained its maximum heat.

"It is admitted that the voltage always falls to some extent as a dynamo becomes heated, but the defenders' witnesses say that the fall should not exceed 2 or 3, or at the very utmost 4 per cent. If the latter amount is exceeded the light becomes seriously affected.

"The pursuers, on the other hand, say that in a dynamo of the size of that in question, which has not been constructed under special stipulations, the ordinary fall of voltage runs from 7 to 10 per cent.

"In regard to the actual fall of voltage which takes place in the dynamo in question, I think that the result of the trial which was made by the pursuers' witness Professor Bailey, and checked by the defenders' witness Mr Ogilvie, may be accepted as a fair test of what the machine can do. Mr Bailey started the dynamo at 1021 revolutions, which produced 116½

¹ Chapman v. Ceuston, Thomson, & Co., March 10, 1871, 9 Macph. 675, 43 Scot. Jur. 326.

² Croan v. Vallance, May 18, 1881, 8 R. 700.

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ary 1895, and they were not entitled to keep the machine and use it and plead damage. Besides, a buyer must elect his remedy. Here he elected to reject, but failed to do so properly, and he could not now fall back upon the alternative remedy given by the statute.

Argued for the defenders;—(1) The dynamo was disconform to contract. (2) It had been timeously rejected. The new armature was only supplied in April, and from that date until October lighting would be required at the most only for a very short time each day, so that the defect of the machine would not be apparent. The letter of 24th September was therefore a timeous rejection. A buyer was not bound to return a defective machine to the seller, or put it into neutral custody. He did all that was required of him if he intimated that he did not accept it, and requested the seller to remove it.¹ If the seller left the machine with the buyer, the latter was entitled even to use it, especially if the seller denied the alleged disconformity to contract. It could not be said, for instance, that a manufacturer who had been supplied with a defective engine could only preserve

volts. After running at the same speed for some hours the voltage dropped to 106. The speed was then increased to 1065 revolutions, when 115 volts were obtained. The result of the trial was therefore to shew that, even with the most skilled handling, the drop of voltage was between 9 and 10 per cent. The drop, therefore, is not far short of the limit stated by the pursuers themselves. The trial further shews that if the dynamo was started at 1070 revolutions a greater amount of voltage would be produced than could with safety be put upon the lamps. As I have said, 1021 revolutions gave, when the dynamo was cold, 116½ volts. It appears that an increase of speed of 50. revolutions would increase the voltage by about 10. If, therefore, the dynamo was started at 1070 revolutions, it would give from 124 to 126 volts, which admittedly would injure the lamps. The trial, however, also shews that after the dynamo has been fully heated it will continue to give the stipulated number of volts at approximately 1070 revolutions.

"The first question is, whether the fall in the voltage is excessive for a small machine, in regard to which no limit of fall has been specified. I have already said that the pursuers' view is that the normal fall of voltage in an ordinary dynamo of small size is from 7 to 10 per cent, and they put into the witness-box several gentlemen well qualified to express an opinion, who supported that view. One of the pursuers' witnesses, however—Mr Hunter—admitted upon cross-examination that his opinion was that a fall of 10 volts was excessive, and that a customer would be entitled to reject a dynamo which shewed so great a fall. For the defenders four electrical engineers of large experience gave evidence to the effect that a fall of voltage of from 7 to 10 per cent was altogether excessive. They say that it is not the case that so great a fall is to be expected in a properly constructed dynamo, of whatever size it may be, and that they would not take a dynamo shewing anything like so great a fall off the maker's hands. Mr Cox-Walker gives his practical experience of a number of dynamos of very much the same type as that in question—some of them made by the pursuers—and he says that he never found the fall in voltage to be more than 2 or 3 volts. He says that in every case, if the dynamo was started at the given number of volts, its speed did not again require to be altered.

"Where there is such a direct conflict between the skilled witnesses, it is not unimportant to inquire what are the considerations upon which the question of what is an excessive fall of voltage depends. In the regulations issued by the Board of Trade under the Electric Lighting Acts for ensuring

¹ Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), sec. 36.

his right of rejection by stopping his factory, and so enormously increasing his claim of damages. In *Chapman's*¹ case the subject of sale was fungibles, and the common law recognised a distinction between the case of fungibles and machinery.² In that case also some of the goods in every lot had been consumed. Goods might be rejected timeously although the purchaser had resold them in whole or in part to a third party without examination.³ In any view, the defenders had a right under the Sale of Goods Act to retain the machine, and plead damage in answer to the pursuers' claim for the price. The distinction which existed in England between a representation and a warranty was not recognised in Scotland. A warranty in Scotland was just a term or condition of the contract.⁴ In England it was a collateral agreement. Here the condition as to voltage, which was essential to the purpose for which the machine had been supplied, had been broken, and as the machine would in consequence not repay the expense of taking it out of the premises where it had been fitted up, the Lord Ordinary's decision was right.

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a proper and sufficient supply of electrical energy, it is provided that 'the variation of pressure at any consumer's terminals shall not under any conditions of the supply which the consumer is entitled to receive exceed 4 per cent from the declared constant pressure.' It is admitted that the meaning of that rule is that the voltage may vary 4 per cent in either direction.

"For example, if the declared constant pressure was 100 volts, the rule of the Board of Trade would be infringed if the voltage ran above 104 or fell below 96. The reason of the rule is obvious. If the pressure rises more than 4 per cent it injures the lamps; if it falls more than 4 per cent the light is dimmed.

"I think that probably a dynamo which had a fall of voltage of 8 per cent might be within Board of Trade regulations, because if it was started at a speed which gave 4 per cent above the constant pressure it would fall to 4 per cent below that pressure. The dynamo in question, having a fall of over 9 per cent, would therefore exceed, although not to a great extent, the Board of Trade limit, and the pursuers accordingly contend that the Board of Trade regulations were very stringent, and could not be held to apply to an ordinary commercial dynamo. I do not think that it is proved that the Board of Trade regulations are stringent; and they are certainly not nearly so stringent as the requirements which the defenders' witnesses say they enforce and obtain in practice. I imagine that the object of the Board of Trade was to secure that on the one hand the supply of energy should be sufficient to give a proper light, and, on the other hand, should not be so strong as to injure the lamps. I see no reason why the Board of Trade should have made the rule more stringent than was necessary to accomplish these objects. Indeed, I think that the pursuers practically admit that the Board of Trade rule is not unnecessarily stringent, because they do not contend that the dynamo in question—which only exceeds the variation allowed by the Board of Trade by a little over 1 per cent—can be satisfactorily worked at a constant rate of speed. They say that the proper way of working the dynamo is either to increase the speed or to use a resis-

¹ *Chapman v. Couston, Thomson, & Co.*, July 19, 1872, 10 Macph. (H. L.) 74, 44 Scot. Jur. 402.

² *Pearce Brothers v. Irons*, Feb. 25, 1869, 7 Macph. 571, 41 Scot. Jur. 302.

³ *Magistrates of Glasgow v. Ireland & Son*, June 27, 1895, 22 R. 818; *McCaw, Stevenson, & Orr, Limited, v. Maclaren & Sons*, Feb. 28, 1893, 20 R. 437.

⁴ *Bell's Prin. sec. 93 and 111.*

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LORD M'LAREN.—The defenders, who are designed electrical engineers and contractors, after some preliminary correspondence, ordered from the pursuers "one No. 3 dynamo, giving 115 volts, 40 ampères, at approximately 1100 revolutions," at the price of £57, 16s., "to be delivered by earliest." The order was on 22d September 1894, and was accepted in course. The descriptive words "No. 3 dynamo" refer to the corresponding number in the pursuers' trade catalogue; but I observe that the specification does not precisely correspond to the catalogue, because the nearest specification in the catalogue is that of a machine designed to give an electro-motive force of 100 volts at 1100 revolutions per minute. This is partly explained by the preliminary correspondence, and partly by the defenders' letter of 7th September, where they say, "the E.M.F. would be 115, and the machine to run about 1200 or 1250. We suppose that machine would do if it were speeded up." But I do not think it necessary to clear up this discrepancy, because if the pursuers chose to accept an order for a machine

tance coil, these being both expedients which are only required if the dynamo cannot properly accomplish its work at a uniform rate of speed.

"If, as the pursuers say, a dynamo should be held to be satisfactory if the voltage can be kept steady by regulating the speed, I have difficulty in seeing what is the precise principle upon which the limit of 10 per cent is fixed. I suppose that it would be said that to allow a larger fall of voltage would impose upon the engine which drives the dynamo an unduly great variation of speed, although in the present case it seems to me (if I understand the evidence aright) that it would be as easy to meet a fall of 15 volts as of 10 volts. On the other hand, the view that the fall in voltage should not exceed what is required, at a uniform rate of speed, to maintain the light with safety to the lamps, appears to me to rest upon a definite and reasonable principle.

"If it had been shewn that it was well known to persons skilled in the matter that small dynamos had (apart from special orders) a fall of voltage which required to be met by an increase of speed or other device, the case would have been different. But half of the experts who were examined say that they never heard of such a rule, and deny its existence. It seems to me that the natural meaning of a contract to supply a dynamo which will produce a stated number of volts at approximately a given speed is, that if the dynamo is worked at a speed reasonably approximating that which is stipulated, a voltage will be produced sufficiently near the stated amount to maintain a sufficient light on the one hand without, on the other hand, putting an undue strain on the lamps.

"There are various considerations which point to that being the true construction of the contract. Thus, where, as in this case, the motive power is a gas-engine, it appears that the speed cannot be altered from time to time each night without injury to the engine. Further cases may occur in which it is impossible to alter the speed, as where the same engine is used to drive the dynamo and also other machines. Again, where the dynamo is wanted to light a shop or a house, the method of working proposed by the pursuers would be most objectionable. They say that for a period extending to from three to six hours the speed of the engine must from time to time be increased, or that a resistance coil must be put on at first and gradually cut off. That would involve that, during a great part of the year, the whole time during which the light was required would be taken up in getting the dynamo into working order, and that it would only attain

which was to furnish a definite number of ampères at a definite electro-
 motive force, and at a given price, it is no answer to say that their No. 3
 machine would not be equal to the demand made upon it. The makers
 were bound by their contract to provide a machine capable of performing
 a definite amount of work, and if this could only be done by a larger or
 more powerful machine than a No. 3, they must bear the loss. It is of
 course a circumstance to be taken into consideration, that the order was
 given by an electrical engineer, who would presumably have knowledge of
 the capabilities of such machines; but I do not think that this circumstance
 would absolve the pursuers from their obligation to furnish a dynamo capable
 of producing 115 volts, 40 ampères, at approximately 1100 revolutions per
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The dynamo was intended for the use of a customer, Mr George Latimer, in his place of business, Lothian Road, Edinburgh. Mr Latimer was dissatisfied with the dynamo first supplied to him (October 1894); this was taken back, and another dynamo was supplied in February 1895. In con-

a condition in which it could give constant results when the lights were no longer required.

"I have therefore come to the conclusion that the dynamo was not conform to contract.

"The next question is, whether it is still open to the defenders to refuse payment of the contract price. As the law stood prior to the Sale of Goods Act, 1893, I think that it is extremely doubtful whether, in the circumstances which have occurred, the defenders could have pleaded breach of contract to the effect of resisting a claim for the price.

"The defenders, no doubt, all along objected to the dynamo, and called upon the pursuers to make it right, and finally they told the pursuers that if they could not make it work without a fall of more than 4 volts they must remove it. The pursuers did not remove it, and it has continued to be worked in Messrs Latimer's shop until the present time. Under the old law, I think that the defenders would have put themselves in the wrong by continuing to work the dynamo. When it became apparent that the pursuers would not or could not put it right, I think that it would have been incumbent upon the defenders to replace it as soon as possible, and either to return it to the pursuers, or to put it in safe keeping at their risk.

"But the Sale of Goods Act has made an important alteration upon the law. A buyer is no longer bound to reject or return goods which are disconform to contract, and to repudiate the contract; but, if he has not expressly or by implication accepted the goods, he can retain them and claim damages, or set up the breach in diminution or extinction of the price.

"That I take to be the effect of the 11th, 35th, 53d, and 62d sections of the Act.

"By section 11 (2) it is provided that in Scotland 'failure by the seller to perform any material part of the contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.'

"The buyer's remedies are further specified in section 53. It is there, *inter alia*, provided that, 'where there is a breach of warranty by the seller,' the buyer may '(a) set up against the seller the breach of warranty in diminution or extinction of the price.'

"By the 62d section it is enacted that—'As regards Scotland, a breach

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sequence of complaints as to its performance, a new armature was afterwards supplied. I mention these particularly, because it is fair to the pursuers to keep in view that they gave due attention to the defenders' demands so long as these amounted only to a requirement that the machine should be made complete and put into good order, and did not take the shape of a claim to reject or rescind the contract of sale.

I pass from the admitted facts of the case to the question in dispute, as to which a proof was taken before the Lord Ordinary. Mr Latimer was still dissatisfied with the performance of the dynamo; and it appears from the evidence that he had some reason for dissatisfaction, because, while it was no doubt possible in the early part of the evenings to get an electro-motive force of 115 volts from the dynamo, yet after it had been run for two or three hours the voltage fell off to the extent of 8 to 10 per cent, and continued falling; this of course involved a diminution of light in an even greater ratio, though the precise difference of illuminating effect is not matter of evidence.

It is common ground that every dynamo which has been run for two or three hours suffers a certain diminution of the electro-motive force produced, and if it is not admitted, I think it is proved as a scientific fact that this effect is greater when the machine is worked up to the limit of its powers than it would be if a more powerful machine were substituted which could be run with less strain and at a lower speed. The Lord Ordinary in his analysis of the evidence has given weight to the view of the defenders' witnesses on this subject, which is to the effect that the fall in voltage ought

of warranty shall be deemed to be a failure to perform a material part of the contract.'

"Now, I think that if the construction which I have put upon the contract between the pursuers and the defenders is sound, there was a failure to perform a material part of the contract, and that the defenders were entitled to retain the goods and treat the failure as a breach of warranty entitling them to diminution or extinction of the price.

"The pursuers founded upon the 35th section, and argued that the defenders must be held to have accepted the goods, and could not now either reject them or resist an action for payment of the price.

"The 35th section provides that the buyer is deemed to have accepted the goods—(1) when he intimates to the seller that he has accepted them; (2) 'when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller'; and (3) when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

"It was admitted that the defenders were not in the first or third of these positions, but it was argued that by continuing to use the dynamo they had acted in a way inconsistent with the ownership of the seller. I am of opinion that the argument is untenable. The right to retain given by the Act involves the right to use, and use would only imply acceptance if there had been no timeous rejection of the goods. In this case I think that there was timeous rejection of the goods. The defenders from the first complained that the dynamo was not conform to contract, and when it became apparent that the pursuers could not put it right, the defenders told them that they might remove it. That, in my opinion, was rejection within the meaning of the Act.

"I am therefore of opinion that the defenders are entitled to set up the breach of contract as in extinction or diminution of the price."

not to exceed from 2 or 3 volts in the 100, and that a fall of from 8 to 10 per cent is altogether excessive. I think it is perfectly plain that so considerable a fall as 8 per cent would be incompatible with good lighting, unless the downward tendency could be corrected in some way. This is not seriously disputed by the pursuers; but their answer is, that the defenders, when they ordered a No. 3, which is a small machine, knew, or must be taken to have known, that the voltage could not be depended on, and that their remedy was to increase the speed of the dynamo when the voltage fell.

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As a matter of fact, I have no doubt that the explanation given by the pursuers is correct, and that the cause of the faulty performance is that the No. 3 machine was not equal to the work required, and again I do not doubt that by "speeding-up" the engine from time to time the voltage might be restored to the proper standard. It is not said that this was not in fact done. But this observation is not an answer to the defenders' objections, and, as already indicated, I think that the pursuers having undertaken to supply a machine producing 115 volts, at a speed of 1100 revolutions a minute, are not excused by saying that what they promised was impossible with a machine of the given size and pattern. It was open to them to decline the order if they were unable to execute it as given, and in my opinion they do not fulfil their contract by supplying a machine which deviates from the prescribed electro-motive force by a greater percentage than is usual in the case of machines supplied by good makers. It follows that if the defenders, or their customer, Mr Latimer, had taken proper measures for putting an end to the contract of sale they would have been within their rights.

I now come to the consideration of the legal aspects of the case, and I may begin by saying that I shall assume for the purposes of the argument that the defenders' letter to the pursuers, of date 14th September 1895, amounts to an unqualified rejection of the dynamo. I shall also assume that the rejection in the month of September of a machine which was delivered in February, and whose defects had been manifest to the defenders from the beginning, did not come too late. I am not giving a legal opinion in that sense. I only assume for the purposes of the argument that the rejection did not come too late. Under the Sale of Goods Act it is not necessary that the buyer should return the goods; it is enough that he intimates his rejection, and that he holds the goods at the disposal of the seller. But the Act of Parliament does not say that a buyer may reject the subject of sale and go on using it as if it were his property. It would be a very strange theory of law which would give rise to such a result, because it amounts to this, that when a buyer has an imperfect machine or article of any kind supplied to him, if he only goes through the form of a rejection, he may continue to use the article as long as he pleases without paying for it.

Now, the rejection of the subject of sale by a buyer is in legal effect a rescission of the contract of sale on the ground of the seller's non-performance or imperfect performance of his obligations. But if a purchaser claims right to rescind the contract of sale, he must, of course, be prepared to make reasonable restitution, that is to say, if he cannot restore the goods

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But it is admitted that the defenders' sub-vendee (whom in this question I identify with the defenders) has continued to use the dynamo just as if he had accepted it in fulfilment of the contract. This use was in fact continued from 14th September, the date of the nominal rejection of the dynamo, down to and after the raising of the action in December 1895. It is not necessary to consider the case of such a slight or temporary use of the article as might be taken by a buyer consistently with a *bona fide* intention of rejecting it, because we are here dealing with a case of use continued for three months, and following on a longer use while the machine was under trial. Now, as the sale of goods is regulated by Act of Parliament, I must say that in my opinion, when the Act speaks of the buyer's right of rejection, this must be taken to mean a rejection according to known legal conditions, one of which is that the buyer must not break bulk further than is necessary, or use or consume the article in the case of goods sold for use or consumption.

It is hardly necessary to quote authority on a point which is so well understood. But this condition of the right of rejection is laid down by Bell in the Principles, sec. 99, nearly in the words which I have used, and it is fully recognised in the opinions of the Lords in the important case of *Couston, Thomson, & Company v. Chapman*.¹

If in this case the sellers had assented to the rejection of the dynamo, and had agreed to take it back, the contract would then have come to an end, and any subsequent detention and use of the machine by the buyer could only give rise, as I conceive, to a pecuniary claim. But the makers did not, in fact, assent to the proposed rejection of their machine, and the validity of the rejection could only be determined by subsequent agreement, or by the decision of a Court of law.

Now, I consider that pending a decision as to a buyer's claim to reject, the goods must be treated as if in neutral custody, and this whether the buyer be himself the custodier (as he may be under the Act of Parliament), or whether he places them in the custody of a third party. The condition that the buyer does nothing in relation to the goods which is inconsistent with the ownership of the seller is in my opinion especially applicable to the period when the parties are at issue as to the determination of the contract, and this view receives indirect confirmation from the language of the 35th section, where the doing of an act which is inconsistent with the seller's ownership is declared to be equivalent to the acceptance of the goods.

The importance of maintaining the integrity of the principle has led me to dwell on the qualification which the law attaches to the buyer's right of rejection at, perhaps, unnecessary length. I must now examine more closely the Lord Ordinary's ground of judgment.

The Lord Ordinary has sustained the defenders' second and third pleas in law. Now, these pleas appear to me to be inconsistent, and only capable of being maintained as alternative propositions; because the second plea

¹ 10 Macph. (H. L.) 76, 80.

affirms that the pursuers have failed to implement their contract, and as a consequence, that the defenders are not liable in payment of the price, while the third plea amounts to a claim to set off the damages for breach of contract against the price. Now, under the statute (sec. 53), it is only where there is a breach of warranty by the seller that a claim of damages may be set up in extinction or diminution of the price. The reason of this is evident; if the goods are rightly rejected, the price is not due, and no question of compensation or set-off can arise. Without dwelling further on this point, it may be well to consider whether the defenders are in a position to treat the case as one of breach of warranty. By the 11th section of the statute it is provided that in Scotland "failure by the seller to perform any material part of the contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

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struction Co.,
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Under this enactment the common law of Scotland is radically altered, but it is not made identical with the law of England. Why this change should have been made I do not know, but we have nothing to do with the policy of the statute. The clause as it stands gives the buyer an unqualified right of election either to treat the contract as repudiated, or to affirm the contract and put forward a claim in diminution of the price; but the clause does not entitle the buyer to do two inconsistent things. In this case, I conceive that the defenders made their election on 14th September 1895 to treat the contract as repudiated. They are not in a position to found on their election, because they have taken the use of the dynamo; but having made their election, and thus raised the issue which this action is brought to settle, the defenders, in my opinion, are not entitled to recall their election and to set up a claim as for breach of warranty. The introduction of breach of warranty into the case is a contribution by counsel, who were probably right in thinking that the case should have been so treated from the beginning. But I can find no trace of such a claim in the evidence or the correspondence subsequent to 14th September, which is the actual date on the point of election.

I ought to add, that even if the election had been different, I could not agree with the Lord Ordinary that damage is proved equal to the price of the machine. The evidence only establishes a certain amount of inconvenience experienced by the buyer in the use of the machine, and I cannot admit that a buyer who has the means of supplying himself with an efficient machine by purchase is entitled to go on using the defective article until he has set up an amount of damage which is sufficient to extinguish the price. The question may arise in other cases, and I should desire to reserve my opinion upon it. On the main question, I am of opinion that the Lord Ordinary's judgment should be recalled and decree granted for the price.

LORD ADAM concurred.

LORD KINNEAR.—I agree with the Lord Ordinary that the dynamo supplied by the pursuers to the defenders was not conform to contract. I

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think this question depends not upon any evidence as to the conditions upon which a dynamo may in general be held to be a satisfactory machine, but upon the construction of a written contract by which it is stipulated that the dynamo to be supplied shall give 115 volts 40 amperes, at approximately 1070 revolutions.

On this ground I am of opinion that the defenders might have rejected the machine, and refused payment of the price, had they not retained it in their possession and continued to use it as their own for so long a time as to preclude their afterwards rejecting it. But I agree with your Lordships, for the reasons that have been already given, that it is now too late for them to repudiate the contract.

I am, however, unable to concur in the opinion that they are also deprived of the alternative remedy given by the statute to a buyer when the seller has failed to perform any material part of the contract of sale, viz., that of retaining the goods and treating the failure to perform such material part as a breach which may give rise to a claim for compensation or damages. They cannot be deprived of this remedy by reason of their having accepted the goods, because that is the very condition upon which the right arises, to treat the failure of a material part of the contract as a breach giving a claim for damages. Nor does it appear to me that they are barred from claiming damages on this ground by any final election to resort to a different and inconsistent remedy. The argument, as I understand it, is that they are not entitled to retain the goods and claim damages for breach of a material part of the contract, because they had intimated to the pursuers that they claimed to reject the goods, and to treat the contract as repudiated. But we are all agreed that their attempted rejection is ineffectual, and that they are not entitled to treat the contract as repudiated. It seems to me somewhat inconsistent to hold that they cannot reject the goods because they have in effect elected to retain them, and at the same time that they cannot claim damages on the assumption of their retaining the goods because they have elected to reject them. I can quite understand that a buyer might be barred from maintaining one alternative remedy, if by maintaining the other he had done anything to alter the seller's position to his prejudice. But I do not see that the pursuers' position is in any way prejudiced by the defenders' conduct. It is true they called upon the pursuers to remove the machine as not being conform to contract, adding,—"You can take what action you care to, and we will do our best to defend ourselves in the matter." But this in no way prejudices the pursuers in any plea which they might otherwise have taken to meet the alternative case which the defenders now maintain. When the pursuers brought their action for payment of the price, I think it was still open to the defenders to maintain, firstly, that the machine is not conform to contract, and therefore that they are entitled to reject it; and secondly, that if they cannot reject it they are at least entitled to claim damages for breach of a material condition. I think the argument on the merits of this latter plea arises now under exactly the same conditions as if they had intimated from the first that they would not reject the dynamo, but that they would claim damages for the breach of the condition in question. If that be so, there is no room for a plea in bar, for the defenders cannot be

barred by their conduct from maintaining a legal right, unless they have led the other party to alter his position in reliance on some implied undertaking or indication of an intention not to maintain it. Your Lordships hold that it would be unjust to allow the defenders, who have received a part of the consideration for which they contracted, to keep the machine and pay nothing because the contract has not been fully performed. I think the statute enables them, in these circumstances, to treat the condition which has been broken as if it were a warranty or independent agreement giving rise to a claim for damages, and to set up their claim for damages against the sellers in diminution or extinction of the price. On this point therefore I agree with the Lord Ordinary. I have some doubt, however, whether the amount of the damages has been satisfactorily made out. The damage claimable for breach of one condition would not necessarily be the same as for the breach of the entire contract. I presume that the claim should be measured by the difference between the value of the machine actually supplied and the value which it would have had to the defenders if it had been in all respects conform to contract. I think the evidence upon this point is not altogether satisfactory, but it is a point upon which I should not be disposed to differ from the Lord Ordinary if we were to adhere to his interlocutor.

As your Lordships are of opinion that the interlocutor should be recalled, it is unnecessary to consider it further, since my opinion will have no effect upon the judgment.

THE LORD PRESIDENT concurred with LORD M'LAREN.

THE COURT recalled the Lord Ordinary's interlocutor, and decerned in favour of the pursuers in terms of the conclusions of the summons.

WALLACE & PENNELL, W.S.—RICHARD JOHNSTONE, S.S.C.—Agents.

STRATON BROUGHAM BURNS AND OTHERS, Pursuers (Reclaimers).

No. 56.

—C. J. Guthrie—T. B. Morison.

WADDELL & SON, Defenders (Respondents).—Mackenzie—

John Wilson.

Jan. 14, 1897.
Burns v.
Waddell &
Son.

Process—Reclaiming Note—Competency—Court of Session Act, 1868 (31 and 32 Vict. c. 100), secs. 53 and 54.—Held that an interlocutor (not falling within the provisions of sec. 28 of the Court of Session Act, 1868) which does not, either by itself or taken along with a previous interlocutor or interlocutors, dispose of the question of liability for expenses, is not an interlocutor disposing of the whole subject-matter of the cause, and cannot be reclaimed against without the leave of the Lord Ordinary.

Process—Reclaiming Note—Competency—Consent of parties.—The Court will not entertain an incompetent reclaiming note although the respondent waives his right to object.

In October 1893 Straton Brougham Burns and others, formerly tenants under Sir Windham Anstruther, of the Mauldslee coal-field, raised an action against Waddell & Son, their subtenants in a portion of the coal-field, concluding for relief of certain sums amounting to £550 claimed from the pursuers by Sir Windham Anstruther, in respect of damages occasioned by improper working.

The defenders disputed their liability to relieve, but subsequently made a tender.

1st DIVISION.
Ld. Kyllachy

No. 56.

Jan. 14, 1897.
Burns v.
Waddell &
Son.

On 10th July 1896 the Lord Ordinary (Kyllachy) pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, in respect it is not disputed that the landlord, Sir Windham Anstruther, has offered to accept payment of the sums mentioned in the minute of tender, No. 20 of process, as in full of the claims to which this action relates, finds that on payment or consignment of the sums tendered in said minute, the defenders will be entitled to absolvitor; and in order that such payment or consignment may be made, continues the cause."

On 13th August the pursuers, without having moved for or obtained the leave of the Lord Ordinary, reclaimed.

The pursuers were proceeding to discuss the merits when the attention of parties was directed by the Lord President to the question of the competency of the reclaiming note.

The pursuers argued;—The reclaiming note was competent, for practically the whole merits of the cause were decided by the Lord Ordinary's interlocutor, and it was only in the most technical sense that it could be called an interlocutory judgment. Besides no objection to the competency was taken by the respondents.

The respondents stated that while their view was that the reclaiming note was incompetent they had no interest to and did not press the objection.

LORD PRESIDENT.—In my opinion this reclaiming note is incompetent, and it is our duty to dismiss it. The Court of Session Act, 1868, says in peremptory terms that—except in the way provided by the 28th section of the Act—until the whole cause has been decided in the Outer-House, it shall not be competent to present a reclaiming note against any interlocutor of the Lord Ordinary without his leave first had and obtained. By express decision of the Court in the case of *Baird*,¹ an interlocutor does not fall within that class, unless it disposes of expenses, by which I mean, not that it decides the amount of expenses payable, but that it deals with and determines the question of the liability of one or other of the parties for expenses. Now this interlocutor contains no such element, but is distinctly what may be called an interlocutory judgment. What then is our duty? The parties may think it convenient that we should go on and decide this question, but it does not fall within the scope of the official duties which we hold the Queen's commission to perform. Our official duty is to try cases which are competently brought before the Court. This is not a case of that kind, and it would be contrary to our duty to spend time which is dedicated to law suits on voluntary arbitration.

LORD ADAM.—I am of the same opinion. The Legislature has laid down rules for the conduct of business in the Court of Session, and one of them is that a reclaiming note against an interlocutory judgment of a Lord Ordinary, except within a certain time and subject to certain regulations, is incompetent. This interlocutor is shewn by the case of *Baird*¹ to be not a final judgment, but an interlocutory judgment. There was a mode by which within a certain time a reclaiming note might competently have been presented, if the leave of the Lord Ordinary had been obtained. The

¹ *Baird v. Barton*, June 22, 1882, 9 R. 970.

parties did not follow that course, and I am altogether adverse to the idea that we should proceed on the assumption that if the Lord Ordinary's leave had been asked he would have given it. No. 56.

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LORD M'LAREN.—I quite appreciate the position which Mr Mackenzie has taken up, that he does not think that it is in the interests of his client to take exception to the reclaiming note being proceeded with. It is unfortunate that the proper course has not been followed and the leave of the Lord Ordinary asked. If I may hazard an opinion, I have very little doubt that leave would have been given by the Lord Ordinary, for the interlocutor, if not technically, at least substantially, disposes of the whole merits of the case. But we are bound by the conditions of the statute, and as our attention was called to the omission we have no alternative.

LORD KINNEAR concurred.

THE COURT refused the reclaiming note as incompetent.

P. MORISON, S.S.C.—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents.

JAMES M'FADYEN, Pursuer (Appellant).—*A. J. Young—
A. S. D. Thomson.*

No. 57.

DALMELLINGTON IRON COMPANY, LIMITED, Defenders (Respondents).—*Balfour—Salvesen.*

Jan. 16, 1897.
M'Fadyen v.
Dalmellington
Iron Co.,
Limited.

Reparation—Master and Servant—Notice of injury—Reasonable excuse for want of notice—Employers Liability Act, 1880 (43 and 44 Vict. cap. 42), sec. 4.—The Employers Liability Act, 1880, sec. 4, enacts that an action for the recovery of compensation under the Act shall not be maintainable unless notice that injury has been sustained is given within six weeks from the occurrence of the accident causing the injury, "provided always that in case of death the want of such notice shall be no bar to the maintenance of such action if the Judge shall be of opinion that there was reasonable excuse for such want of notice."

In an action for damages under the Act brought by the father of a deceased miner, the pursuer admitted that he had not given notice of the injury sustained by his son until three days after the expiry of six weeks from the occurrence of the accident, but averred that his son survived his injuries for a fortnight. "The pursuer is an old man, and is illiterate, and was not aware of the necessity of giving notice, and it was not known whether the deceased would survive the injuries he had received, and sue himself for damages in respect thereof."

The Court *dismissed* the action, holding (*dub.* Lord M'Laren) that no reasonable excuse for the want of the statutory notice had been averred.

THIS was an action brought in the Sheriff Court at Glasgow by James M'Fadyen, residing at Joppa, in the county of Ayr, against the Dalmellington Iron Company, Limited, Glasgow, for payment of damages at common law and under the Employers Liability Act, 1880, on account of the death of the pursuer's son, who had been fatally injured while in the employment of the defenders. Sheriff of Lanarkshire.

The pursuer averred, *inter alia*;—(Cond. 17) " . . . The pursuer caused notice of said occurrence to be sent to the defenders, in terms of the Employers Liability Act, 1880. Notice was given on 21st November 1895, three days after the expiry of the six weeks allowed by statute for such notice being given. It is explained that

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the accident occurred on 7th October, the death on 22d October, and the public inquiry at Ayr on 12th November, and that notice was given, as above stated, on 21st November. The pursuer is an old man, and is illiterate, and was not aware of the necessity of giving notice; and it was not known whether the deceased would survive the injuries he received, and sue himself for damages in respect thereof. Indeed, up to very shortly before his death deceased was expected to recover. Further, the defenders have not been prejudiced in any way; and it was, in any view, desirable to await the result of the public inquiry, after which the pursuer had to consult his sons, who live in Glasgow, as to the steps to be taken in the circumstances."

The defenders pleaded;—(2) The defenders not having received timeous notice in terms of the Employers Liability Act, 1880, they are entitled to absolvitor in so far as the action is based upon that statute.*

On 30th June 1896 the Sheriff-substitute (Spens) assolizied the defenders, on the ground that according to the admitted facts of the case the accident to the pursuer's son had been caused, or at least materially contributed to, by his own fault.

The pursuer appealed, and moved for issues.

Argued for the pursuer on the question of notice;—The circumstances stated on record shewed that there was a reasonable excuse for the pursuer's failure to give the statutory notice. In any case, if an issue at common law were allowed, the question whether or not the want of notice was excusable should be reserved for the decision of the Judge who should preside at the trial.¹

Argued for the defenders on the question of notice;—There was no reason for postponing the decision of the question as to notice, even if an issue were allowed at common law, and the question fell to be decided against the pursuer, as there was no relevant averment of reasonable excuse.²—[LORD M'LAREN suggested that the injury of which the pursuer was bound to give notice was the injury he had himself sustained through his son's death, and that notice within six weeks of the son's death satisfied the statute.] The word "injury" in the section meant the personal injury to the employee, and the section required notice to be given within six weeks of the occurrence of the "accident causing the injury," meaning evidently the accident to the workman. In regard to the time within which an action must be raised, the Legislature had discriminated between the case where death did or did not result from the injury, and a comparison of

* Section 4 of the Employers Liability Act, 1880 (43 and 44 Vict. cap. 42), enacts,—“An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: Provided always that in case of death the want of such notice shall be no bar to the maintenance of such action if the Judge shall be of opinion that there was reasonable excuse for such want of notice.”

¹ Trail v. Kelman & Co., Oct. 22, 1887, 15 R. 4; Macleod v. Pirie, Feb. 15, 1893, 20 R. 381.

² Connolly v. Young's Paraffin Light and Mineral Oil Company, Limited, Nov. 17, 1894, 22 R. 80.

the different parts of the clause shewed that they did not intend to do so in regard to the period within which notice was to be given. No. 57.

At advising,—

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LORD PRESIDENT.—The Sheriff-substitute has given the go-by to the question of notice, but the defenders have a right to have that plea disposed of, raised as it is on relevancy, and they have claimed our judgment upon it. Admittedly, notice was not given within the six weeks prescribed by the statute; and the only question is, whether there is a relevant averment of reasonable excuse for the want of such notice. In my opinion there is not. There is no circumstantial statement of reasonable excuse at all. What is said about the pursuer might be said probably of any and every father of a miner, viz., that he is an old man, and is illiterate. To sustain this as an excuse would be to nullify the enactment requiring notice, and no literature is required to get a letter sent to the employer, stating, as the Act says, "in ordinary language," the cause of the injury and the date at which it was sustained.

Again, the statement that a fatal result of the injury was not apprehended, if it has any significance, is merely a criticism on the statute, which prescribes the same period for notice, whether the man lives and himself sues, or dies and some relative sues.

Holding, as I do, that the action cannot be maintained by reason of the absence of any averment of reasonable excuse for the want of the statutory notice, I find no occasion to consider the more difficult question decided by the Sheriff-substitute. I am for recalling his interlocutor and dismissing the action.

LORD ADAM concurred.

LORD M'LAREN.—Your Lordships are all of opinion that the injury referred to in the statute means, not the injury which the pursuer has sustained, but the injury which the deceased person has sustained.

The result of that view would seem to be that, wherever the person who was mortally injured survives the period allowed for notice, it would be impossible to give the notice required by the statute. It may be that in such a case the Court would hold that there was a reasonable excuse if notice of action had been given by the deceased within the prescribed time. But supposing that the deceased had not given notice, is the father to lose his right of action? I should have thought that in the case supposed, as it would be impossible for the father to give notice of the death of his son within the time required by the statute, the fact that the son had survived the period of notice, and that the right of action did not arise until after the expiration of the period of notice, was in itself a reasonable excuse, and that the same principle would apply to the case of the death of the injured party while the period of notice was running. But I cannot say that I hold this opinion with any confidence after the view taken by your Lordships, and I do not desire to dissent from the decision. The difficulty is, that the right of action which the father has for the death of his son is a different right of action from that which the son had himself during the period of his survival. The father's right only arose on the death of his son. He might not

No. 57. be able to give the notice which is required by the statute, if the statute be strictly interpreted as is proposed.
 Jan. 16, 1897. M'Fadyen v. Dalmellington Iron Co., Limited. LORD KINNEAR concurred with the LORD PRESIDENT.

THE COURT recalled the interlocutor of the Sheriff-substitute, and dismissed the action.

PATRICK & JAMES, S.S.C.—GILL & PRINGLE, W.S.—Agents.

No. 58. MRS MARGARET WATSON OR WATT, Pursuer (Reclaimer).—*Salvesen*
 —*Findlay*.
 Jan. 16, 1897. DANIEL MACNEIL WATSON AND OTHERS, Defenders (Respondents).—
 Watt v. Watson. Sol.-Gen. Dickson—Ure—Crabb Watt.

Trust—Trust-deed by a woman before marriage for behoof of spouses in liferent and children in fee—Revocation—Married Women's Property (Scotland) Act, 1881 (44 and 45 Vict. cap. 21).—By a deed executed on the day before her marriage to J. W., a woman, *sui juris*,—on the narrative that “there is a purpose of marriage between J. W. and me, and that in contemplation thereof, and as a provision for myself and for my intended spouse, and the issue, if any, of the said intended marriage, I have of even date assigned” certain securities, “and I have resolved to transfer” certain funds,—assigned and transferred certain funds to trustees, the whole to be held by them in trust; “(second) for payment to me during my life, on my own separate receipt and discharge, and after my death to the said J. W., if he shall survive me,” of the annual income of the trust-estate “for the liferent use allenarly of me and him respectively”; “(third) after the death of the survivor of me and the said J. W., for behoof of the child or children of the intended marriage, in fee,” with power to the trustees even during the subsistence of the liferents to apply part of the capital for the maintenance and education of children in minority; “(fourth) in the event of the death of the said J. W., survived by me, without any child or children . . . the trustees shall pay over the trust-estate to me absolutely for my own behoof; (fifth) in the event of the said J. W. surviving me, and of there being no child or children . . . the trustees shall” on J. W.’s death pay over the trust-estate “to my own nearest of kin.”

In an action brought by the wife, with the consent of the husband, a year after the marriage, there being no children, for declarator that the deed was revocable by her, *held* (by a majority of seven Judges, *diss.* Lord Moncreiff, and *rev. judgment* of Lord Stormonth-Darling) that the deed was revocable by the wife, with consent of her husband, in respect that it was unilateral and executed without reference to any contract of marriage, and that there were no beneficiaries in existence other than the spouses.

Opinion (per Lord M'Laren) that the law as to the revocability after marriage of a wife's voluntary trust-deed, executed by her prior to marriage, had not been altered by the Married Women's Property Act, 1881.

1st Division, with three consulted Judges. Ld Stormonth-Darling. ON 17th July 1895 Mrs Margaret Watson or Watt, with consent of her husband, John Kennedy Watt, produce-merchant, Glasgow, raised an action against Daniel Macneil Watson and others, trustees under a deed of provision and trust executed by the pursuer in contemplation of marriage on 21st August 1894 for reduction of said deed, and alternatively for declarator that the deed was revocable by her, at least with her husband's consent, and that she was entitled to revoke it accordingly, and further that the trustees were bound to reinvest her in the estate so conveyed to them, and to execute all deeds necessary for completing her title thereto.

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The deed in question was executed by the female pursuer on the day preceding her marriage, and provided as follows:—"Considering that there is a purpose of marriage between John Kennedy Watt, produce-merchant, Glasgow, and me, and that in contemplation thereof, and as a provision for myself and my said intended spouse, and the issue, if any, of the said intended marriage, I have of even date herewith transferred to the persons after named and designed," £947 Glasgow Corporation Stock: "And I have resolved to transfer my right and interest in the estate of my father, the deceased John Watson, stationer, Glasgow, to the extent after specified, and also the sum of money contained in the deposit-receipt after mentioned, to be held upon the trusts after specified: Therefore I do hereby assign and transfer to and in favour of Daniel Macneil Watt" and others, "as trustees and trustee for the purposes after mentioned, All and Whole the sum of £117, 10s. 9d., and forming part of" the granter's interest in her father's estate: "And also All and Whole the deposit-receipt by the Commercial Bank of Scotland, Glasgow, for the sum of £35, 9s. 3d., dated the 12th day of May 1894: But these presents and the said transfers of the said Glasgow Corporation stocks are granted in trust, and the said trust-estate shall be held, for the following purposes, viz.,—(First) For payment of the expenses of executing this trust: (Second) For payment to me during my life, on my own separate receipt and discharge, and after my death to the said John Kennedy Watt, if he shall survive me, of the free annual income or revenue of the said trust-estate for the liferent use alienably of me and him respectively; declaring that the said income shall not be affectable by the debts and deeds of either of me and the said John Kennedy Watt or the diligence of our creditors: (Third) After the death of the survivor of me and the said John Kennedy Watt, for behoof of the child or children of the intended marriage, in fee," divisible "in such manner as I shall appoint by any writing under my hand; and in case of no such appointment, for the said children equally, share and share alike; and unless otherwise directed, the trustees shall pay and convey to the said children their respective shares of the said trust-funds and estate on the youngest child attaining majority; and until that event the trustees shall apply the income towards the maintenance and education of such of the children as are in minority and unable to support themselves; with power to the trustees for that purpose to apply such part of the capital as they may deem necessary, and that even during the subsistence of the foresaid liferents; declaring that the above provisions in favour of children shall not become vested interests until the period of payment above mentioned . . . (Fourth) In the event of the death of the said John Kennedy Watt, survived by me, without any child or children, or the issue of a child or children, of the said intended marriage, or on the death of all of such children without any interest in the trust-estate having vested in any of them, the trustees shall pay over the trust-estate to me absolutely for my own behoof: (Fifth) In the event of the said John Kennedy Watt surviving me, and of there being no child or children, or the issue of a child or children, of the said intended marriage, or on the death of all such children without interest in the trust-estate having vested in any of them, the trustees shall on the death of the said John Kennedy Watt hold the trust-estate for, and shall pay over the same to, my own nearest of kin."

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The conclusion for reduction was founded on averments of essential error, but it is unnecessary for the purposes of the present report to refer further to them.

The pursuer pleaded ;—(1) On a sound construction of the said deed, it is revocable by the pursuer the said Mrs Margaret Watson or Watt at will, and she is entitled to decree as craved.

The defenders pleaded ;—(5) The said deed having been delivered and acted upon is irrevocable. (6) In any event the defenders cannot denude without the authority of the Court, and are entitled to the expenses of defending the action.

On 4th March 1896 the Lord Ordinary, after a proof upon the question of essential error, sustained the defences, and in respect thereof assoilzied the defenders from the conclusions of the summons.*

* "OPINION.—The purpose of this action is to get rid of a trust-deed which the pursuer Mrs Watt executed on 21st August 1894, the day before her marriage, and she proposes to effect this either by having it declared that the deed is in its own nature revocable, or by reducing it on the ground that she granted it under essential error as to its import and effect.

"On the second of these grounds I allowed a proof. The record contains plentiful averments that Mrs Watt was induced to grant the deed by misrepresentation and concealment on the part of her brother and the family agent, who led her (she says) to believe that it was intended merely for the management of her estate, and that it would not prevent her from resuming possession of her estate at any time she chose. The result of the proof is, in my opinion, entirely to disprove these allegations. (His Lordship then considered the evidence.)

"The second question is whether the deed is in its own nature revocable. I am of opinion that it is not.

"I do not found that opinion upon the fact that the trustees hold the fee for the children of the marriage, because, as yet at least, there are none. The case does not therefore fall within the category of which *Shedden v. Wilson*, Nov. 29, 1895, 23 R. 228, is the latest example.

"The principle which seems to me to bar revocation is that to which effect was given in the leading case of *Menzies v. Murray*, 2 R. 507, the principle, namely, that *stante matrimonio* a wife has no power to alienate or diminish the rights secured to her by an antenuptial trust made in contemplation of marriage. It was argued that this principle had been rendered obsolete by the statutory exclusion of the *jus mariti*. It might be enough to reply that *Menzies v. Murray* was followed by the Second Division only a few weeks ago in the case of *Ker's Trustees v. Ker*, 23 R. 317. But the truth is, that the argument involves an entire misapprehension of the principle of *Menzies'* case, which is to protect the wife, not against the diligence of the husband's creditors, but (to use the words of Lord Deas) 'against marital influence on the one hand and self-sacrifice on the other.' It is precisely where there is an exclusion of the *jus mariti* that this kind of danger arises.

"I am quite aware that the trust in *Menzies v. Murray*, which the wife was held not entitled to bring to an end, even with the consent of all the beneficiaries, was a trust created by antenuptial contract. But I am unable to see that there is any difference in principle, so far as this question is concerned, between a trust so created and a trust set up by the wife herself in a unilateral deed made *intuitu matrimonii*. What Mrs Murray proposed to give up was not her marriage-contract provisions, but the trust which secured them, and that was a trust entirely of her own creation. The husband had no part in creating it, for he placed nothing under it. His

The pursuer reclaimed, and on 14th November the cause was appointed to be argued before seven Judges. No. 58.

Argued for the pursuer;—The deed was revocable. (1) It was not expressly declared to be irrevocable. (2) The liferent was not declared to be alimentary, and the liferenter was not sufficiently protected against creditors.¹ No one could by a unilateral deed put his estate beyond the reach of his creditors.² (3) No children had been born of the marriage, and therefore there was no *jus quæsitum* in anyone.³ The case of *Murison v. Dick*⁴ was conclusive in favour of the pursuer's right to revoke. The Lord Ordinary had distinguished that case from the present on the ground that the deed was there revoked before the marriage. That distinction, however, made no difference, for it could not be contended that the marriage here had taken place on the faith of the deed, or that the deed had been truly executed in contemplation of the marriage.⁵

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accession to the deed, therefore, while it made the provisions contractual, and therefore onerous, added nothing to the sanctity of the trust.

“The force and subsistence of such deeds’ (i.e., antenuptial protective deeds), says Lord Gifford in 5 R., p. 1039, ‘do not flow from the consent of the intended husband, although such consent is usually adhibited. They draw their real efficacy, and their real strength and finality, from the will of the person who dedicates the trust fund, and if this be the intended wife herself, then it is her act, and not the act of her intended husband, which places the fund beyond even her own power while she remains under coverture.’

“It would be absurd to say that every kind of trust-deed executed by a wife before marriage is rendered irrevocable by the bare fact of marriage supervening. The deed might be merely administrative or merely testamentary. To become irrevocable on the principle of *Menzies v. Murray* it must have been made in contemplation of marriage, and must contain provisions for the wife's own protection. Here these conditions are satisfied. The deed declares that it is granted in contemplation of the pursuer's marriage with Mr Watt, and as a provision for herself and him, and the issue, if any. It secures the pursuer's liferent, present and prospective. In so far as its provisions are properly matrimonial provisions, it must therefore stand. In so far as it merely provides for the destination of the estate to third parties after the death of the spouses without leaving issue, it is testamentary, and therefore revocable.

“The cases relied on by the pursuer seem to me inapplicable. In *Murison v. Dick*, 16 D. 529, the deed was revoked before marriage, while the granter was still mistress of her own fortune. In *Mackenzie v. Mackenzie's Trustees*, 5 R. 1027, the lady was only allowed to revoke an antenuptial trust-deed on executing a postnuptial contract approved of by the Court, and even this limited kind of revocation might not have been permitted if the antenuptial deed had been held to have been granted in contemplation of marriage. But the Lord Justice-Clerk (without whom there would not have been a majority in the Inner-House) characterised the deed as not executed in contemplation of marriage, and as nothing but a voluntary interdiction, intended to protect the granter against her own extravagance. Lord Young in the Outer-House seems to have taken very much the same view.”

¹ Rogerson, &c., v. Rogerson's Trustee, Nov. 6, 1885, 13 R. 154.

² Corbet, &c., v. Waddell, &c., Nov. 13, 1879, 7 R. 200.

³ Mackenzie, &c., v. Mackenzie's Trustees, July 10, 1878, 5 R. 1027, Lord Ormisdale, p. 1035, Lord Justice-Clerk (Moncreiff), 1041.

⁴ Murison v. Dick, Feb. 10, 1854, 16 D. 529, 26 Scot. Jur. 239.

⁵ Mackenzie, &c., v. Mackenzie's Trustees, July 10, 1878, 5 R. 1027, Lord Justice-Clerk (Moncreiff), p. 1041.

No. 58. *Menzies v. Murray*¹ had no application, the deed in it being a bilateral marriage-contract with a strictly alimentary liferent. *Williamson v. Boothby*² dealt with a marriage-contract in the strict sense of the term, which the deed in the present case was not. In any event, since the passing of the Married Women's Property (Scotland) Act, 1881, (44 and 45 Vict. c. 21), the reasons which existed for protecting a wife, and for refusing to allow her to revoke, at a time when by operation of law her moveable estate passed upon her marriage to her husband, had ceased to exist.

Argued for the defenders;—The deed was irrevocable. The case of *Anderson v. Buchanan*³ was the first of a series of cases which decided that where a wife by antenuptial contract secures to herself a liferent provision, she is not entitled to revoke the deed, even although she has not declared that liferent to be alimentary, and although there is no other interest in existence. No doubt in that case the deed was expressly declared to be ~~irrevocable~~, and two of the Judges⁴ who formed the majority of the Court rested their opinions on the clause which so declared it, but as Lord Neaves pointed out in the case of *Pringle v. Anderson*,⁵ the true ground of judgment in the case was that the law ought not to refuse to the wife the power to protect herself against her husband, who was her administrator-in-law. The principle was again affirmed in *Menzies v. Murray*,⁶ and *Standard Property Investment Company v. Cowe, &c.*⁷ and the latest case of *Ker's Trustees v. Ker*⁸ was a very strong one for the defenders, because the deed there was not declared to be irrevocable, the children interested were consenting parties to revocation, and the case was subsequent to the Married Women's Property Act, 1881. The principle contended for by the defenders was strongly asserted by Lord Gifford in *Mackenzie v. Mackenzie*,⁹ relied upon by the pursuer, and it was to be observed that the Lord Justice-Clerk's ground of judgment was that the deed was not truly executed in contemplation of marriage, and apparently no weight was attached by the Court to the fact that the deed was unilateral. Assuming that it was essential to irrevocability that there should be a clause declaring the liferent alimentary, then the clause protecting it from creditors was a sufficient equivalent.¹⁰ The result of the above authorities was that in order to the irrevocability of such a deed (1) it must be executed in immediate contemplation of marriage, and for the purposes of the marriage; (2)

¹ *Menzies v. Murray*, March 5, 1875, 2 R. 507.

² *Williamson v. Boothby*, June 11, 1890, 17 R. 927.

³ *Anderson v. Buchanan*, June 2, 1837, 15 S. 1073, 9 Scot. Jur. 509.

⁴ *Anderson v. Buchanan*, June 2, 1837, 15 S. 1073, *per* Lord Mackenzie, and Lord Medwyn, p. 1086.

⁵ *Pringle v. Anderson*, July 3, 1868, 6 Macph. 982, *per* Lord Neaves, 991, 40 Scot. Jur. 563.

⁶ *Menzies v. Murray*, March 5, 1875, 2 R. 507.

⁷ *Standard Property Investment Co. v. Cowe, &c.*, March 20, 1877, 4 R. 695.

⁸ *Ker's Trustees v. Ker*, Dec. 13, 1895, 23 R. 317.

⁹ *Mackenzie, &c. v. Mackenzie's Trustees*, July 10, 1878, 5 R. 1027, Lord Gifford, 1036, Lord Justice-Clerk (Moncreiff), 1041.

¹⁰ *Irvine v. McLaren*, Jan. 24, 1829, 7 S. 317, Lord Glenlee, 318; *Martin v. Bannatyne, &c.*, March 8, 1861, 23 D. 705, Lord Neaves, 707, Lord Justice-Clerk (Inglis), pp. 708 and 709.

marriage should follow upon it, and (3) the deed should be delivered and the funds handed to the trustees.¹ These elements all existed here.

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At advising on 12th January 1897,—

LORD M'LAREN.—In this action, Mrs Watt, with her husband's consent, concludes first for reduction on extrinsic grounds of a deed of trust which she executed on the day preceding her marriage, and alternatively for a decree declaring that the trust is revocable. The second conclusion was alone referred to the Court of seven Judges, and it is this branch of the case on which we are now to give judgment. I shall therefore leave out of view all considerations founded on the facts which have been the subject of proof, and consider only the legal effect of Mrs Watt's deed as a settlement of her estate.

The trust-deed is dated 21st April 1894, and it begins with the following narrative:—"Considering that there is a purpose of marriage between John Kennedy Watt, produce merchant, Glasgow, and me, and that in contemplation thereof, and as a provision for myself and my said intended spouse, and the issue, if any, of the said intended marriage, I have of even date hereof transferred to the persons after named" (the trustees of the settlement) certain stocks, also the truster's interest in the estate of her father, and a sum of money in bank. The deed then conveys these securities to the trustees in trust for payment of their expenses, and thereafter for payment of the income of the trust-funds to Mrs Watt for life, and to her intended husband, if he should survive her, for life, excluding assignment and the diligence of creditors. The trustees are directed to hold the fee for the child or children of the marriage, whom failing as mentioned in the deed. The deed was therefore executed in contemplation of marriage, and the purposes are such as are not unusual in contracts of marriage, but the husband was not a party to the deed, and it must be taken to have been executed without his consent. Also, as the husband gave nothing, and came under no pecuniary obligation on the occasion of the marriage, the elements of mutual consideration and contract are absent. If the deed be irrevocable, this result must depend on the mere fact that the execution of the deed was followed by marriage.

It is of course indisputable that an effective settlement may be made in the form of a contract of marriage containing a trust of the wife's estate for the spouses in liferent and the issue of the marriage in fee. Under such a deed it is recognised that the trustees are protectors of the interests of the wife and children. Their title is preferable to that of any donee to whom the wife may attempt to convey the estate in derogation of the trust, and to that of the wife herself should she attempt to revoke the trust. The main purpose of such deeds—the protection of the wife against her own voluntary acts during the marriage—is carried out in England and Scotland by means of a trust, and while there are differences of form and expression in the English and Scottish trusts, as was pointed out by Lord Cottenham in *Rennie v. Ritchie*,¹ there is, I think, substantial identity in the main

¹ Fraser on Husband and Wife, pp. 1489 *et seq.*; *Rennie v. Ritchie*, April 25, 1845, 4 Bell's Appeals, 221, *per* Lord Cottenham, 244 *et seq.*

No. 58. elements, which are, first, the consent of the spouses, and, secondly, the withdrawal of the estate from their control by the interposition of a trust. I notice in passing that a contract of marriage may incidentally dispose of estate which the spouses do not desire to settle, and the disposal of which is not a term of the treaty of marriage. This was the ground of decision in *Ramsay's* case,¹ and if the judgment in that case has any bearing on the case before us, it only proves that the mere execution of a trust conveyance upon marriage does not of itself amount to an irrevocable settlement if the element of contract is wanting.

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Before considering the effect of the series of cases ending in *Menzies v. Murray*² with reference to their bearing on the present question, it may be proper to notice that this question could not well have arisen before the year 1881, when the Married Women's Property (Scotland) Act came into operation. Until that time the *jus mariti* was in full vigour; and by what has been termed the assignation of marriage the wife's personal estate and the income of her heritable estate passed to the husband. I think it is consistent with all the authorities that the husband could not be deprived of these rights except by his own consent. It is hardly necessary to elaborate this point, which indeed has only an indirect bearing on the matter in issue, but I may be permitted to refer to a passage in Erskine's Institute (i. 6, 14) which has been judicially approved. In this statement of the law the learned author begins by referring to the erroneous opinions of previous writers, including Lord Stair, who held that the husband's renunciation of his rights fell itself under the *jus mariti* as a moveable right conceived in favour of the wife; and then he proceeds,—“This doctrine, which springs from a mere subtlety, is irreconcilable to that *bona fides* which ought to prevail in marriage-contracts, and indeed to common sense; for all rights not inalienable may be renounced by those entitled to them, and the husband's right of administering his wife's moveable estate, is not accounted by the law of any other country so essential to him but that he may divest himself of it.” In the important case of *M'Dougall v. City of Glasgow Bank*,³ relating to the effect of an exclusion of the husband's rights in relation to *acquirenda*, this passage is cited by Lord Mure and the Lord President as being a correct statement of the law and the principle on which it is founded; and if, as Mr Erskine states, and this Court has found, the exclusion of the *jus mariti* in relation to wife's estate depends on the husband's renunciation, it is impossible to maintain that, in the state of the law which existed prior to 1881, an unmarried woman could, by putting her moveable estate under trust, prevent it from falling under her husband's dominion upon her supervening marriage. I am not here considering the effect of the exclusion of the *jus mariti* from property coming to the wife by will or gift, which depends on different principles, but I think it is clear on the authorities that the husband was a necessary party to a deed in contemplation of marriage which was intended to exclude or restrict his rights in relation to the wife's estate.

Accordingly, in the two cases, in which the effect of the wife's unilateral deed was considered, the deed was held to be revocable; I refer to the cases

¹ 10 Macph. 120.

² 2 R. 507.

³ 6 R. 1089.

of *Murison*¹ and *Mackenzie*.² It is true that other elements entered into the decision of these cases, the judgments being rested largely on a consideration of the circumstances in which the deeds were granted, and, as I think, also on the ground that in the particular cases the trust was a purely voluntary conveyance for the benefit of the lady herself, a conveyance which could not and did not divest her of the right of resuming the administration of her estate. But the cases are at least illustrations of the principle that the wife's estate cannot be tied up during the subsistence of a marriage by a deed to which the husband is not a party. No. 58.
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Passing to the cases in which trust-conveyances of the wife's estate have been held effectual and irrevocable, I observe that in every one of these cases, from *Anderson v. Buchanan*³ to *Menzies v. Murray*,⁴ the trust was contained in or executed with reference to an antenuptial contract of marriage. In these cases it was not necessary to consider the element of the husband's consent, because it was common ground that the mere exclusion of the *jus mariti* by contract would not prevent the spouses from disposing of the estate by their joint act. The question in these cases related to the measure of the higher protection which might be given by means of a trust. But I observe that in the reported opinions of the Court of seven Judges who advised *Menzies v. Murray*,⁴ all the Judges are at pains to state that their opinions are given with reference to a trust constituted by antenuptial contract of marriage. I do not think that in fair construction any of the opinions there given as to the inviolable nature of a trust so constituted can be extended so as to cover the case of a trust constituted by the act of the wife alone. It may be that in these opinions the principle of contract is made to support consequences which do not directly flow from it, because the effect of the decision is that a trust constituted by matrimonial contract cannot be revoked by the same authority which created it. But this effect has been given to matrimonial contracts for reasons of social expediency, and when it is remembered that by the law of Scotland a married woman is incapable of undertaking a personal obligation, it can hardly be said to be a very anomalous rule, that a settlement of property which is made a term of the treaty of marriage should be as indissoluble as the marriage itself. But if it should be thought that in *Menzies v. Murray*,⁴ and the cases which preceded it, the Court took a step in the direction of protecting the wife against herself, which it is difficult to refer to the combined effect of contract and trust, or to justify in principle, this criticism would not furnish a valid reason for extending the rule to cases to which it has not hitherto been applied. And again, if we are to treat the case of a trust contained in an antenuptial contract as a case governed by an arbitrary rule founded on custom and convenience, the result would seem to be the same, because the means of securing the wife's interest are known and settled, and no sufficient reason can be given for reopening the question.

I think I can find indications of the view which I now express in the opinions of the Judges constituting the majority in the case of *Mackenzie*.² It is, at least, clear that they considered the decision in *Menzies v. Murray*⁴ to be inapplicable to the case of a voluntary trust.

¹ 16 D. 529.² 5 R. 1027.³ 15 S. 1073.⁴ 2 R. 507.

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I come then to the conclusion that, if this case were to be decided according to the law existing prior to 1881, the decision must be that the trust was revocable before marriage, and that its character was not altered by the supervening marriage, because the trust-conveyance was not a term of the contract or treaty of marriage. I must add that, in my opinion, the Act of 1881 leaves this question unaffected.

It is right to notice in this connection that while the Married Women's Property Act deprives the husband of the administration of the wife's estate during the subsistence of the marriage, it leaves him in possession of important rights at the dissolution of the marriage, and it does not take away the curatorial power.

Now, in the deed under consideration, the husband is to get a life interest of the estate in case of his survival, a right which may not be so valuable as the right secured to him by the statute. This consideration, however, is not conclusive, because it may be said that in so far as the deed is prejudicial to the husband's interests he is not bound by it, and that it will be open to him to claim his *jus relictii* if he survives. Accordingly, I do not base my opinion upon anything in the terms or provisions of the Married Women's Property Act, 1881, except that I keep in view that the effect of marriage-contracts is saved by the 8th section of the Act.

I look at the question rather in this light: If the views which I have expressed be well founded, the operation of the common law on the estates of married women was liable to be modified or completely excluded by the device of a trust-conveyance executed before marriage, containing clauses effectual for the protection of the wife's interest, and especially for restricting her interest to a usufruct during the subsistence of the marriage. But this object could only be accomplished by a marriage-contract or equivalent deed to which the husband was a party. In this way the rights of both spouses were reconciled. The wife's estate was protected; the husband's legitimate interests were not interfered with, because he was a party to the deed, and the settlement was deemed irrevocable *stans matrimonio*, because it was recognised that during marriage the powers of the wife to enter into a new contract were suspended. The Married Women's Property Act, 1881, preserved the then existing law in relation to settlements of the wife's estate by marriage-contract, but gave no new right. It follows, in my opinion, that an effectual trust of the wife's estate can only be made under the conditions which existed prior to 1881, and one of these conditions is, that the future husband must be a party to the deed. There is no reason to suppose that any change in this respect was within the scope of the Married Women's Property Act. If it had been I should have expected to find the change clearly expressed in that measure. While I venture to think that it is beyond the powers of the Court to sanction an alteration of the conditions of an effectual trust of the wife's estate, I should not be disposed to exercise the power if we had it, because I think that the project of tying up the wife's estate by a deed not communicated to her intended husband would not be conducive to the peace of families, and would not be consistent with the confidence that ought to subsist between persons who are entering into the relation of marriage.

I may observe in conclusion that our decision will not necessarily affect

any question that may arise in other cases as to the rights of children under a unilateral trust-deed. The condition of the present case is that there are no beneficiaries in existence other than the spouses, and in these circumstances, I think that Mrs Watt has an unqualified right to revoke the deed of trust. It might be otherwise if there were children born before the power of revocation was exercised.

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LORD TRAYNER.—I think the question presented to us for determination is attended with difficulty, but I have come to be of opinion that the pursuer is entitled to succeed. I shall state briefly the grounds on which I have arrived at that conclusion.

I take it to be settled on authority that a married woman cannot *stans matrimonio* discharge or revoke any provision made in her favour by her antenuptial marriage-contract. Accordingly, if the deed in question came within that rule, the defenders would be entitled to a judgment. They say it does. They do not maintain that the deed in question is an antenuptial contract, for that it plainly is not. It is not a contract, compact, or agreement at all; it is a unilateral deed, imposing obligation on no one except upon the granter, if indeed upon her. But the defenders say that the deed under consideration is equivalent, in material respects, to a marriage-contract, and that its effect, so far at least as its revocability is concerned, is the same. They therefore maintain that the rule I have referred to should be here applied. With regard to that rule, I shall only now say that I feel bound to follow it, in respect of the authority by which it has been settled, but that I am not prepared to extend the limits of its application. If the deed in question, then, is to be regarded as equivalent to a marriage-contract it is not, according to the authorities, revocable by the pursuer; if it is not to be so regarded, then its revocability will depend on considerations as to the character and effect of the deed, taken along with the circumstances under which it was executed.

The defenders argue that the deed in question must be regarded as equivalent to an antenuptial contract of marriage, because (1) it was executed in anticipation or contemplation of marriage; (2) that it constitutes a trust; and (3) that the purposes of the trust are matrimonial purposes. These are said to be the essential features of an antenuptial contract of marriage, and it is further said that the deed in question possesses or presents the whole three. Now, does it?

The deed in question undoubtedly proceeds upon the narrative that there is a purpose of marriage between the pursuer and her husband, and "that in contemplation thereof" she has executed the deed. The language so far is similar with that usually employed in the narrative of an antenuptial contract of marriage. But it is not the same. An antenuptial contract of marriage sets out that the parties to it have agreed to marry, and in prospect of that agreement being carried out have resolved upon certain conditions, which it is the purpose of the antenuptial contract to express. The conditions are almost invariably conditions mutually binding, but whether so or not, are the conditions on which the marriage has been agreed to, and on the faith of which the marriage is to be solemnised. Here it is different. The deed sets out no contract or agreement to marry, but

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merely that there is a purpose of marriage, in contemplation of which the granter of the deed makes a certain disposition of her estate. The proposed or contemplated marriage is not conditional on her granting such a deed; the non-execution of it would not have prevented the marriage, which had been agreed to unconditionally. The marriage followed the execution of the deed in point of time; it did not follow on the faith of the deed. But I do not think this difference in the narrative of the deeds of very great importance, because it is not the narrative of a deed so much as its substantive provisions which give it its character. The narrative expresses the reason or inducing cause of granting, nothing more. For example, a man might on the narrative of his failing health, or of his labouring under a fatal disease, and in view of his approaching death, dispose to his son a certain property or estate. But, notwithstanding such a narrative, if the deed was a conveyance *per verba de presenti* duly delivered it would not be in the technical sense a *mortis causa* deed. So here, the narrative that the deed was granted in contemplation of marriage would not, of itself, make it a marriage-contract, or equivalent to a marriage-contract, unless its provisions otherwise gave it that character.

The second ground on which the defenders maintain that this deed is equivalent to an antenuptial contract of marriage is that it constitutes a trust for carrying out its purposes. In this, no doubt, it resembles a marriage-contract, but not more than it resembles a trust-settlement. The mere constitution of a trust in itself is plainly of no importance in this question. The purposes for which the trust was constituted are important and must be considered, and this leads me to the defenders' third point. They say that the purposes of this deed were matrimonial purposes. Briefly stated, the purposes of this deed were as follows:—(1) That the income of the estate conveyed should, during her lifetime, be paid to the granter (the pursuer) on her own separate receipt and discharge; (2) on her death, the income of the estate to be paid to her husband, if he survived; (3) on the death of both, the fee to be divided among their children; and (4) failing children, the estate to go to the granter's own heirs. The only one of these purposes which could possibly be carried out, during the existence of the marriage, was the first. It was not matrimonial. To give the granter of the deed the income of her own estate "on her own separate receipt" was simply giving her what she had before; it was making no change in respect of the marriage. If the income of the estate had been directed to be paid to the spouses in aid of the *oneris matrimonii*, that might have been described as a matrimonial purpose—a dedication of the granter's means to a matrimonial purpose. But where is the matrimonial purpose in dedicating the granter's means to herself to do with them what she pleases, just as she did when there was no matrimonial relation existing? In like manner, the grant of the income to the surviving husband is not to enable him to educate or maintain the family, or for any purpose properly matrimonial. It is simply a legacy to himself, after the marriage has been dissolved, and when no matrimonial purpose could be served. The destination of the fee to the children, and failing them to the granter's heirs, being the act of the pursuer alone, and not a condition binding on her by contract with her husband, I regard as testamentary and not matrimonial.

If I am right so far, it follows that this deed not being an antenuptial contract of marriage, or equivalent to such a contract, the question of whether it is revocable or not is not foreclosed by the authority to which I referred at the outset of my opinion.

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I think the deed in question is revocable, because it was a conveyance in trust for the administration or management of the grantor's estate for her own behoof, and by the execution and delivery of which no right was constituted which forms a bar to the revocation of that deed by the grantor, in whom, notwithstanding of the execution and delivery of the deed, the radical right to the estate conveyed still remained vested. If, by the execution and delivery of the deed, a *jus quesitum tertio* had been conferred, the pursuer could not have revoked or recalled her conveyance standing such a right. But I think there is no such right in question. The conveyance of the fee of the estate to be held for the children of the marriage is not such a right, for there are no children of the marriage. Even if there had been, I should have had difficulty in holding that under this deed there was anything more conferred on them than a mere *spes*. But there are no children, and therefore as regards the fee there is no *jus quesitum*. The husband's right to the liferent after his wife's death may be in a different position (I do not say it is), but if it is, it does not bar the revocation of the deed, as he is a consenter to that being done, and his right to renounce or discharge such a liferent right is not disputed.

I think therefore that the pursuer is entitled to our judgment.

LORD MONCREIFF.—I regret to differ from the view which all of your Lordships take of this case, but at the conclusion of the argument it seemed to me that the Lord Ordinary's interlocutor was well founded, and further consideration has not altered that opinion.

We are not called upon to consider whether the deed of provision and trust which was executed by Mrs Watt on the eve of her marriage is reducible on the head of essential error or force and fear, or on the ground (which is not pleaded on record) that it was executed in fraud of the husband's rights. There is no question with creditors; and the one question upon which our opinion is asked is that raised by the pursuer's first plea in law, viz., whether the deed is revocable by Mrs Watt at will. These being the admitted conditions of the argument, I am of opinion with the Lord Ordinary, and substantially for the same reasons, that the deed cannot be revoked *stante matrimonio*.

Whatever may be thought of the original soundness of the decision in *Anderson v. Buchanan*,¹ I do not think that the authority of that case can now be disputed. It has never been successfully impugned, and it has been followed in a series of cases, the latest of which is *Ker's Trustees v. Ker*.²

But it is said that *Anderson v. Buchanan*¹ ran counter to the well-established rule of law that a voluntary and gratuitous trust, the sole interest in which is or comes to be vested in one individual, and by which no separate and independent interests are created, can at any time be put an end to at the desire of that individual; that it is not desirable that the principle of

¹ 15 S. 1073.

² 23 R. 317.

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*Anderson v. Buchanan*¹ should be further extended; and that therefore, while it must receive effect where the provisions for the wife's benefit sought to be revoked are contained in an antenuptial marriage-contract, it should not be applied to a unilateral trust-deed. This assumes that, as regards the irrevocability of a trust created by a wife solely for her own benefit and protection, there is a distinction between a trust contained in a marriage-contract and one created by unilateral deed. In my opinion there is no such distinction, and the decided cases give no countenance to any such distinction.

In considering this question it is desirable to extract from the decisions what matters have or have not been held material in deciding as to the irrevocability of an antenuptial trust. I think that the cases when examined establish the proposition maintained by the defenders' counsel that the only elements that are required in order to render such a trust irrevocable are—(1) that it should be executed in immediate contemplation of marriage, and for the purposes of the marriage; (2) that marriage shall follow upon it; and (3) that the deed shall be delivered and the funds handed to the trustees.

All these requisites exist in the present case, and they will be found to have been combined in all the cases in which a trust has been held irrevocable,—for instance, in *Anderson v. Buchanan*,¹ *Menzies v. Murray*,² *Pringle v. Anderson*,³ *Williamson v. Boothby*,⁴ *Ker's Trustees v. Ker*,⁵ and other cases.

Again, in those cases in which revocation has been allowed, it will be found that one at least of these elements was wanting. For instance, in *Murison v. Dick*,⁶ although the deed, which was unilateral, was executed in contemplation of marriage and delivered, it was revoked before the marriage took place, and while the lady was mistress of her own fortune.

In *Ramsay v. Ramsay's Trustees*,⁷ although the provision in question was contained in an antenuptial contract of marriage, and marriage followed, it appeared from the terms of the deed that it was intended that the residue of the wife's property (as distinguished from a sum of £5000 settled for the purposes of the marriage) should be at the wife's disposal both during the subsistence of the marriage and after its dissolution—in short, that *quoad* the residue the trust was one for management or administration only. I observe in passing that in that case the fact that the provision as to residue was contained in a marriage-contract to which the husband was a party did not prevent revocation. What was considered material was not the character of the deed, but the nature of the provision.

In the next place there are certain matters which have been held to be immaterial. In order to render a trust irrevocable it is not necessary that the funds should come from a third party. In *Anderson v. Buchanan*¹ and *Menzies v. Murray*,² and other cases, the funds came from the wife herself.

Neither is it necessary that a *jus quesitum* should be conferred by the deed on a third party. This question was fully before the Court in

¹ 15 S. 1073.² 2 R. 507.³ 6 Macph. 982.⁴ 17 R. 927.⁵ 23 R. 317.⁶ 16 D. 529.⁷ 10 Macph. 120.

Anderson v. Buchanan.¹ The Judges who formed the minority laid special stress upon the absence of ulterior interests. I refer particularly to the opinions of Lord Moncreiff and Lord Fullerton, 15 S. 1080, 1081. Notwithstanding the opinions of those eminent Judges the majority of the Court decided that the trust could not be revoked, although the only interests affected were those of Mrs Anderson herself, for whose individual benefit alone the provisions were made. No. 58.
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Lastly, although most of the decisions to which we were referred apply to trusts created by marriage-contract, I do not find that, whichever way they were decided, anything turned upon the fact that the provisions were contained in a contract and not in a unilateral deed.

The pursuers naturally rely upon the absence of decisions in which a unilateral deed has been held to be irrevocable, and they found upon two cases in which such deeds were held to be revocable. The first is *Murison v. Dick*,² the ratio of which decision I have already explained, viz., that the trust was revoked before marriage, while the lady was still *sui juris*.

The second is ~~*Mackenzie v. Mackenzie's Trustees*~~.³ If that case were an authority in the pursuer's favour it would be of importance, because the deed which the Court held that the pursuers were entitled to revoke was unilateral, and marriage had followed upon it. But the case cannot be so regarded. Of the three Judges who took part in the decision in the Inner-House Lord Gifford dissented, and Lord Justice-Clerk Moncreiff, while he concurred in the judgment, did so solely and expressly on the ground that in his opinion the deed was not executed in immediate contemplation of marriage, and was thus distinguishable from *Anderson v. Buchanan*¹ and *Menzies v. Murray*,⁴ and other cases. Lord Ormisdale seems to have been partly influenced in his opinion by the fact that the spouses were willing to execute a postnuptial contract, and Lord Young also proceeded mainly on that ground, and expressed no opinion as to the wife's right to revoke absolutely.

It is not necessary to consider here whether it is within the powers of the Court to remodel such a deed; that is not proposed by the pursuers. I think I have said enough to shew that *Mackenzie v. Mackenzie's Trustees*,³ when the grounds of judgment are examined, is not an authority in the pursuer's favour.

I have already pointed out that the mere fact that the trust is contained in a marriage-contract will not make it irrevocable if its provisions are not in their nature necessarily connected with the purposes of the marriage, and this indicates that the revocability of trusts created *intuitu matrimonii* depends upon other considerations. The provisions made by a woman in her own favour are distinct and separable whether they occur in a contract or in a unilateral deed. If the provisions are in their nature revocable, the husband's signature does not add the sanction of irrevocability, and, on the other hand, the absence of his consent will not make them revocable if in their nature they are in the circumstances irrevocable.

In the absence of express decision, I may refer to Lord Gifford's remarks

¹ 15 S. 1073.

² 5 R. 1027.

³ 16 D. 529.

⁴ 2 R. 507.

No. 58. on this point. He expressed a strong opinion that it made no difference that there a trust was constituted by a unilateral deed to which the husband was not a party. His opinion was that while the trust could undoubtedly have been revoked before marriage, marriage barred Mrs Mackenzie from revoking, because upon that occurrence she ceased to be *sui juris*, and then he adds the words quoted by the Lord Ordinary,—“The force and subsistence of such deeds do not flow from the consent of the intended husband, although such consent is usually adhibited. They draw their real efficacy and their real strength and finality from the will of the person who dedicates the trust fund, and if this be the intended wife herself, then it is her act, and not the act of her intended husband, which places the fund beyond even her own power while she remains under coverture.”

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Lord Ormisdale had said,—“That Mrs Mackenzie was entitled to revoke the trust even after the marriage so long as she had no children, is also, I think, free from serious doubt.” In regard to this Lord Gifford says,—“I am of opinion that the true point when the deed now in question became irrevocable was not the existence of issue but the date of the marriage itself. Of course the existence of issue of such a marriage was highly probable, and it may strengthen the case against revocation of the trust that such issue now exists, but the deed will not become revocable because existing issue fail. It is the marriage itself that created the irrevocability, and not till the marriage be dissolved will the wife, if she survive her husband, recover the independent position which she originally held.”

I agree in the views expressed by Lord Gifford. I think that the true ground on which irrevocability rests is that after marriage the wife is not in this matter a free agent, and therefore cannot go back on the trust which, while a free agent, she created for her own protection during marriage. The unanimous decision of the Court in *Menzies v. Murray*¹ necessarily involves this. The case was decided on the assumption that all parties in any way interested in the trust funds consented to the termination of the trust; and therefore the trust was kept up solely for the protection of Mrs Murray, and against her wish.

In the present case I agree with the Lord Ordinary that where the provisions sought to be revoked are made by a woman before marriage in regard to her own funds, and solely for her own benefit and protection during marriage, the fact that the husband is not a consenting party to the deed cannot enhance the wife's right to revoke it.

I do not think that the statutory provisions for the protection of the property of married women affect the question. While the wife's separate estate remains distinct and unmixed with that of her husband, those provisions afford protection against the husband's creditors in the event of his bankruptcy. They also afford protection against the husband himself when his wife is living separate from him. But they do not afford any effectual protection to her against his solicitations and her own inclinations, when she is on good terms and living with him; and that is exactly the case for which such a trust is required.

I have said nothing as to the expediency of holding a married woman to

such self-interdiction against her will, because the decisions by which I hold we are bound, and which in my opinion apply equally to marriage-contracts and unilateral deeds, are based upon and recognise the policy of such a rule. No. 58.
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But even if the question were still open, I am not satisfied that the balance of considerations is in favour of freedom to revoke. There may no doubt be individual cases in which to hold such a trust irrevocable may cause inconvenience and hardship, but this to my mind is more than compensated in the great majority of cases by the security afforded to the wife's separate estate. The alternative to holding such a trust irrevocable would be that when the intending husband did not consent there would be no means by which a woman could protect her property during marriage without conferring an indefeasible right upon third parties, which would continue even after the marriage was dissolved by the death of the husband.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

The LORD PRESIDENT, the LORD JUSTICE-CLERK, LORD ADAM, and LORD KINNEAR concurred with Lord M'Laren and Lord Trayner.

At advising, on 16th January, the Lord President delivered the judgment of the Court as follows:—

LORD PRESIDENT.—In terms of the opinions delivered, we recall the interlocutor of the Lord Ordinary, and grant decree of declarator, in terms of the declaratory conclusions. As to the reductive conclusions, they were supported by averments that were sent to proof, but we did not find it necessary to submit that matter to the consideration of the seven Judges. As proof was allowed on that matter, and the question was fully argued, and as it involves character and conduct and furnishes an independent ground for attacking the deed, it is right that it should be known that the Court grant absolvitor from the reductive conclusions. Therefore we assoilzie from the reductive conclusions of the action. Then we declare that the deed is revocable by Mrs Watt, with the consent of her husband, and that she is entitled to revoke the said deed accordingly, and that the defenders are bound to reinvest the pursuer in her estate, and to execute all deeds that are necessary to complete her title to the estate. We find the trustees entitled to their expenses out of the trust-estate, as between agent and client, and we do not find it necessary to make any finding as regards expenses for the pursuer, since we have granted decree in terms of the declaratory conclusions. It is also proper to add that while we find that the trustees are bound to execute all necessary deeds to reinvest the pursuer in her estate, these deeds will be paid for by the pursuer.

THE COURT pronounced this interlocutor:—"In conformity with the opinion of a majority of the Judges present, recall the said interlocutor: Assoilzie the defenders from the reductive conclusions of the summons: Find and declare that the deed of provision and trust libelled is revocable by the pursuer, Mrs Watt, with consent of her husband; and that she is entitled to revoke the said deed accordingly; also, that the

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defenders are bound to reinvest the pursuer in the estate conveyed to them by her, and to execute all deeds necessary for the purpose of completing her title to said estate, and decern: Find the trustees, defenders, entitled to their expenses out of the trust-estate as between agent and client."

STURROCK & STURROCK, S.S.C.—J. GORDON MASON, S.S.C.—Agents.

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W. M. BARKLEY & SONS, Pursuers (Respondents).—*Johnston—Hunter.*

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JOHN SIMPSON, Defender (Appellant).—*Ure—A. S. D. Thomson.*

Agent and Principal—Relief—Res inter alios.—Simpson, a shipping-agent in Glasgow, having been instructed by Barkley, a coal-merchant in Belfast, to charter a vessel to convey a cargo of coals from Glasgow to Belfast, the discharge to be in turn by lighters, entered into a charter-party with Paton, a shipowner, under which discharge was to be "as customary." On arrival of the ship at Belfast Paton requested Barkley to take delivery on the quay within twenty-four hours, in accordance with the custom of the port. Barkley refused, maintaining that the delivery should be by lighters in turn. The coals were then discharged and stored by Paton, who retained possession under his lien, constituted by the charter-party, for demurrage and freight. In an arbitration which followed between Barkley and Paton, it was found that Barkley ought to have taken delivery at the quay, and he was found liable in demurrage, the cost of storage, and expenses in the arbitration.

In an action by Barkley against Simpson for the loss he had sustained through these proceedings, on the ground that they had been caused by Simpson's failure to take the charter-party in terms of his instructions, *held* that the loss sued for had not been caused by the defender's failure to take the charter-party in terms of his instructions, but by the pursuers' actings in not taking delivery of the cargo in terms of the charter-party, and that the defender was not liable therefor.

Opinions, that, in any event, the defender would not have been liable in the expenses of the arbitration, in respect that he was not a party thereto and that the dependence of the arbitration had not been intimated to him.

2D DIVISION.
Sheriff of
Lanarkshire.

IN March 1895 W. M. Barkley & Sons, coal-merchants, Belfast, raised an action in the Sheriff Court at Glasgow against John Simpson, shipping-agent, Glasgow, for payment of the sum of £367, 7s. 6½d. The facts of the case were thus stated by Lord Trayner in his judgment:—

"The pursuers instructed the defender to charter a vessel for them to convey from Glasgow to Belfast a cargo of coals. These coals were destined for the Belfast Gas Company, as the defender knew, and his instructions were, as I think, that the charter-party of the vessel chartered should have a discharging clause requiring the vessel to discharge the coal into lighters, and in turn. The discharging clause actually inserted in the charter-party entered into between the defender and the shipowners, Messrs Paton & Hendry, Glasgow, was one by which the shipowners were taken bound to discharge "as customary." It is established that under such a clause the ship was only bound to discharge the coals at the quay, and the pursuers to take delivery in twenty-four running hours. The defender sent to the pursuers, on 30th March 1894, a copy of the charter-party he had

executed for them, and they took exception at once to the terms of the discharging clause, and requested the defender to get it altered. The shipowners would not alter the contract which had been made. This, however, the defender did not intimate to the pursuers. The ship arrived at Belfast on the evening of the 4th of April. The pursuers refused to take delivery of the coal at the quay, insisting that it should be delivered into lighters in turn (and I gather there were some vessels "in turn" before the vessel in question). The ship refused to deliver except at the quay "as customary." After the twenty-four hours for discharging had expired, the shipowners landed and stored the cargo, and held the same under their lien for freight and demurrage. The cargo was afterwards sold, and realised less than the invoice price. Legal proceedings followed between the shipowners and the pursuers in the High Court of Justice in Ireland, the exact nature of which does not appear, but there parties appear to have agreed to submit their differences to arbitration, with the result that the pursuers were practically unsuccessful in their contention. The arbiter found that under the charter-party the pursuers were bound to take delivery of the coals at the quay, and found them liable to the shipowners in demurrage, the cost of landing and storing the coal, and in the expenses of the arbitration, less one-sixth of the taxed amount."

The sum of £367, 7s. 6½d. concluded for in the present action consisted of (1) £41, 1s. 3d. of freight, £14 of demurrage, £45, 7s. 3d. for discharging, carting, and storing, &c., being £102, 10s. 6d. in all; (2) £127, 14s. 2d., the expenses of the arbitration incurred to the shipowners; (3) £78, 6s. 7d. legal expenses incurred to their own solicitors; and (4) £58, 16s. 3½d. as the difference between the price realised by the sale of the coal and the contract price with the gas-works.

The pursuers averred that, contrary to their instructions to take the charter-party "for 'discharge in turn gas lighters,' the defender inserted in the charter-party the words 'as customary' without making any reference to the gas-works or the gas lighters, and by so doing has caused great loss and expense to the pursuers."

In cond. 6 the pursuers averred that in answer to their complaints that the charter-party did not contain a discharging clause into lighters, the defender had given them repeated assurances (on which they had relied) to the effect that he had informed Messrs Paton & Hendry that the cargo was for the Belfast Gas-Works, and that as it was customary for the gas-works coal to be discharged into lighters in turn, the discharging clause "as customary," contained in the charter-party, meant discharge into lighters. That in reliance on the defender's assurance they had refused to take delivery of the coal, and subsequently had entered into the arbitration proceedings.

The pursuers pleaded;—(1) The pursuers having sustained the loss and damage condescended on through the defender's failure to comply with their instructions as above stated, they are entitled to decree as craved. (2) The defender, in entering into said charter-party with Paton & Hendry, having acted outwith his authority, is bound to relieve the pursuers of all loss and damage incurred in consequence of his having so acted.

The defender pleaded;—(1) The action is irrelevant. (3) The defender never having consented to the arbitration proceedings, he should be assoilzied in so far as the conclusions of the action relate

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On 22d November 1895 the Sheriff-substitute (Erskine Murray) pronounced this interlocutor (after findings in fact):—"Finds, on the whole case, and in law, on the evidence as now before the Court, under reference to the note annexed hereto, (1) that except as hereinafter excepted, the above losses and expenditure were caused to the pursuers though the act or neglect of the defender when acting as their agent, and that he is liable to them in repayment thereof; (2) that as regards the item of £41, 1s. 3d. for freight, that was an item which the pursuers would have been in the circumstances fairly bound to pay even had the arbitration been successful, and therefore is not one for which the defender can be held liable; (3) that as regards the item of £45, 7s. 3d., as this might have been avoided by the pursuers had they, when they offered to take delivery on the quay, accompanied their offer with an offer under protest of freight and demurrage, this item also is one for which the defender is not fairly chargeable; (4) that of the arbitration expenses, half thereof may fairly be held as attributable to the fault of the defender, being £103, 0s. 4½d.: Therefore finds that if judgment is to be given on the evidence now in Court the defender would be liable to pay to the pursuers the balance, being £177, 18s. 8d."

On appeal the Sheriff (Berry), on 29th July, adhered, and remitted to the Sheriff-substitute for further procedure.*

On 8th October 1896 the Sheriff-substitute refused a motion by the defender to be allowed a proof.

The defender appealed, and during the debate the parties by joint minute agreed that the documents and proof in the arbitration proceedings should be held as evidence in the cause.

It appeared that the defender had been examined as a witness in these proceedings, and had deponed that he had informed the ship-owners' clerk at the time of making the contract that the coal was destined for the Belfast Gas-Works, that the clerk denied this, and that as there was no other available evidence the arbiters had decided against the pursuers.

* "NOTE.— . . . The only question as to which I have felt difficulty is as to whether in the damages for which the defender is to be held liable there should be included the share of the arbitration expenses which the Sheriff-substitute has allowed. On consideration, however, I am not disposed to differ from him on the point. We see from the correspondence that the defender encouraged the pursuers to take up the position which they did in the arbitration, saying, for example in his letter of 6th April 1894, that he was still of opinion that the clause in the charter-party was sufficient. Again, in his reply of 14th April to the pursuers' letter of the 13th, he insisted that he had made the shipowners aware that the cargo was not intended for the quays; in other words, that its destination was the gas-works. That was found in the arbitration not to be proved. Further, the defender himself was examined as a witness in the arbitration. He knew from the first of the proceedings being instituted, and, if he had disapproved of the pursuers defending the claim before the arbiters, he ought to have taken objection to them doing so instead of giving what must be regarded as encouragement to them to persevere in their defence. In these circumstances he must be held to have contemplated, as a probable consequence of a failure in the arbitration, liability to pay costs."

Argued for the defender;—(1) No fault could be imputed to him for having taken the charter-party in question, because although the pursuers objected to its terms they did not repudiate it as disconform to their instructions. They did not even send it back to the defender for alteration. They must then be held to have accepted it as it stood. (2) Assuming that he was in fault, it was clear that the loss on the coal was entirely due to the pursuers' own actings. They acted unreasonably in refusing to take delivery on the quay. They ought to have accepted delivery there, and paid the freight and demurrage under protest, and if any loss accrued they might have sued the defender, their agent, in the Small-Debt Court for the difference between the expense of carrying the coal in lighters to the gas-works at Belfast and the expense of carrying it in carts from the quay. (3) The defender was not liable, because the loss could not be said to be such as might fairly and reasonably be considered as either arising naturally from the breach of contract itself, or such as might reasonably be supposed to have been in contemplation of both parties.¹ Lastly, he could not be liable in the expenses of an arbitration to which he was no party, and the dependence of which had never been even intimated to him.

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Argued for the pursuers;—The whole loss and the subsequent expenses were due to the defenders having taken out a charter-party which was in its terms not in accordance with the instructions given him by the pursuers. He had failed to tell the pursuers, as he should have done, that the shipowner refused to alter it. In short the loss and expenses must be held to have been "reasonably incurred"² owing to the defender's breach of contract.³ It was in the circumstances unnecessary that notice should have been given to the defender of the arbitration proceedings. Those proceedings were entered into by the pursuers solely because of the defender's statements that he had informed the shipowners that the coal was for the Belfast Gas-Works, a statement which, though deposed to by the defender in the proceedings, was denied by the shipowners' clerk. In any view notice was not the foundation of the claim.⁴

At advising,—

LORD TRAYNER.—The manner in which this case was presented to the Sheriff for decision is calculated to produce some confusion, but when the real question between the parties is reached I cannot say I think it attended with difficulty. The facts admit of being stated very shortly. [His Lordship here stated the facts as above.]

These claims as stated on record amount to £367, 7s. 6d., and the ground on which the defender is said to be liable for this sum is that the

¹ Hadley v. Baxendale, 1854, 9 Welsby, Hurlstone, & Gordon's Reports, at p. 354; Baxendale and Others v. London, Chatham, and Dover Railway Co., 1874, L. R., 10 Exch. 35; Ovington & Others v. M'Vicar, May 12, 1864, 2 Macph. 1066, 36 Scot. Jur. 553; Campbell v. A. & D. Morison, Dec. 10, 1891, 19 R. 282; M'Gill v. Bowman & Co., Dec. 9, 1890, 18 R. 206.

² Hughes v. Groome and Another, 1864, 33 L. J. Q. B. 335, at p. 339.

³ Hammond & Co. v. Bussey, 1887, L. R., 20 Q. B. Div. 79.

⁴ Duffield v. Scott and Others, 1789, 3 Durnford and East's Reports, 374; Smith v. Compton and Others, 1832, 3 B. and A. 407; Jones v. Williams, 1841, 7 M. and W. 493.

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pursuers have suffered loss and damage to that amount, "through the defender's failure to comply with their instructions," by entering into the foresaid charter-party "outwith his authority."

The Sheriff-substitute has sustained the claim to the extent of £177, 18s. 8d. He disallows the claim for repayment of freight, which is obviously right, and was admitted to be so by the pursuers' counsel. He disallows farther the claim connected with the discharging and storing of the coal for a reason which I shall afterwards notice, and he disallows one-half of the expenses occasioned by the arbitration. The only two items of the pursuers' claim which he finds the pursuers entitled to as claimed are demurrage and the loss sustained by the sale of the coal. I am unable to follow the logical sequence of the Sheriff's findings. It appears to me that if the pursuers are entitled to any decree at all in this action, they are entitled to something more than the Sheriff has awarded, and if not entitled to what the Sheriff has disallowed, then not entitled to what the Sheriff has given. What I mean by this will be made clear by considering the ground on which the Sheriff has disallowed the charge connected with the discharging and storing of the coal. He says that "as this might have been avoided by the pursuers had they, when they offered to take delivery on the quay, accompanied their offer with an offer under protest of freight and demurrage, this item is one for which the defender is not fairly chargeable." But if it is a good ground for refusing this part of the pursuers' claim, that that item of their loss could have been avoided by their making the offer to which the Sheriff refers, it would follow that the defender is not "fairly chargeable" with any damage or loss whatever which could have been avoided by such an offer if made. Now, it appears to me that that ground logically carried out strikes at almost the whole of the pursuers' claim; for if the offer referred to had been made and acted upon by the pursuers, the greater part of their alleged loss and damage would have been avoided. The offer alluded to was made under these circumstances. The pursuers having refused to take delivery of the cargo at the quay, the shipowners intimated that if this refusal was persisted in they would land and store the cargo, and hold it under their lien until their freight and demurrage were paid. The pursuers on the same day offered "without prejudice to the charter-party" to discharge the cargo and place it in their own store, but offered no payment or security for the freight or demurrage. Had they offered (even under protest) to pay freight and demurrage, the coal would have been delivered to them, there would have been no legal proceedings or arbitration, and no forced sale of the coal involving a loss. In short, this course if adopted would have avoided practically the whole loss and damage now in question.

Then, again, I am unable to see any reason why the defender has been held liable for one half of the arbitration expenses, and only one half. If by his fault, the pursuers suffered loss to the extent of these expenses, they should be indemnified for the whole, not the half, of their loss. The Sheriff-substitute says that "on the whole, the amount of these expenses which may fairly be held to have been caused by the fault of the defender may be stated at one-half." I confess I cannot follow this. If the fault of the defender caused any part of the expenses of the arbitration, it caused

the whole, for the question in the arbitration (and there was really but one question) was what did the charter-party mean, and what were the rights and obligations of the parties under the discharging clause when properly construed. It all turned on the discharging clause, which, according to the pursuers' averment, the defender had, contrary to his instructions, inserted in the charter-party. I am unable to see any reason for thus splitting up the pursuers' claim. They are, in my opinion, entitled to all they ask or nothing.

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I am of opinion that the pursuers are not entitled to succeed in this action, and for a reason very much the same as that on which the Sheriff-substitute refuses them the item of £45, 7s. 3d., the expenses of discharging and storing the coal. I think the pursuers could and should have avoided the loss for which they seek now to be indemnified by the defender, and that the loss which they have sustained was not the consequences of what the defender did, but the result of their own actings.

When the pursuers received the copy of the charter-party on 31st March—four days before the vessel left Glasgow with the coals, they saw that they were bound to discharge the coal "as customary." They knew, or should have known, what that meant. They knew it was not what they wanted, nor what they had instructed the defender to agree to as the discharging clause. They knew further that their request to have the discharging clause altered had not been replied to, and therefore, so far as their knowledge went the charter remained in the, to them, objectionable terms. In such circumstances, I think, their duty was plain. Their agent had made a contract for them—they must fulfil it—and claim any relief from him competent to them in the circumstances. They should at once have recognised that under the charter-party as executed the shipowner in offering to discharge "as customary," that is on the quay, was doing all he was bound to do, and they should have taken delivery there. If taking delivery there incurred loss or expense beyond what would have been occasioned by discharging the cargo into lighters in turn, for that they would have had recourse against their agent, by whose fault, or failure to obey his instructions, such loss had been occasioned. Such a course, if followed, would have avoided the loss now claimed. I cannot hold the defender liable in the consequences of the pursuers having maintained a position altogether untenable, having regard to the plain terms of the charter-party executed by their agent, and under which their cargo had been carried. I think the pursuers might have had a claim for the difference, if any, between the cost of conveying the coals to their purchaser, the gas company, by carts from the quay, and by lighters from the ship's side. But no decree can be given for that in this action, as there is no information or proof before us from which the amount of such difference, if any, can be fixed.

The view which I have taken of the case renders it unnecessary to dispose of the question argued before us, whether, assuming the defender's liability for the other items of the pursuers' claim, he could in any view be made liable for the expenses of the arbitration. Had it been necessary to decide that question, my opinion on it would have been adverse to the pursuers. I know of no case or other authority in our books in which such a claim has been given effect to where, as in the present case, the person sought to be

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charged with such expense was not a party to the proceedings, or had not, at least, had the dependence of them intimated to him, that he might protect his own interests therein.

On the whole matter, I think the interlocutor appealed against should be recalled, and the defender assolized.

LORD YOUNG.—The whole controversy has arisen out of a litigation of an extravagant kind entered into between Messrs Paton & Hendry and the pursuers, resulting in an arbitration between the parties and decree in favour of the former. The pursuers' conduct in this matter is to me inexplicable. The relation between them and Paton & Hendry was a contract relation standing on a charter-party. It was decided in the arbitration that the meaning of the clause of discharge in the charter-party was what it bears to be on the face of it, that the coals were to be delivered on the quay. Paton & Hendry desired to deliver them on the quay, but the pursuers refused to take delivery. They said,—“You must deliver them into lighters, or,” I suppose, “if not, take them back to Glasgow.” Anything more extraordinary on the part of business men I have never seen, and anything more ridiculous it would be difficult to conceive. Even if it be assumed that the pursuers' instructions to the defender were to insert a clause in the charter-party requiring the discharge of the cargo into lighters, their only proper course was to have taken delivery of the coal on the quay and thereafter to have charged the defender with any extra expense incurred by reason of the coal being carted to the gas-works from the quay instead of being delivered into lighters according to instructions. They might have had a claim against the defender for extra expense incurred by reason of his not carrying out their instructions, but they had no right to refuse to take delivery of the coal from Paton & Hendry, who were acting in terms of the charter-party. The expenses sued for having been incurred in consequence of the pursuers' inexplicable conduct, I have no hesitation in arriving at the conclusion that the defender is entitled to absolvitor.

LORD JUSTICE-CLERK.—I shall confine myself to a consideration of the question whether the pursuers took proceedings and carried them on in such circumstances and in such manner as to entitle them to succeed in the present action. The pursuers, without intimation to the defender, embarked on this litigation, and then in the course of it, again without intimation to the defender, entered into an agreement to take the case out of the hands of the official Court and submit it to arbiters chosen, without the defender being consulted. Thus throughout the defender was afforded no opportunity for dealing with the matter as it might affect his interests. And what is now maintained by the pursuers is, that they having been held to be wrong in an arbitration conducted entirely by themselves, and without the defender having any control whatever over the proceedings, or any voice as to their mode or their management, he, the defender, must make good all that has been lost to the unsuccessful parties in the litigation. I am entirely unable to assent to that. I think the Sheriffs have erred here in holding that the pursuers were entitled to a decree. I cannot assent to the proposition that parties to a contract are entitled to carry on a litigation at their own hand, and to submit the

subject-matter of it to arbiters to decide, all without intimation to the agent who made the contract for them, and on being unsuccessful in the litigation, to demand payment of all they have lost from that agent, because before the litigation he had stated as a fact what they found they were afterwards unable to prove by sufficient evidence, and expressed an opinion as to its effect upon the contract. And I do not think that a refusal so to hold involves any hardship to a principal in such a case. Here the pursuers, if their agent was in fault, might have saved all this expense and kept themselves *indemnes* by taking delivery as the shipowners insisted, and then proceeding against the agent for any loss caused by the mode of discharge being different from that which he had led them to understand he had secured for them. It is plain that any such loss would have been of trifling amount, and ascertainable in a less expensive manner than, first, an action in the High Court of Justice in Ireland, then an arbitration before two arbiters and an oversman, and lastly an action practically for relief before this Court. A real sum at issue of probably at the utmost £20 has by these litigations been swelled to what cannot be less now than £500—a result much to be deplored—and which I can see no just ground for imposing upon this defender.

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Lord Moncreiff concurred.

THE COURT pronounced this interlocutor:—"Find in fact [here followed various findings in fact] (10) that the agreement entered into by the pursuers with the shipowners to have their differences settled by arbitration was not intimated by the pursuers to the defender, nor was any instruction given by them to him of the dependence or progress of said arbitration proceedings; (11) that the sums for which the pursuers were found liable to the shipowners as aforesaid, as well as the loss sustained by the pursuers on the sale of the coals, were not occasioned by the defender having taken the charter-party with the discharging clause thereof in the terms in which it is there expressed, nor by any failure in duty or negligence on the part of the defender as the agent of the pursuers; but (12) that the whole loss for which the pursuers sue in this action was occasioned by the pursuers' own actings: Find in law that the defender is not liable to the pursuers in the sum sued for, or any part thereof: Therefore assoilzie him from the conclusions of the action."

J. GORDON MASON, S.S.C.—WHIGHAM & MACLEOD, S.S.C.—Agents.

COWIE BROTHERS & COMPANY, Pursuers (Respondents).—*Balfour—Burnet.*

No. 60.

GEORGE HERBERT, Defender (Appellant).—*Ure—Findlay.*

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Cowie
Brothers &
Co. v. Herbert.

Trade-mark—Similarity—Risk of native purchaser in foreign market being misled—Interdict in general terms.—A merchant who exported biscuits for sale in Burmah and elsewhere abroad, and whose registered trade-mark was an architectural drawing, shewing the front elevation of Glasgow Town Hall, brought an action to have another merchant interdicted "from in any way using in connection with the sale of biscuits" the pursuers' trade-mark, or any mark substantially the same.

It was proved that the defender exported biscuits for sale in Burmah,

No. 60. under a label which contained a picture, drawn in perspective, shewing the front and one of the sides of Glasgow Town Hall. It was admitted that a purchaser at home was not likely to mistake the one design for the other, but there was evidence, however, that the similarity was such as was calculated to mislead native purchasers in the Burmese market. It was not proved that anyone either at home or abroad had in fact been misled. The Court *refused* the interdict craved.

1st Division.
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Lanarkshire.

In July 1889 Cowie Brothers & Company, merchants in Glasgow, who were in the habit of exporting biscuits and other goods to Rangoon, registered as a trade-mark an architectural drawing, shewing the front elevation of the Glasgow Town Hall.

In November 1894 they raised an action in the Sheriff Court at Glasgow against George Herbert, Kingston Biscuit Factory there, praying the Court "to interdict the defender from in any way using, in connection with the sale of biscuits not exported or selected or prepared for exportation by the pursuers, the pursuers' trade-mark, numbered 85,461, and published in the *Trade-Marks Journal*, No. 579, at page 425; or any mark substantially the same as, or only colourably different from, pursuers' said trade-mark; and from in any way infringing the exclusive rights of the pursuers in the said trade-mark."

The pursuers averred that they had recently ascertained that the defender was using on tins or packages containing biscuits exported by him a representation of Glasgow Town Hall, in imitation of and substantially the same as the complainers' trade-mark, and that, *inter alia*, the defender had recently consigned to Rangoon for sale a quantity of tins or packages containing biscuits, and bearing such counterfeit trade-mark.

They also averred,—“The defender's use of the label complained of was calculated to lead buyers to believe that the goods consigned by him had been selected and consigned by the pursuers, and was injurious to pursuers' trade, and an infringement of their trade-mark.”

The defender denied the infringement, and stated that he was not aware until immediately before the raising of the present action that the pursuers had appropriated and registered the design of the Glasgow Municipal Buildings used by them as a trade-mark; that the design in question was, at the date of registration by the pursuers, incapable of registration, in respect that it was not the design of the pursuers, it was in common use, and specially a representation of the Glasgow Municipal Buildings had been used by the defender as a trade-mark for his biscuits.

Copies of the pursuers' trade-mark and the defender's label were produced. It appeared that while each gave a picture of the Glasgow Town Hall the former was a front elevation of the building geometrically drawn, and that the latter gave a view shewing the front and one side of the building drawn in perspective.

The defender pleaded;—(2) The subject of the so-called trade-mark being invalid in respect of want of novelty, being incapable of registration, and in prior use, the defender is entitled to be absolved from the conclusion of the action, with expenses. (3) The defender not having infringed any alleged trade-mark, is entitled to absolvitor, with costs.

Additional pleas in law for defender:—(1) The pursuers, by acquiescence and delay, being barred from stating any objections to defender's use of his own label, the present action should be dismissed, with costs. (2) The pursuers having adopted or imitated the subject

of the design in use by the defender, are not entitled to the protection of the Court, and the present action falls to be dismissed, with expenses. No. 60.
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On 30th January 1895 the Sheriff-substitute (Guthrie) pronounced the following interlocutor:—"Finds that the pursuers are proprietors of a trade-mark, which was registered as on 22d January 1889, and that the registration thereof . . . is conclusive evidence, in terms of sections 75 and 76 of the Patents, Designs, and Trade-Marks Act,* 1883, of their right to the exclusive use thereof, subject to the provisions of the said Act: Finds, therefore, that the defender's second plea in law, and his first and second additional pleas in law, can only be maintained in an application to the Court of Session for rectification of the register†: Finds that the question of infringement cannot be conveniently decided without probation; therefore allows a proof." X X

On appeal the Sheriff (Berry) adhered.

A proof was afterwards led.

It appeared from the proof that the first shipment of goods made by the pursuers to Rangoon under their trade-mark was in October 1889, and there was evidence that the defender first printed his label in 1887, and that biscuits were sent by him to Rangoon with his label in January 1889 under the name Guthrie & Company. It also appeared that in October 1894 an assistant of the pursuers in Rangoon, who had been in their employment there since 1889, for the first time heard of biscuits being sold under a town hall label of the defender, that he at once took steps to have the man who sold them taken to Court, and that the latter was sentenced to pay a fine of 200 rupees, or suffer three months' imprisonment. It was not proved that anyone had in fact mistaken the defender's label for the pursuers' trade-mark, but three witnesses for the pursuers, besides the pursuers and their servants, deponed that the similarity of the designs was calculated to mislead native purchasers.‡ The defender's witnesses deponed contra.

* The Patents, Designs, and Trade-Marks Act, 1883 (46 and 47 Vict. c. 57), enacts, sec. 75,—“Registration of a trade-mark shall be deemed to be equivalent to public use of the trade-mark.” Sec. 76.—“The registration of a person as proprietor of a trade-mark shall be *prima facie* evidence of his right to the exclusive use of the trade-mark, and shall after the expiration of five years from the date of the registration be conclusive evidence of his right to the exclusive use of the trade-mark, subject to the provisions of this Act.”

† See immediately succeeding report.

‡ Andrew Symington of the Indian Civil Service, and an assistant commissioner in Burmah:—"I think there is a similarity between these two marks which might deceive a native buyer. In Burmah goods are known by the brands on them. The brand appears on Cowie & Company's label as the Glasgow Town Hall. In Burmah the town hall would be known as a palace, and in India as a temple. A native that bought goods under Cowie's label might, in a subsequent purchase, take by mistake goods under Guthrie & Company's label."

James Galbraith, East India merchant:—"I have seen the labels in question. I consider that there is a similarity between Guthrie & Company's labels and Cowie & Company's labels. The similarity is such as would deceive a native buyer in Rangoon. The natives are in the way of giving the different tickets names of their own. I think the labels in question would go under the same name, and confusion would arise between the two. (Q.) If a native who had been buying under Cowie & Company's town hall mark ordered goods, how do you think he would order them? (A.)

No. 60.

On 9th November 1895, the Sheriff-substitute (Guthrie) granted interdict as craved,* and on 24th June 1896 the Sheriff adhered.

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The defender appealed.

Argued for the appellant;—The registration of the pursuers' trade-mark relieved the pursuers of the necessity of proving that their trade-mark had been and was in actual use. In that sense registration was equivalent to the public user which prior to the Act had been of the essence of a trade-mark,¹ but it went no further. Here the defender's label had been in use prior to the registration of the pursuers' trade-mark, or at anyrate contemporaneously with it, and the pursuers could not therefore claim an exclusive right, assuming the trade-mark and label to be similar. But in point of fact the designs were altogether dissimilar, for although both the pictures were pictures of the Town Hall of Glasgow, the general effect was quite different, the pictures having been taken from entirely different points of view. The defender's also shewed many more details of the building. Presumably, therefore, there was no risk of mistake, and the pursuers had not rebutted this presumption. The labels had been circulating side by side for several years, and not a single instance of anyone having been deceived had been established. That was essential, or at anyrate very material, where there was contemporaneous use.² All that the evidence of the witnesses for the pursuers came to—and it was of a

He would order them in his native language as a house or palace or large building. . . . Cross.—They would distinguish them if they were put together, but they would call them both a house or palace. It would pass in their idea as a large house. They could not describe it. . . . A sharp man buying them himself might easily enough see there was a difference, but at the same time these two would pass in the interior. I have been buying them in the interior myself, and have seen them ranged along the shop, and I say that these two would pass as one for the other. . . . As a European dealer I would know the difference, but I would not as a native."

Francis Park, merchant, Manchester:—"I think there is a similarity between these labels such as would deceive native buyers, especially up country buyers."

* "NOTE.—The pursuers' title to their trade-mark having formerly been sustained, the only question is whether the trade-mark used by the defender is so like it as to have a tendency to mislead. It is not necessary to the pursuers' case that they should shew that the defender had an intention to deceive, and I do not think that is alleged or proved. Neither have I anything to do, as has already been held, with the question whether the pursuers are properly registered. They are registered, and that is conclusive for the present purpose.

"Further, an attentive consideration of the question of similarity satisfies me that purchasers are likely to be deceived by the resemblance of the one label to the other. A good deal is said about the greater probability of uneducated (?) Orientals being deceived, but it does not seem at all unlikely that an average English buyer might mistake the one picture for the other. It must be observed that deception occurs not when the two pictures are presented at the same moment for comparison, but when the defender's picture is seen by itself, and can only be compared with the representation of the registered trade-mark which the intending buyer carries in his memory."

¹ *In re Hudson's Trade-marks*, 1886, L. R., 32 Ch. Div. 311.

² *Sebastian on Trade-marks*, 334; *Kerly on Trade-marks*, 206; *Estcourt v. Estcourt*, *Hop Essence Co.*, 1875, L. R., 10 Ch. 276, p. 280; *Rodgers v. Rodgers*, 1874, 31 L. T. 285, p. 289; *Baker v. Rawson*, L. R., 45 Ch. Div. 519; *Lambert*, 1888, 5 P. O. R. 542; *Talbot*, 1894, 11 P. O. R. 77.

very vague and indefinite character—was this, that there was a risk of the natives of Burmah being misled. That was wholly insufficient to warrant an interdict. The distinction attempted to be drawn between the British and the Oriental purchaser was absurd. Besides, the interdict asked was in general terms, and yet it was practically admitted that, *quoad* the home market, there was no risk of mistake—in other words, that there was no infringement. But how could the same design be an infringement abroad and yet no infringement at home? There was no precedent for an interdict restricted to a particular market; and, in any view, the pursuers had not moved to have the interdict asked for confined to the Burmese markets.

Argued for the pursuers;—The pursuers being the owners of a registered trade-mark were entitled under the statutes to the absolute and exclusive use of it. The registration, after five years, was equivalent to evidence of the appropriation of that particular design. When there was such evidence, then no one else was entitled to use the design.¹ It mattered not therefore that the defender now averred that he had been contemporaneously using a similar design; even if true, that was no answer to an action of interdict. On the evidence there was no proof that the defender's label had been in the Rangoon market prior to 1894. When it then appeared the pursuers had at once taken prompt measures to have it suppressed. The only question was whether the defender's design was so similar to the pursuers' trade-mark as to be an infringement of it. The pursuers had proved that it was. It was not necessary to establish that in fact anyone had been deceived.² It was enough to prove that persons purchasing with ordinary caution were likely to be misled, though they might not be misled if they saw the two marks side by side.³ Fraud on the part of the infringer need not be proved.⁴ The intelligence of the ultimate purchaser of the goods was the proper test of the probability of deception,⁵ and accordingly, what the Court had to consider here was the likelihood of the Burmese natives being deceived. That had been clearly proved. It was notorious that what attracted the attention of an Oriental was the general effect of a picture, and that he did not appreciate nice distinctions of detail. It was true that questions of infringement had not so frequently arisen in connection with foreign as with home markets, but there were cases in which the Court had recognised the opinions of natives as the criterion,⁶ and the Court might restrict the interdict, if that was necessary, to a particular market.⁷

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¹ *Singer Manufacturing Co. v. Kimball & Morton*, Jan. 14, 1873, 11 Macph. 267, Lord President, at p. 272, 45 Scot. Jur. 201.

² *Johnston v. Orr Ewing & Co.*, 1882, L. R., 7 Ap. Ca. 219; *Sykes v. Sykes*, 1824, 3 B. and C. 541; *Perry v. Truefitt*, 1842, 6 Beavan, 66, Sebastian, 141.

³ *Seixo v. Provezende*, 1865, L. R., 1 Ch. Ap. 192; *cf.* *The Singer Manufacturing Co. v. Loog*, 1882, L. R., 8 Ap. Ca. 15.

⁴ "*Singer*" *Machine Manufacturers v. Wilson*, 1877, L. R., 3 Ap. Ca. 376; *Assam Tea Co.*, 1889, 7 P. O. R. 183.

⁵ *Orr Ewing & Co. v. Johnston & Co.* 1877, L. R., 13 Ch. Div. 434.

⁶ *Orr Ewing & Co. v. Johnston & Co.*, 1877, L. R., 13 Ch. Div. 434, Fry, J. at p. 448, 7 Ap. Ca. 219; *Wilkinson v. Griffith*, 1891, 8 P. O. R. 370; *Anglo-Swiss Condensed Milk Co. v. Metcalf*, 1886, 3 P. O. R. 28.

⁷ *Kerly on Trade-marks*, 351; *Carver v. Bowker*, 1877, *Sebastian's Digest*, 581; *Barber v. Manico*, 1893, 10 P. O. R. 93; *Rodgers v. Rottgen*, 1889, 5 *Times Reports*, 678.

No. 60. At advising,—

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LORD PRESIDENT.—I am unable to agree with the Sheriffs. My confidence in the judgment received a serious shake, from which it has never rallied, when the pursuers' counsel rested their whole argument on a distinction which the Sheriff-substitute expressly repudiates, and which goes deep into the pursuers' case. The pursuers' counsel did not maintain that "an average English buyer" was at all likely to be misled; and they relied solely on the evidence of the probability of Burmese buyers being deceived.

This is a question of fact, and what we have to determine is whether the pursuers have established that the defender's labels so resemble the registered trade-mark of the pursuers as to be apt to mislead purchasers into taking the defender's goods for the pursuers'. There is no evidence that anyone has actually been so misled; but such direct evidence, while it is the best, cannot be held to be in all circumstances indispensable. I am quite willing to make allowance for the distance of the market in question, and for the difference in race of the probable purchasers, as making it intelligible that the evidence should not be of the best, or be copious. Still, we cannot grant interdict, unless we are satisfied by adequate evidence.

Now, reverting to what I referred to at the outset, the pursuers make a difficult beginning, when it has to be admitted that they have no case about the British market. This implies, and leads one to remember, that the two labels, to anyone accustomed to the buildings of Europe, and to the labels of commerce, are not like one another. In fact, but for the circumstance that they are known to have both been intended to present views of the same building, I do not believe that this question would ever have arisen. But then it is always to be remembered that, on the face of the labels, they do not purport to depict the Glasgow Town Hall at all, and the fact that they are both views of that building is therefore, as I have said, a mere circumstance, which does not of itself really affect the dispute. They are, on the face of them, as unlike as if, instead of being different views of the same building, they had been intended to represent different buildings. Nor is there anything in the surroundings or get-up of the two labels which contributes to assimilate them.

But then it is said that in Rangoon a very crude view is taken of such things. Indeed, the pursuers' case is a bold one, for it really comes to this, that the native purchaser will draw no distinctions between one large building and another, but will take each and all as depicting a mosque or palace, and will so call the label. As applied to British trade-marks, this would seem to prove, if not too much, at least a good deal. It would practically strike all large edifices out of the region of lawful trade-marks, giving a monopoly to the pursuers or someone else. It is curious also to note that, applying the pursuers' contention to the interdict which he has obtained, and now defends, this rule would apply to British as well as to Oriental markets, although in the British market the reason for the rule is not alleged to exist. I do not forget that, late in the day and not spontaneously, the pursuers avowed that, rather than have no interdict, they would be content with an interdict applicable to the Rangoon market; but this subject was not very fully developed.

These being the conditions of the argument, it is surely necessary that the proposition in fact that (let it be in Burmah) the resemblance of the two labels is such that that of the defenders is apt to mislead should be clearly made out. Now, when the evidence is examined, it turns out to be small in amount, and (what there is of it) very thin and general. The drastic proceedings taken by the pursuers in Rangoon, on the appearance of the defenders' label, can hardly affect our judgment on the evidence now before us. When the evidence is considered, it appears that, apart from the pursuers and their servants, there are only three witnesses who speak to this matter. Of these one is not a commercial man, and he expresses the opinion that there is a similarity which "might" deceive a native buyer. Again, Mr Galbraith "thinks the labels would go under the same name,"—the natives would call them both a palace. But this gentleman's opinion, such as it is, is most confident about what he calls "the interior" of Burmah, which makes the matter still more remote and hazy. In like manner Mr Park thinks there is a similarity such as would deceive native buyers, "especially up country buyers."

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Now, if this evidence were supported by the labels themselves, or by facts about other markets, it would stand in a more favourable position than it does now, with no antecedent or surrounding probability. Standing by itself, and being at best more or less conjectural, it forms an insufficient substitute for direct evidence of deception. The case for the defenders would certainly have been strengthened on this matter if they had been able to shew that their label had actually been for some time in the Rangoon market, for this would have made the absence of evidence of deception still more important. I do not think, however, that they have succeeded in making good this point.

On the whole matter, I am, in the first place, wholly unable to affirm the Sheriff's finding in fact. Read along with the note of the Sheriff-substitute, it means that, all the world over, or at least in the British as well as in the Rangoon market, the one label so resembles the other as to be apt to mislead purchasers. This wide proposition is unsupported by evidence, and was not maintained by the pursuers in the debate before us. As regards the Burmese markets, I think the case is not proved. Accordingly, I am for recalling the interlocutors of 9th November 1895 and 24th June 1896, and for finding in fact that the pursuers have failed to prove that the defender's labels so resemble the pursuers' trade-mark as to be apt to mislead purchasers, and for finding in law that the rights of the pursuers to the trade-mark have not been infringed. This leads to absolvitor.

LORD ADAM.—I concur.

LORD M'LAREN.—It is not immaterial in considering questions of this nature to remember that the primary use of a trade-mark is to distinguish goods of a certain description or quality. It is not a substitute for a signature on a label. The same firm may have different trade-marks, each appropriated to a particular article of manufacture. Still, if the goods of a trader have acquired a reputation under a certain trade-mark, the law will give protection to the trader using the trade-mark, by restraining the sale of other goods under that mark or one so like it as to be calculated to deceive.

No. 59. pursuers have suffered loss and damage to that amount, "through the defender's failure to comply with their instructions," by entering into the foresaid charter-party "outwith his authority."

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The Sheriff-substitute has sustained the claim to the extent of £177, 18s. 8d. He disallows the claim for repayment of freight, which is obviously right, and was admitted to be so by the pursuers' counsel. He disallows farther the claim connected with the discharging and storing of the coal for a reason which I shall afterwards notice, and he disallows one-half of the expenses occasioned by the arbitration. The only two items of the pursuers' claim which he finds the pursuers entitled to as claimed are demurrage and the loss sustained by the sale of the coal. I am unable to follow the logical sequence of the Sheriff's findings. It appears to me that if the pursuers are entitled to any decree at all in this action, they are entitled to something more than the Sheriff has awarded, and if not entitled to what the Sheriff has disallowed, then not entitled to what the Sheriff has given. What I mean by this will be made clear by considering the ground on which the Sheriff has disallowed the charge connected with the discharging and storing of the coal. He says that "as this might have been avoided by the pursuers had they, when they offered to take delivery on the quay, accompanied their offer with an offer under protest of freight and demurrage, this item is one for which the defender is not fairly chargeable." But if it is a good ground for refusing this part of the pursuers' claim, that that item of their loss could have been avoided by their making the offer to which the Sheriff refers, it would follow that the defender is not "fairly chargeable" with any damage or loss whatever which could have been avoided by such an offer if made. Now, it appears to me that that ground logically carried out strikes at almost the whole of the pursuers' claim; for if the offer referred to had been made and acted upon by the pursuers, the greater part of their alleged loss and damage would have been avoided. The offer alluded to was made under these circumstances. The pursuers having refused to take delivery of the cargo at the quay, the shipowners intimated that if this refusal was persisted in they would land and store the cargo, and hold it under their lien until their freight and demurrage were paid. The pursuers on the same day offered "without prejudice to the charter-party" to discharge the cargo and place it in their own store, but offered no payment or security for the freight or demurrage. Had they offered (even under protest) to pay freight and demurrage, the coal would have been delivered to them, there would have been no legal proceedings or arbitration, and no forced sale of the coal involving a loss. In short, this course if adopted would have avoided practically the whole loss and damage now in question.

Then, again, I am unable to see any reason why the defender has been held liable for one half of the arbitration expenses, and only one half. If by his fault, the pursuers suffered loss to the extent of these expenses, they should be indemnified for the whole, not the half, of their loss. The Sheriff-substitute says that "on the whole, the amount of these expenses which may fairly be held to have been caused by the fault of the defender may be stated at one-half." I confess I cannot follow this. If the fault of the defender caused any part of the expenses of the arbitration, it caused

the whole, for the question in the arbitration (and there was really but one question) was what did the charter-party mean, and what were the rights and obligations of the parties under the discharging clause when properly construed. It all turned on the discharging clause, which, according to the pursuers' averment, the defender had, contrary to his instructions, inserted in the charter-party. I am unable to see any reason for thus splitting up the pursuers' claim. They are, in my opinion, entitled to all they ask or nothing.

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I am of opinion that the pursuers are not entitled to succeed in this action, and for a reason very much the same as that on which the Sheriff-substitute refuses them the item of £45, 7s. 3d., the expenses of discharging and storing the coal. I think the pursuers could and should have avoided the loss for which they seek now to be indemnified by the defender, and that the loss which they have sustained was not the consequences of what the defender did, but the result of their own actings.

When the pursuers received the copy of the charter-party on 31st March—four days before the vessel left Glasgow with the coals, they saw that they were bound to discharge the coal "as customary." They knew, or should have known, what that meant. They knew it was not what they wanted, nor what they had instructed the defender to agree to as the discharging clause. They knew further that their request to have the discharging clause altered had not been replied to, and therefore, so far as their knowledge went the charter remained in the, to them, objectionable terms. In such circumstances, I think, their duty was plain. Their agent had made a contract for them—they must fulfil it—and claim any relief from him competent to them in the circumstances. They should at once have recognised that under the charter-party as executed the shipowner in offering to discharge "as customary," that is on the quay, was doing all he was bound to do, and they should have taken delivery there. If taking delivery there incurred loss or expense beyond what would have been occasioned by discharging the cargo into lighters in turn, for that they would have had recourse against their agent, by whose fault, or failure to obey his instructions, such loss had been occasioned. Such a course, if followed, would have avoided the loss now claimed. I cannot hold the defender liable in the consequences of the pursuers having maintained a position altogether untenable, having regard to the plain terms of the charter-party executed by their agent, and under which their cargo had been carried. I think the pursuers might have had a claim for the difference, if any, between the cost of conveying the coals to their purchaser, the gas company, by carts from the quay, and by lighters from the ship's side. But no decree can be given for that in this action, as there is no information or proof before us from which the amount of such difference, if any, can be fixed.

The view which I have taken of the case renders it unnecessary to dispose of the question argued before us, whether, assuming the defender's liability for the other items of the pursuers' claim, he could in any view be made liable for the expenses of the arbitration. Had it been necessary to decide that question, my opinion on it would have been adverse to the pursuers. I know of no case or other authority in our books in which such a claim has been given effect to where, as in the present case, the person sought to be

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charged with such expense was not a party to the proceedings, or had not, at least, had the dependence of them intimated to him, that he might protect his own interests therein.

On the whole matter, I think the interlocutor appealed against should be recalled, and the defender assolizied.

LORD YOUNG.—The whole controversy has arisen out of a litigation of an extravagant kind entered into between Messrs Paton & Hendry and the pursuers, resulting in an arbitration between the parties and decree in favour of the former. The pursuers' conduct in this matter is to me inexplicable. The relation between them and Paton & Hendry was a contract relation standing on a charter-party. It was decided in the arbitration that the meaning of the clause of discharge in the charter-party was what it bears to be on the face of it, that the coals were to be delivered on the quay. Paton & Hendry desired to deliver them on the quay, but the pursuers refused to take delivery. They said,—“You must deliver them into lighters, or,” I suppose, “if not, take them back to Glasgow.” Anything more extraordinary on the part of business men I have never seen, and anything more ridiculous it would be difficult to conceive. Even if it be assumed that the pursuers' instructions to the defender were to insert a clause in the charter-party requiring the discharge of the cargo into lighters, their only proper course was to have taken delivery of the coal on the quay and thereafter to have charged the defender with any extra expense incurred by reason of the coal being carted to the gas-works from the quay instead of being delivered into lighters according to instructions. They might have had a claim against the defender for extra expense incurred by reason of his not carrying out their instructions, but they had no right to refuse to take delivery of the coal from Paton & Hendry, who were acting in terms of the charter-party. The expenses sued for having been incurred in consequence of the pursuers' inexplicable conduct, I have no hesitation in arriving at the conclusion that the defender is entitled to absolvitor.

LORD JUSTICE-CLERK.—I shall confine myself to a consideration of the question whether the pursuers took proceedings and carried them on in such circumstances and in such manner as to entitle them to succeed in the present action. The pursuers, without intimation to the defender, embarked on this litigation, and then in the course of it, again without intimation to the defender, entered into an agreement to take the case out of the hands of the official Court and submit it to arbiters chosen, without the defender being consulted. Thus throughout the defender was afforded no opportunity for dealing with the matter as it might affect his interests. And what is now maintained by the pursuers is, that they having been held to be wrong in an arbitration conducted entirely by themselves, and without the defender having any control whatever over the proceedings, or any voice as to their mode or their management, he, the defender, must make good all that has been lost to the unsuccessful parties in the litigation. I am entirely unable to assent to that. I think the Sheriffs have erred here in holding that the pursuers were entitled to a decree. I cannot assent to the proposition that parties to a contract are entitled to carry on a litigation at their own hand, and to submit the

subject-matter of it to arbiters to decide, all without intimation to the agent who made the contract for them, and on being unsuccessful in the litigation, to demand payment of all they have lost from that agent, because before the litigation he had stated as a fact what they found they were afterwards unable to prove by sufficient evidence, and expressed an opinion as to its effect upon the contract. And I do not think that a refusal so to hold involves any hardship to a principal in such a case. Here the pursuers, if their agent was in fault, might have saved all this expense and kept themselves *indemnes* by taking delivery as the shipowners insisted, and then proceeding against the agent for any loss caused by the mode of discharge being different from that which he had led them to understand he had secured for them. It is plain that any such loss would have been of trifling amount, and ascertainable in a less expensive manner than, first, an action in the High Court of Justice in Ireland, then an arbitration before two arbiters and an oversman, and lastly an action practically for relief before this Court. A real sum at issue of probably at the utmost £20 has by these litigations been swelled to what cannot be less now than £500—a result much to be deplored—and which I can see no just ground for imposing upon this defender.

LORD MONCREIFF concurred.

THE COURT pronounced this interlocutor:—"Find in fact [here followed various findings in fact] (10) that the agreement entered into by the pursuers with the shipowners to have their differences settled by arbitration was not intimated by the pursuers to the defender, nor was any instruction given by them to him of the dependence or progress of said arbitration proceedings; (11) that the sums for which the pursuers were found liable to the shipowners as aforesaid, as well as the loss sustained by the pursuers on the sale of the coals, were not occasioned by the defender having taken the charter-party with the discharging clause thereof in the terms in which it is there expressed, nor by any failure in duty or negligence on the part of the defender as the agent of the pursuers; but (12) that the whole loss for which the pursuers sue in this action was occasioned by the pursuers' own actings: Find in law that the defender is not liable to the pursuers in the sum sued for, or any part thereof: Therefore assoilzie him from the conclusions of the action."

J. GORDON MASON, S.S.C.—WHIGHAM & MACLEOD, S.S.C.—Agents.

COWIE BROTHERS & COMPANY, Pursuers (Respondents).—*Balfour—Burnet.*

No. 60.

GEORGE HERBERT, Defender (Appellant).—*Ure—Findlay.*

Jan. 16, 1897.
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Co. v. Herbert.

Trade-mark—Similarity—Risk of native purchaser in foreign market being misled—Interdict in general terms.—A merchant who exported biscuits for sale in Burmah and elsewhere abroad, and whose registered trade-mark was an architectural drawing, shewing the front elevation of Glasgow Town Hall, brought an action to have another merchant interdicted "from in any way using in connection with the sale of biscuits" the pursuers' trade-mark, or any mark substantially the same.

It was proved that the defender exported biscuits for sale in Burmah,

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Carruthers'
Trustee v.
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The Court *refused* the application, the Lord Justice-Clerk and Lord Trayner holding (Lord Young expressing an opinion to the same effect) that the application was incompetent, in respect that the £104 was not property which had been "recovered or preserved on behalf of" the pursuer; Lord Young, Lord Trayner, and Lord Moncreiff holding that in any event the order craved was one which the Court, in the exercise of its discretion under the Act, ought not to grant.

2D DIVISION.

(SEE *ante*, *Carruthers v. Carruthers' Trustees*, June 26, 1895, 22 R. 775, rev. July 13, 1896, 23 R. (H. L.) 51.)

On 9th June 1894 Miss Margaret Carruthers, daughter of the late David Carruthers, manufacturer, Bervie, and liferentrix of the residue of her father's estate under his trust-disposition and settlement, raised an action against her father's testamentary trustees concluding for count, reckoning, and payment, and for decree ordaining the defenders personally to restore to the trust-estate such sum as should be found to be the amount lost to the trust through the defalcations of Hall Gregor, one of the trustees, who had absconded, by payment of the said sum to William Carruthers, who was at the date of the action the sole trustee.

Defences were lodged for William Carruthers, and for Forbes and Glegg, two trustees who had resigned.

On 26th June 1895 the Second Division assoilzied the defenders (22 R. 775), but on appeal the House of Lords reversed that judgment, and pronounced the judgment embodied in the following interlocutor of the Second Division pronounced on 5th December 1896, in a petition to apply the judgment of the House:—"Apply the judgment of the House of Lords of date 13th July 1896, and in respect thereof decern against the defender William Carruthers and James Glegg as individuals, and Ann Forbes or Forbes as executrix of the deceased Hector Forbes, and as such representing him as an individual, and that all conjunctly and severally for payment to the defender William Carruthers as remaining trustee under the trust-disposition and deed of settlement of the deceased David Carruthers mentioned in the petition, that the same may be applied along with the rest of the trust-estate in terms and for the purposes of the said trust-disposition and deed of settlement, of the sum of £104, 2s. 7d. sterling, with interest thereon at the rate of £4 per centum per annum from and after the 31st day of January 1891, and until payment: Find the petitioner (pursuer) entitled to the expenses incurred by her in the Inner-House, and the expenses of the petition: Remit," &c.

Thereafter Messrs Finlay & Wilson, S.S.C., the pursuer's agents, presented a note to the Lord Justice-Clerk, in which they craved his Lordship, under the Law-Agents and Notaries-Public (Scotland) Act, 1891, sec. 6,* to move the Court "to declare the said Finlay & Wilson

* The Law-Agents and Notaries-Public (Scotland) Act, 1891 (54 and 55 Vict. cap. 30), section 6, enacts as follows:—"In every case in which a law-agent shall be employed to pursue or defend any action or proceeding in any Court, it shall be lawful for the Court or Judge before whom any such action or proceeding has been heard or shall be depending, to declare such law-agent entitled to a charge upon and against, and a right to payment out of, the property of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved on behalf of his client by such law-agent in such action or proceeding, for the taxed expenses of or in reference to such action or proceeding, and it shall be lawful for such Court or

entitled to a charge upon and against and a right to payment out of said sum of £104, 2s. 7d., and interest for the taxed expenses incurred by the said pursuer to said Finlay & Wilson in connection with said action in so far as the same shall not be recovered under the award of expenses already made as aforesaid by your Lordship's Division, and to remit the account of their expenses so to be charged to the Auditor to tax and report, and thereafter to approve of said report, and to decern against the said William Carruthers as remaining trustee fore-said, for payment to the said Finlay & Wilson of the said sum of £104, 2s. 7d., and interest thereon, so far as required for payment of the taxed amount of such expenses remaining after deduction of any sum recovered as aforesaid, the said sum of £104, 2s. 7d., and interest thereon, being first received by the said William Carruthers as remaining trustee fore-said; or to do further or otherwise in the premises as to your Lordships shall seem proper."

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William Carruthers, the trustee, opposed the application.

The amount for which Messrs Finlay & Wilson craved a charging order considerably exceeded the £104, 2s. 7d. recovered in the action.

It further appeared that the whole income of the trust-estate was being employed to pay off trust debts—principal and interest—which it was not disputed was the legitimate course of trust administration. In this way the pursuer, as liferentrix, had received nothing, and she would never receive anything if she should die before the whole debts had been paid off. It was stated on behalf of Messrs Finlay & Wilson that they calculated that the entire debts would be paid off in about five years from the date of their application.

Argued for Finlay & Wilson;—The Statute of 1891 gave Scots law-agents a right similar to that enjoyed by English solicitors under the English Solicitors Act, 1860 (23 and 24 Vict. c. 127), and under the English Act such an application as the present would have been competent, for it had been held, on the construction of that Act, that the property recovered need not be property recovered for the sole behoof of the person who had employed the solicitor, if the other persons interested took the benefit of the solicitor's services in effecting the recovery, these services being regarded as of the nature of salvage services.¹ The words "on behalf of his client" did not occur in the English Act, but that made no difference; the words were not "solely" on behalf of the client. The case for the other side really depended on reading the word "solely" into the Act, for it could not be disputed that the pursuer, having a title and interest to sue, had succeeded in vindicating a benefit, although it might be a contingent benefit, for herself, since her liferent would begin to be paid sooner; and this was sufficient to satisfy the words of the Act, unless the word "solely" was read in. But if "solely" was read in, then no solicitor to a liferenter could ever take advantage of the Act. The partial and contingent character of the pursuer's interest in the pro-

Judge to make such order or orders for taxation of, and for raising and payment of, such expenses out of the said property as to such Court or Judge shall appear just and proper; and all acts done or deeds granted by the client after the date of the declaration, except acts or deeds in favour of a *bona fide* purchaser, shall be absolutely void and of no effect as against such charge or right."

¹ Greer v. Young, 1882, L. R. 24 Ch. Div. 545, see *per* L. J. Bowen at p. 556; Scholey v. Peck, L. R. [1893], 1 Ch. 709.

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party recovered might be a ground for the Court, in the exercise of their discretion under the Act, restricting the amount of the account to be charged on the property, but it was not a ground for refusing the application to charge as incompetent.

Argued for the defender;—The application was incompetent because the property sought to be charged was not property "recovered or preserved on behalf of" the pursuer. The property recovered was property recovered on behalf of the trust-estate, and not of the pursuer, who took no immediate or direct benefit from the recovery, and might never take any benefit at all. The English authorities had no application, the language of the English Act being different from the Scots Act; besides the clients in these cases did take some immediate and direct benefit. In any case, the English authorities ought not to be followed. They proceeded on the erroneous analogy of salvage claims, which never exceeded the amount of the property salvaged, whereas the purpose of the present Act was to extend the principle of decrees in name of agents-disbursers by giving agents the means of preventing their clients from disposing of property recovered or preserved through the agent's services to the prejudice of the agent, and in such cases, as here, the agent's account might well exceed the amount of the property recovered or preserved. In any view, the Court in their discretion ought to refuse the application.

LORD JUSTICE-CLERK.—I think the terms of the clause of the Act of Parliament founded on indicate two sets of circumstances in which a law-agent will be entitled to a charging order. On the one hand he may have been acting for the pursuer, and may have recovered the property or sum sued for, or, on the other hand, he may have been acting for a defender, and may have "preserved" for his client a property or sum which the pursuer sought to take from him. Now, the particular one of these alternatives which the law-agents here maintain they come under is "recovery." The lady for whom they acted was the pursuer of this action. We have to consider whether anything has been recovered by them on behalf of their client. It is plain that here there has been no such recovery on behalf of their client. The sum of money for which decree has been obtained is a sum which the trustees had suffered by their negligence to be lost to the trust-estate through their factor absconding with it. It has been decided by the House of Lords that the trustees are bound to replace that sum in the trust-estate. They have not been ordained to pay anything to the pursuer. It does not seem to me that anything has been recovered on behalf of the client here. The debts against the trust-estate are such that a considerable period must elapse during which nothing will be payable to her. It may be that nothing will ever be payable.

We have been referred to some cases decided in England upon the corresponding English statute. There is a difference between the English and the Scottish Acts of Parliament, and it is therefore questionable whether these decisions are applicable. But even if there had been no such difference, it would not alter my view. In the cases quoted the plaintiff had an immediate right to something in consequence of the decree obtained. I think the illustration of salvage given in these cases is inappropriate. It does not seem a sound view that the costs are of the nature of a salvage

payment. As was pointed out by Lord Trayner in the course of the discussion, salvage is a payment for the saving of property, and it is always less in amount than the value of the property saved. The word "salvage" does not apply to the case of a claim by which the whole fund may be carried off, as indeed would be the case here if the charging order were granted.

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On the whole matter I think the prayer of the note should be refused.

LORD YOUNG.—This is a case certainly not without general interest. It is a note presented under the Act 54 and 55 Vict. cap. 30, section 6. The law-agents here had as their client the pursuer of an action against trustees personally for payment of a sum which an absconding trustee, who also acted as factor to the trust, had gone off with. The sum upon which the law-agents ask for a charge is a sum of £104, 2s. 7d., with respect to which the following interlocutor was pronounced by this Court in pursuance of an order of the House of Lords—(His Lordship quoted the interlocutor of 5th December 1896). So that we are asked to say that money in the hands of the trustee of David Carruthers to be disposed of by the trustee in terms of that decree is to be charged with this account of expenses incurred by the pursuer of this action, to whom nothing has been ordered to be paid at all. Now, I confess that I am not prepared to say as matter of law that money ordered to be paid by the defenders to this trustee is money "recovered or preserved on behalf of the client" of these applicants. I am not at all prepared to affirm that. Indeed, I am inclined to think it is not so. It is not doubtful that their client may never get anything at all if the money is disposed of as it is ordered to be disposed of by the decree.

But, apart from that, as matter of discretion—and under this section we have full discretion—I am not prepared to grant a charging order. A case may be figured in which a law-agent would have a strong equitable claim to such an order. If, for instance, £10,000 had been recovered for behoof of various parties not all clients of the law-agent, he might very reasonably ask for an order for payment of his account out of the sum recovered. It is easy to conceive of cases in which, although the whole sum is by no means recovered on behalf of his client only, the law-agent might have an irresistible claim for payment of his account out of the fund recovered.

In this case, however, I am of opinion that even if it could be predicated that this sum had been recovered on behalf of this applicant's client, this is not a case in which we ought, in the exercise of our discretion under the statute, to grant the order craved.

LORD TRAYNER.—I am of opinion that this application does not disclose a case falling within the terms of section 6 of the Law-Agents and Notaries-Public Act, 1891. Further, I am of opinion that, assuming the case to fall within the provisions of that section, it is not one in which we ought, in the exercise of our discretion, to grant the charging order craved.

LORD MONCREIFF.—I do not differ from the result at which your Lordships have arrived. I think that in this case there are special circumstances which make it right that the application should, as matter of discretion, be refused. The sum recovered is not large, and the law-agents' account is

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larger than the sum recovered. It is not clear that there will, as the result of the decree obtained in this action, be anything available for the pursuer. The creditors claim the whole estate, and it may be that their claims will absorb it all. Now, the Court has a discretion, and, looking to the whole circumstances, I do not think that this is a case in which we ought, in the exercise of that discretion, to grant a charging order *in hoc statu*. I go no further.

In regard to the construction of section 6 of the Act, I prefer to reserve my opinion. It might be too narrow an interpretation to say that in no case can a charging order be given except upon a sum recovered or preserved solely for the applicant's client. There might be cases in which the law-agent would be entitled to a charging order upon a fund, although that fund had not been recovered only for his own client, or although his client's interest in it might be contingent. I prefer to reserve my opinion on these points, and refuse the application simply in the exercise of our discretion.

THE COURT refused the prayer of the note, found the pursuer's agents liable in the expenses of the discussion, and modified the same at £3, 3s., and decerned.

PARTIES—MACKENZIE & BLACK, W.S.—Agents.

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Weir & Co.

THE GOVAN ROPE AND SAIL COMPANY, LIMITED, Pursuers
(Respondents).—*Ure—Clyde*.

ANDREW WEIR & COMPANY, Defenders (Reclaimers).—*Jamieson—
Younger*.

Sale—Breach of contract by buyer—Measure of damage—Sale of Goods Act, 1893 (56 and 57 Vict. c. 71), sec. 53, subsec. 2.—A ropemaker agreed to supply at a certain price 20 tons of rope of a special quality in such quantities as the purchaser should from time to time order, but on condition that the whole should be taken within a certain time. The special quality of rope was not kept in stock by the seller, but was made from time to time as each order was sent. The purchaser having failed to order the whole of the 20 tons within the time specified, the seller raised an action of damages for his loss of profit on the quantity which had not been ordered. *Held (aff. judgment of Lord Pearson)* that the true measure of the damages to which the seller was entitled was the difference between the contract price and the cost to the seller of the raw material plus the cost of manufacture.

Sale—Contract for successive deliveries of goods—Failure of buyer to take delivery—Defence that goods previously delivered disconform to contract.—In an action of damages by a seller for breach of a contract for the supply of a specified quantity of goods, of which delivery was to be taken as required, subject to the proviso that delivery of the whole should be taken before a certain date, the buyer sought to justify his failure to take delivery on the ground that particular lots of goods delivered under the contract had not been of the stipulated quality. *Opinion per Lord Adam* that the defence was relevant, although at the date when he should have taken delivery the buyer was not aware of the defect in the goods previously supplied.

Observations per Lord McLaren as to the right of a buyer, who has contracted for goods to be supplied to him by successive deliveries, to rescind the contract on the ground that particular consignments made under the contract were not of the stipulated quality.

Process—Amendment of record—Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 29.—In an action of damages by a seller for breach of a

contract of sale by the buyer failing to take delivery in terms thereof, the pursuer in his record as originally framed stated the damage he had suffered to be "the difference between the contract price and the current price" of the goods sold at the date of the alleged breach. After the Lord Ordinary had taken the case to avizandum on a proof, the pursuer proposed to amend his condescendence by substituting for the averment above quoted the following:—"The loss of profit occasioned to the pursuers through the said breach of contract amounts to the sum sued for."

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Held (aff. judgment of Lord Pearson) that the amendment was competent.

By offer and acceptance dated respectively 8th and 17th March 1892, the Govan Rope and Sail Company contracted with Andrew Weir & Company, shipowners, Glasgow, to supply them with 20 tons of manilla rope.

1st DIVISION.
Lord Pearson.

The offer of the Govan Rope and Sail Company was in these terms:—"We offer you, say 20 tons pure manilla rope at £34 per ton, less 5% dist., 1/mo., free delivery U.K. or usual Continental ports. To be taken up as required by you, but on the understanding that you will give us a share of your orders regularly, and not keep it all back until your other contracts are completed."

The acceptance was as follows:—"We accept offer made us to-day for 20 tons of manilla rope of not lower quality than good seconds, at £34 p. ton, delivered to our ships U.K. or Continent free. Terms, monthly account, less 5% discount."

Only about half a ton of rope having been taken up by Andrew Weir & Company under the contract, the Rope Company complained that they were not duly implementing the contract. Subsequently certain alterations were made on the original contract. These alterations were specified in the following letter, dated 2d March 1894, by the agents of the Rope Company to the agents of Andrew Weir & Company:—"We have yours of yesterday. We confirm the arrangement come to, viz., that your clients complete their contract with ours by the close of the current year, our clients supplying yours with 'current' hemp in place of that originally contracted for."

By the end of the year 1894 Andrew Weir & Company had only ordered and taken delivery of about 5½ tons of rope.

The Govan Rope Company accordingly, in November 1895, brought the present action against Andrew Weir & Company for payment of £182, 4s. 1d., as damages for breach of contract.

They averred,—(Cond. 5) "The difference between the contract price and the current price of the same quality of rope, as at 31st December 1894, amounted to . . . the sum now sued for."

The defenders denied the alleged breach of contract, and stated that the non-implement of the contract was due to the pursuers having supplied them with an inferior quality of rope in November 1894, for the "River Falloch," and in April 1894 for the "Gowanbank."

They pleaded;—(2) The fulfilment of the contract having been prevented by the pursuers' failure to supply rope of the quality therein stipulated for, the defenders should be assoilzied.

A proof before answer was allowed. The pursuers led evidence to shew that the difference between the contract price of the 14½ tons of "current" hemp rope of which delivery had not been taken under the contract and the cost of the raw material delivered in Glasgow, plus cost of manufacture, was £144, 5s. 6d. The pursuers did not keep rope made of the quality of hemp known as "fair currents" in stock, but manufactured it on receiving an order.

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The defenders led evidence with the object of shewing that the pursuers had supplied them on four occasions with rope inferior to the quality stipulated for in the contract, but failed to prove that the rope supplied had been disconform to the contract except in one instance (*i.e.*, the rope supplied to the "River Falloch" in October 1894), and on that occasion it appeared the defenders had agreed (by letter of 6th November 1894) to carry on the contract "in the meantime," on the understanding that the defective rope was taken back and replaced with rope of the stipulated quality, and the matter was settled on that footing. It was admitted that on the other three occasions the defenders only acquired knowledge of the alleged defective character of the rope after 31st December—the date by which they should have taken delivery of the whole quantity contracted for. It also appeared that in July 1895, after the pursuers had intimated their intention to claim damages, a small quantity of rope was ordered and delivered under the contract.

After the case had been taken by the Lord Ordinary to *avizandum* on the proof, the pursuers were allowed to amend the record by deleting the averment in cond. 5 above quoted, and substituting therefor the following,—“The loss of profit occasioned to the pursuer through said breach of contract amounts to the sum sued for.”

On 27th June 1896 the Lord Ordinary (Pearson) decerned against the defenders for payment of £144, 5s. 6d.*

* “OPINION.—(After narrating the facts as given above with regard to the constitution and subsequent alteration of the contract, and the amount of rope of which the defenders had taken delivery)—The pursuers now sue for damages on the ground of the defenders’ failure to take full delivery. The measure of damages originally stated on record was ‘the difference between the contract price and the current price of the same quality of rope as at 31st December 1894.’ The measure of damage to which the proof was directed is the difference between the contract price of the 14½ tons, or £493, and the cost of the raw material delivered in Glasgow plus cost of manufacture, or £348, 14s. 6d. That difference is £144, 5s. 6d. The defenders objected to this change of front on the pursuers’ part, but made no motion for time to meet the pursuers’ evidence on the subject, and I think these figures may fairly be taken as correct whether as applied to the date limited by the contract, or to the year 1894 generally, or to July 1895. The case of *Russell, Hope, & Company*, 7th December 1895, was referred to as shewing the incompetency of amending the record to the effect proposed, but the circumstances there necessitated an amendment of the conclusions of the summons by the addition of an alternative conclusion for an amount larger than any of the four sums originally sued for. Here there is no such necessity.

“The defenders further object to the measure of damages thus resorted to by the pursuers as being untenable in law. They maintain that the true measure of damages in such a case is not loss of profit on the particular contract, but the difference between contract price and market value at the date of the breach. The latter test is appropriate where the seller either keeps the goods in stock, or buys them *in forma specifica* to enable him to fulfil his contract for delivery; but it does not apply in the case of the seller being a manufacturer of the contract goods, and making them up out of the raw material from time to time as deliveries are asked for, which was the position of the sellers here as regards the quality of rope to be supplied under this contract. It appears to me that the criterion of damage now adopted by the pursuers is in accordance with the principle which governs the whole law on the subject, namely, that the party observing the contract

The defenders reclaimed, and argued;—1. The pursuers' failure to supply rope of the contract quality to the "River Falloch," had prevented the defenders from implementing the contract, and the pursuers had therefore no right to sue for breach of contract. Further, it was proved that rope of inferior quality had been supplied on other occasions, and the defenders could found upon the pursuers' failure on these occasions to supply rope conform to the contract, although knowledge of its inferiority had not been acquired by them until after the 31st December 1894. 2. The measure of damage now proposed by the pursuers was not admissible. The true measure was the difference between the contract and market price at the date of the breach of contract,¹ the duty of a seller, where a buyer failed to implement a contract of sale, being to go into the market and sell his goods at the market price. 3. In any case, the claim of damages now made was made on a different basis from that in the original record, which was remitted to probation, and the amendment was therefore incompetent.²

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Argued for the pursuers;—(1) The defenders had failed to fulfil their contract. They had also failed to prove any breach on the pursuers' part to justify their refusal to implement it. Further, in a continuing contract for successive deliveries of goods, the buyer was not entitled to repudiate the contract on the ground that a single consignment was defective, unless the seller maintained that it was up to contract quality, or the buyer could shew in some way that the defects of which they complained would exist in future consignments.³ Nor could the buyer justify a failure on his part to take delivery by a breach of contract on the seller's part of which the buyer was not aware at the date when delivery should have been taken. The pursuers were therefore entitled to damages. The small quantity of goods delivered in July 1895 could not be held to amount to a waiver of the pursuers' right to demand damages. (2) The true measure of damage was that now claimed. The goods in question not being kept in stock by the pursuers or other ropemakers, but only made to order, loss of the profit which would have been earned on the contract was the direct and natural result of the breach of contract.⁴ (3) The case of *Russell, Hope, & Co.*,² was inapplicable, for in the present case no larger sum was claimed by the amendment than had been claimed before. The amendment was therefore competent.

is to be put as nearly as possible in the same position as he would have been if the contract had been performed.

"The defenders, however, take up this position, that the pursuers were themselves in breach of the contract, and that, in the circumstances, they were justified in declining to requisition for further deliveries within the contract period, and the pursuers are barred from recovering damages. (His Lordship then reviewed the evidence as to the pursuers having delivered rope of inferior quality in breach of the contract.)

"On the whole, I hold that the counter case set up for the defenders has failed, and that the pursuers are entitled to decree for the amount above mentioned, with expenses."

¹ *Warin & Craven v. Forrester*, Nov. 30, 1876, 4 R. 190, aff. June 5, 1877, 4 R. (H. L.) 75; *Roper v. Johnson*, 1873, L. R., 8 C. P. 167; *Duff & Co. v. Iron and Steel Fencing and Buildings Co.*, Dec. 1, 1891, 19 R. 199.

² *Russell, Hope, & Co. v. Pillans*, Dec. 7, 1895, 23 R. 256.

³ *Turnbull v. McLean & Co.*, March 5, 1874, 1 R. 730.

⁴ *Sale of Goods Act*, 1893 (56 and 57 Vict. c. 71), sec. 50, subsec. 2; *Cort v. Ambergate Railway Co.*, 1851, 20 L. J. Q. B. 460.

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LORD ADAM.—(After narrating the facts above stated as to the constitution and subsequent modification of the contract)—By the contract as thus modified therefor, the pursuers were bound to supply the defenders, in place of with good seconds, with “currents,” which was a better class of rope, and on the other hand the defenders were bound to implement the contract by taking delivery of the whole rope by 31st December 1894.

That being the contract it appears that, when that date arrived, the defenders had ordered and obtained delivery of about $5\frac{1}{2}$ tons of rope, leaving upwards of $14\frac{1}{2}$ tons of which they had not taken delivery. It is to recover damages in respect of the defenders’ alleged breach of contract in this respect that the present action has been raised. The defence on the merits is that the defenders were justified in not asking or taking delivery of the rope in question, because the rope which had been previously furnished to them by the pursuers under the contract was not of the quality contracted for, but of an inferior character, and no doubt if the defenders succeed in establishing this they will not be liable.

There are only two occasions specified on record on which the pursuers are said to have supplied bad or inferior rope to the defenders’ ships, one in October 1894 to the “River Falloch,” and the other in April 1894 to the “Gowanbank.”

As regards the case of the “River Falloch” it will be observed that the pursuers have never maintained that the rope supplied by them on that occasion was such as they were bound to supply under the contract. What they did maintain was that, as the rope was wanted in a hurry and required to be manufactured, they could not supply the rope as ordered, but that they had arranged with the defenders that a different rope should be supplied from their stores in Liverpool.

I agree with the Lord Ordinary that the pursuers have failed to prove this alleged special arrangement. But the matter was closed by a letter of date 6th November 1894 by the defenders to the pursuers’ agents, in which they say:—“We may say in the meantime we will carry on the contract with the Govan Rope and Sail Company, Limited (the pursuers), and on the understanding that they will take back the inferior quality of rope sent to the ship ‘River Falloch,’ and replace it with fair current quality as per contract.” The pursuers took back the rope sent to the ship and replaced it with rope according to contract, and so that matter was closed.

It appears to me that after this the defenders cannot found on the inferior rope sent to the “River Falloch” as a substantive ground for refusing to give further orders to the pursuers for rope—seeing that they say, in so many words, that they will still carry on the contract. No farther orders were however given before the end of the current year, when the contract terminated, and the pursuers thereupon intimated to the defenders their claim for damages for breach of contract.

It appears, however, that the pursuers had supplied ropes under the contract to other ships of the defenders, and particularly to the “Gowanbank” about the end of April or beginning of May 1894. It is now alleged that

these ropes were of inferior quality and not according to contract. The ropes were accepted by the defenders at the time of delivery, but it is said that in the course of the voyage they proved to be of inferior quality. This the defenders say was not known to them until September 1895. It is clear therefore that the alleged inferior quality of these ropes could have had no influence on the conduct of the defenders in not fulfilling their contract. Nevertheless, I see no reason why, if the defenders are able to prove that the ropes in question were inferior and not according to contract, it should not found a good answer to the present claim.

The Lord Ordinary is of opinion that the defenders have failed to prove this, and I concur with him. (His Lordship then reviewed the evidence on this point.)

It farther appears that in July 1895 the defenders ordered, and the pursuers supplied, a small quantity of rope as under the contract. I do not think that the pursuers can, by having done so, be held to have abandoned their claim for damages for breach of contract. There is no plea to that effect stated on record. If the defenders had gone on ordering and the pursuers supplying rope the case might have been different. The defenders make no offer now to implement the contract by taking farther delivery of rope.

As regards the measure of damage, it was originally stated on record to be the difference between the contract price and the current price of the same quality of rope as at 31st December 1894. The pursuers were allowed by the Lord Ordinary to delete that, and to insert in place thereof a claim for the loss of profit occasioned to the pursuers through the breach of contract,—the reason for making the amendment, as I understand, being that there is no current or market price for the kind of rope contracted to be supplied with which the contract price can be compared.

It was objected that this amendment was incompetent. I do not think so. The 29th section of the Court of Session Act of 1868 enacts that the Court may at any time amend any error or defect in the record, and directs that all such amendments shall be made as may be necessary for determining in the existing action the real question in controversy between the parties,—that is, in this case, the true amount of damage, if any, due to the pursuers. I think the amendment is necessary for that purpose, and does not subject to the adjudication of the Court any larger sum than is specified in the summons.

That being so, what the pursuers now claim as the loss of profit is the difference between the contract price of the 14½ tons and the cost of the raw material required for its manufacture, delivered in Glasgow, plus the cost of manufacture. I think this claim is right. I think in the words of the 50th section of the Sale of Goods Act of 1893, it is the loss directly and naturally resulting in the ordinary course of events from the defenders' breach of contract. As I have already said, there is no current or market price for the goods in question with which the contract price can be compared.

I think the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN.—I am not sure that the law is clearly settled as to the remedy or remedies open to a purchaser under a continuing contract for the supply of goods at such times as he may require them. If on one occasion

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the seller should tender goods inferior to contract quality, the purchaser would not in ordinary circumstances be justified in rescinding the whole contract, though he would be entitled to return the particular lot of goods which were objectionable. But if a seller systematically sends goods which are not conformable to contract, and the contract is for successive deliveries, I do not doubt that, where such conduct is persisted in, so as to make it evident that the seller does not intend to fulfil his contract, the purchaser may rescind the contract and refuse to take further deliveries.

That is the case which the purchasers allege in the present action. They say that all the ropes supplied to them were inferior to sample, and had one after the other to be sent back; that their ships were endangered by reason of defective cordage, and that accordingly they were entitled to rescind the contract of sale. It may be admitted that if the ropes supplied were of inferior quality, the remedy desired by the shipowners would be open to them; but it must be borne in mind that a buyer claiming right to rescind on such grounds must preserve evidence of the alleged faults. It does not appear from the report of the evidence, or from the log, that any care was taken to preserve evidence as to the quality of the rope complained of. On the contrary, it is plain to my mind that this objection was an afterthought, and was only put forward when the purchasers' ship returned home, and it was found inconvenient to take further supplies of rope under the contract.

I agree with Lord Adam in his statement of the case and in his conclusions. The defenders having failed to prove that the manilla rope supplied was systematically defective in quality, have broken their contract by refusing to take further deliveries of rope, and are liable in damages.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

THE COURT adhered.

J. A. CAIRNS, S.S.C.—J. & J. Ross, W.S.—Agents.

No. 64.

Jan. 19, 1897.*
Bell v. Galt.

JOHN BELL, Claimant (Appellant).—*Hunter*.

JAMES GALT, Objector (Respondent).—*Blackburn*.

Election Law—Burgh Franchise—Failure to pay poor-rates—Partial payment of consolidated rate without specific appropriation to poor-rate—Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. c. 48), sec. 3.—The claim of a person to be enrolled as a parliamentary voter was objected to on the ground that he had not paid the poor-rates due by him at the 15th of May preceding. In a case stated it appeared that the claimant had been assessed for 2s. 8d. of consolidated parish rates, of which 1s. 6d. was poor-rate, and that he had paid 2s. to account, but that he had not appropriated this payment to poor-rate. It was not stated that the collector had so appropriated it.

Held that the claimant had not paid the poor-rate, and was not entitled to be enrolled.

Registration
Appeal Court.
Lord Kinneear.
Lord Trayner.
Lord Kin-
cairney.

JOHN BELL, labourer, claimed to be registered as a voter for the burgh of Ayr, as inhabitant-occupier, as tenant of a dwelling-house at 14 Peebles Street.

James Galt objected to the claim on the ground that the appellant had failed to pay all poor-rates that were payable by him in respect of said dwelling-house, or as an inhabitant-occupier of Newton-on-Ayr, in the burgh of Ayr, for the year up to 15th May 1896, and was thus not entitled to be enrolled as a voter in the said burgh, as provided by section 3 of the Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. c. 48).*

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The Sheriff (Brand) sustained the objection, and rejected the claim, whereupon Bell asked and obtained a case for the Court of Appeal.

The facts were thus stated by the Sheriff:—

“The claimant was inhabitant-occupier, as tenant, of a house at 14 Peebles Street aforesaid for not less than twelve calendar months immediately preceding the 31st day of July 1896, and is still an inhabitant-occupier of said house as tenant.

“He was rated for the sum of 2s. 8d. as the total amount due by him in respect of poor, school, and cemetery assessments levied within the burgh of Ayr, and to be collected by the collector of the parish of Ayr, conform to notice in the terms following, viz.”:—The notice here quoted shewed that the assessment was for poor-rate 1s. 6d., school rate 1s., and cemetery rate 2d.

“The claimant made a partial payment of 1s. during the month of May, and a further payment of 1s. in June, and prior to the 20th of the said month.

“Nothing was said either in May or June by the claimant or by the collector as to the appropriation or allocation of these partial payments to any of the three rates included in the notice.

“The question of law for the decision of the Court of Appeal is,—Whether the poor-rates levied upon the claimant as aforesaid have been duly paid by him, and accordingly whether the claimant is duly entitled to be enrolled as a voter in the burgh of Ayr under the statute before mentioned?”

Argued for the appellant;—Under the peculiar circumstances of this case he was entitled to have his name put upon the roll. Although there had been no specific appropriation made with reference to any particular rate when the payments were made, primarily the collector was a collector of poor-rates; and as a disqualification attached to non-payment of poor-rates which had no place as regarded the non-payment of other rates, it fell to be decided that *in dubio* the payments made by the appellant were payments of poor-rates.

Counsel for the respondent was not called upon.

LORD KINNEAR.—In this case the Sheriff says that the claim was objected to on the ground that the appellant had failed to pay all the poor-rates that were payable by him in respect of his dwelling-house, or as an inhabitant-occupier of Newton-on-Ayr, in the burgh of Ayr, for the year up to 15th

* The Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. c. 48), section 3, enacted,—“Every man shall . . . be entitled to be registered as a voter for a burgh . . . provided that no man shall under this section be entitled to be registered as a voter who at any time during the said period of twelve calendar months shall have been exempted from payment of poor-rates on the ground of inability to pay, or who shall have failed to pay, on or before the 1st day of August in the present or the 20th day of June in any subsequent year, all poor-rates (if any) that have become payable by him in respect of said dwelling-house, or as an inhabitant of any parish in said burgh up to the preceding 15th day of May.”

No. 64. May 1896, and was thus not entitled to be enrolled as a voter in the said burgh.

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It is not disputed that he received due notice of the rates for which he was assessed, and therefore, if he has not in fact paid, he must be held to have failed to pay. That being the objection, the Sheriff goes on to say that he sustained it. I take that decision as a finding in fact that the appellant has not paid the rates; and if that is the Sheriff's finding in fact, I see no ground to interfere with his decision unless there is any legal obstacle to his giving effect to the facts.

Now, the appellant says that he was assessed for 2s. 8d. of consolidated rates, of which 1s. 6d. was for poor-rates, and that he paid one shilling in May, and another shilling before the 20th of June, and must therefore be held to have paid the poor-rate. Now, it is an admission in this case, that in making these payments the appellant did not appropriate them, or ask the collector to appropriate them, to the poor-rate. I do not think it is necessary to inquire whether he was entitled to appropriate them, for whether he was or not he did not do it. No appropriation seems to have been made at the time by the collector, and so far as the appellant knows, they never have been appropriated. Whether appropriation has in fact been made we do not know, and I think it is impossible to disagree with the Sheriff on the question of fact unless we are prepared to say that in law some appropriation must have been made by the collector. I see no ground for holding that in law these payments were appropriated to the poor-rates, and think, therefore, that the appeal should be refused.

LORD TRAYNER concurred.

LORD KINCAIRNEY.—I concur. I think there is a question of law here, whether in the circumstances the appellant can be held to have paid the poor-rates. I think there is a question of *onus*, and that it rests on the objector to shew that the rates have not been paid. The appellant brought money sufficient to pay the poor-rates. It is proved simply that he paid it without any statement as to which rate he was paying. If it could have been maintained that the poor-rate is preferable to the school-rate and the cemetery-rate, I think the case would have been a difficult one. But that case is not made; there is nothing but payment without appropriation, and I think it must be held that that payment must be spread proportionately over all the rates, and therefore that the poor-rates have not been fully paid.

THE COURT dismissed the appeal, and affirmed the judgment of the Sheriff.

EMSLIE & GUTHRIE, S.S.C.—RUSSELL & DUNLOP, W.S.—Agents.

No. 65. ROBERT WALLACE, Objector (Appellant).—*Baxter—Lyon Mackenzie.*
WILLIAM BORRIE AND ANOTHER, Claimants (Respondents).—
C. N. Johnston.

Jan. 19, 1897.*
Wallace v.
Borrie.

Election Law—Service Franchise—Representation of the People Act, 1884 (48 and 49 Vict. c. 3), sec. 3.—A constable residing in police barracks had

* Decided Nov. 28, 1896.

the exclusive use and occupation of a room, of which he kept the key. He slept in the room, and when off duty was entitled to use it and to receive visitors in it. Separate common rooms were provided in the barracks for meals and recreations. The right of the constable to the room was contingent on his remaining in the force, and the barracks were subject to the control of the chief-constable, who might at any time remove the constable from the barracks, order him to change his bedroom or keep certain hours, order him to give up the key of his room on ceasing to occupy it, forbid him to receive visitors in the room, and order him to open the door of his room so as to let any person in authority enter. *Held* that the constable inhabited the "dwelling-house" in the sense of section 3 of the Representation of the People Act, 1884,* and that the "dwelling-house" was not inhabited by any person under whom he served, and that therefore he was entitled to be registered.

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Ballingal v. Menzies, Nov. 26, 1886, 14 R. 127, *followed*; *Barnett v. Hickmott*, 1895, L. R., 1 Q. B. 691; and *Clutterbuck v. Taylor*, 1896, L. R., 1 Q. B. 395, *distinguished*.

At a Registration Court for the City of Glasgow, held at Glasgow, on 9th October 1896, Robert Wallace, 4 Adelphi Street, Glasgow, objected to William Borrie and Roderick Bowie, policemen, 6 East Clyde Street, having their names retained on the roll for the Blackfriars Division of the city, as tenant and occupant of houses at that address in virtue of service. Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney.

The Sheriff-substitute (Erskine Murray) repelled the objection, and at the request of Wallace he stated a case as follows:—

"The following joint minute of admissions was adjusted by the parties, and states the facts of the case:—

"The persons objected to are police-constables in the Central Police Division. Each of the parties objected to has had during the whole of the qualifying period the exclusive occupation of one room. The barracks in which these rooms are situated accommodate eighty-two constables, each of whom has the exclusive use of one room, of which he keeps the key and has the sole control, subject to the orders of the chief-constable and the inspectors. Each constable has a key for his room. He sleeps in it at night, and sits in it by day when off duty. He is entitled to receive, and does receive, visitors in it. Separate rooms are provided for meals, &c. These latter are common to the whole constables living in the barracks. Two police inspectors also live in the barracks, and are responsible to the chief-constable for the maintenance of order, but the whole control of the building lies with the chief-constable.

"The right to their rooms of those constables who live in the barracks is contingent on their continuance in the police force. There is deducted from the wages of each constable the sum of 1s. 9d. per week for the use of the furnished bedroom and the common rooms. They are, along with all other constables in Glasgow, whether residing in barracks or in private houses, liable to be called out at any time on emergency arising. The two persons objected to have occupied the same rooms continuously during the whole qualifying period.'

* The Representation of the People Act, 1884 (48 and 49 Vict. c. 3), sec. 3, enacted,—“Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed . . . to be an inhabitant-occupier of such dwelling-house as a tenant.”

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"It is admitted that the chief-constable can:—(1) At any time remove a constable from the barracks; (2) order him to change his bedroom; (3) order him to keep certain hours; (4) order him not to receive visitors in his room; (5) order him not to take his meals in his room; (6) order him to give up his key on ceasing to occupy his room; (7) order him to open the door of his room if he is inside, so as to let the chief-constable, inspector, or other person in authority go in.

"I repelled the objections, holding that both the parties objected to were tenants under the service franchise, they occupying each a room of his own, and not a mere cubicle in a common room; that the point had been decided by a long series of Scotch cases—(*Ballingal*, 14 R. 127; *Gay*, 15 R. 90; *Falconer*, 19 R. 295; *Walshe*, 20 R. 83; *Cruise*, 20 R. 79; and *Campbell*, 23 R. 118); that the same point was decided in England in the case of *Stribling* (16 Q. B. D. 246); that the English cases of *Barnett* ([1895], 1 Q. B. 691) and *Clutterbuck* (Smith's Regn. Cases, I. 59) were to be distinguished from the present, as they applied not to rooms but to mere cubicles in a common room, open at the top, with common light and common air; and that the mere right of the chief constable to make the orders admitted in the joint minute was not sufficient to exclude the parties objected to from their right to a vote, any more than the right of a master to dismiss a servant from his employment in certain circumstances, and to make him vacate his room, would, if that right were not exercised, deprive the servant of the franchise.

"The question of law for the decision of the Court of Appeal is,—Whether policemen, who have been in the exclusive occupation of separate rooms for the whole of the qualifying period, under the circumstances and subject to the regulations contained in the joint minute of admissions, are entitled to be retained on the roll of voters as tenants of houses in virtue of the Representation of the People Acts?"

Argued for the appellant;—The Sheriff-substitute's decision went further than any previous case in sustaining the service franchise. The regulations and restrictions on the constable's occupancy embodied in the joint minute were inconsistent with the inhabitant-occupancy referred to in section 3 of the Act of 1884. The Scots cases to which the Sheriff-substitute referred were decided upon the authority of *Stribling v. Halse*,¹ which had since its date been discredited in *Barnett v. Hickmott*² and *Clutterbuck v. Taylor*.³

Counsel for the respondent was not called upon.

LORD KINNEAR.—We do not think it necessary to ask for a reply in this case. I appreciate the observations cited to us from the opinion of the Lord Chief-Justice in the case of *Barnett v. Hickmott*² upon the case of *Stribling v. Halse*,¹ but I concur, if I may say so, in the observation of that learned Judge, that *Stribling v. Halse*¹ ought to be followed so far as it extends. I think this case is ruled by *Ballingal v. Menzies*,⁴ and I am unable to see any substantial distinction between that decision and this. I

¹ *Stribling v. Halse*, 1885, L. R., 16 Q. B. Div. 246.

² *Barnett v. Hickmott* [1895], L. R., 1 Q. B. 691.

³ *Clutterbuck v. Taylor* [1896], L. R., 1 Q. B. 395.

⁴ *Ballingal v. Menzies*, Nov. 26, 1886, 14 R. 127.

agree also with the Sheriff that the facts here are to be distinguished from those in *Barnett v. Hickmott*¹ and *Clutterbuck v. Taylor*.² What was there decided was a question, not of separate rooms in one building, but of separate cubicles in a common room. This is a different case altogether, and I think that we ought to sustain the decision of the Sheriff.

LORD TRAYNER and LORD KINCAIRNEY concurred.

THE COURT dismissed the appeal, and adhered to the judgment of the Sheriff-substitute.

CLARK & MACDONALD, S.S.C.—RUSSELL & DUNLOP, W.S.—Agents.

JOHN BERTRAM KELLIE, Objector (Appellant).—*A. J. Young.* No. 66.
ROBERT ELLIOT LITTLE, Claimant (Respondent).—*James Ferguson.*

Election Law—Lodger Franchise—Evidence of value—Valuation-roll—Declaration as evidence of qualification—Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. c. 48), sec. 4—Registration Amendment (Scotland) Act, 1885 (48 and 49 Vict. c. 16), sec. 14.—The Representation of the People Act, 1868, sec. 4, enacted,—“Every man shall . . . be entitled to be registered as a voter . . . who . . . (2) as a lodger has occupied in the same burgh separately and as sole tenant for the twelve months preceding the last day of July in any year, lodgings of the clear annual value, if let unfurnished, of £10 or upwards.”

The Registration Amendment (Scotland) Act, 1885, sec. 14, enacted,—“In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall for the purposes of revision be *prima facie* evidence of his qualification.”

A person claimed to be registered as a lodger in respect of the occupation of two rooms and a surgery in a house. The rent for the furnished lodgings payable by the claimant was 8s. a week, amounting to £20, 16s. per annum. An objection was taken that the yearly rent of the whole house (as shewn by the Valuation-roll) was £5, and that the value of the lodgings, which formed only part of the house, could not therefore be of the clear yearly value, if let unfurnished, of £10. The Sheriff, proceeding on the rent actually paid for the lodgings, held that as matter of fact they were of the statutory value, and admitted the claim.

The Court *refused* an appeal, holding that the entry in the Valuation-roll was only an element in the proof, and that the Sheriff was not thereby precluded from forming his own judgment on the value of the rooms occupied by the claimant, and that there was no ground in law for interfering with the Sheriff's decision on the question of fact.

At a Registration Court for the county of Berwick, held at Greenlaw on 30th September 1896, Robert Elliot Little, physician and surgeon, claimed to be enrolled on the Register of Voters for the county, as occupant of lodgings consisting of two rooms and surgery in a house in Station Road, Gordon.

John Bertram Kellie, accountant, Rosebank, Duns, a voter on the roll, objected to the claim on the ground that the yearly rent of the house being less than £10, the lodgings, being a part thereof, could not be of a clear yearly value, if let unfurnished, of £10 or upwards.

The Sheriff-substitute (Dundas) admitted the claim, and Kellie

¹ L. R., 1 Q. B. 691.

² L. R., 1 Q. B. 395.

No. 66. thereupon asked and obtained a case, in which the Sheriff-substitute made the following statements :—

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"The following facts were admitted :—(1) The annual value of the house, of which the said two rooms and surgery are a part, appears in the Valuation-roll of the county at £5. (2) The furnished rent paid by the claimant for said two rooms and surgery is 8s. per week. (3) The claimant is on the Register of Voters for the year 1895-96 in respect of his occupation of the same lodgings.

"The rent paid by the claimant for the lodgings being £20, 16s. a year, I was of opinion, in accordance with previous decisions in similar cases in this county, that one-half thereof was sufficient for the use of furniture and for attendance, leaving the other half, or £10, 8s., for the rent of the rooms alone. . . ."

"The question of law for the decision of the Court of Appeal is,—Whether, the annual value of the said house being less than £10, the said lodgings therein, which are let furnished for 8s. per week, can be held to be of a clear yearly value, if let unfurnished, of £10 or upwards?"

Argued for the appellant ;—It was clear upon the statement of the case that the Sheriff-substitute had held, without evidence to justify it, that the lodgings were of the yearly value of £10. But the Valuation-roll was the conclusive test of value, and the Sheriff-substitute should have proceeded upon what he found in it, and should have rejected the claim.

Argued for the respondent ;—The decision of the Sheriff-substitute must, in accordance with an unreported case of *Mackenzie v. Menzies* in 1892, be taken to be final as a finding in fact. But in any view he had rightly held, having regard to section 14 of the Registration Amendment (Scotland) Act, 1885, that the claimant's declaration was *prima facie* evidence of his qualification, and he had found in fact that £10, 8s. was the actual rent paid for the rooms. The Valuation-roll was not the statutory test of the value of the lodgings.¹

At advising,—

LORD KINNEAR.—If we were to consider the question which the Sheriff has stated for our decision, without reference to the preceding statement of facts, I should have some difficulty in answering it, and indeed in ascertaining the precise point of law which it is intended to raise. But the statement of facts appears to me to remove any difficulty of this kind. It appears that the claimant claimed to be enrolled as occupant of lodgings, consisting of two rooms and a surgery in a house in the parish of Gordon ; that the rent which he pays for these rooms as furnished is 8s. a week, and that an objection has been stated to the claim on the ground that the yearly rent of the entire house as appearing on the Valuation-roll is less than £10. The statutory qualification for the lodger franchise requires that the voter shall, for the twelve months preceding the last day of July in any year, have occupied lodgings of "a clear yearly value, if let unfurnished, of £10 or upwards." There is no specific direction in the Act conferring the franchise as to the mode in which this value is to be ascertained, but in the 14th section of the Registration Act, 1885, it is provided that in the case

¹ *Stevenson v. Miller*, Nov. 13, 1880, 20 R. 8 ; *Brown v. Blackwood*, Oct. 20, 1869, 8 Macph. 8.

of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purpose of revision, be *prima facie* evidence of his qualification. This is a material distinction between the lodger qualification and those other qualifications in burghs or counties for which the Valuation-roll is either *prima facie* evidence or conclusive. Since nothing is said to the contrary, we must assume that the claimant in this case made the proper statutory declaration, and accordingly that he has furnished *prima facie* evidence of his qualification. To this the Sheriff adds,—that in his opinion one-half of the rent paid by the claimant,—that is, one-half of £20, 16s.,—is sufficient for the use of the furniture and attendance, leaving the other half, or £10, 8s., for the rent of the rooms alone, the only objection to this decision being that which I have already stated. Now, that is the Sheriff's finding in fact, and the case discloses nothing against it except the statement that the annual value of the house of which the claimant's rooms are a part appears in the Valuation-roll of the county at £5. I therefore understand the question of law which the Sheriff has stated for our decision to be, whether it is conclusive against the admission of the claim that the annual value of the house of which the claimant occupies a part only appears on the Valuation-roll to be less than £10. I am of opinion that this is not a sufficient objection. The claimant's name is not entered on the Valuation-roll, and that roll does not purport to set forth the value of his lodgings; and, therefore, even if the entries which are actually to be found were conclusive for the purposes of this case, there would still remain a question of fact, and not of law, viz., what is the yearly value of the claimant's lodgings? Now, it does not appear to be an incredible hypothesis that persons may take a house on lease with the view of letting it in rooms as lodgings, and with the hope of obtaining a larger rent from their lodgers than they have themselves to pay to their landlord. But whether that may be or not is a question of fact, and not of law. But then the Valuation-roll is not conclusive, because the statute requires the Sheriff to start from a totally different basis, viz., the claimant's own statement, as *prima facie* evidence. That is evidence which may be rebutted by contrary evidence which may be adduced by an objector, and I do not doubt that for that purpose the objector may found on the Valuation-roll. But then when it is adduced, the Valuation-roll is not conclusive. It is only one item of evidence to be taken into account along with other evidence in determining the question of fact which the Sheriff has to decide.

The Valuation-roll, therefore, does not, in my opinion, afford any ground in law for overruling the Sheriff's judgment upon a question of fact. The question he had to consider was, whether the lodgings occupied by the claimant are fairly worth £10 a year if let unfurnished. The value of the house may be one element to be taken into account in deciding that question, but it is not conclusive; and if, taking all the circumstances together, the Sheriff was of opinion that the lodgings would generally fetch a rent of £10, 8s., I think that he was justified in admitting the claim. I express no opinion on the question of fact, but taking the Sheriff's decision to be as I have stated it, I think the entry in the Valuation-roll affords no ground in law for setting it aside. I am therefore for affirming the decision of the Sheriff.

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No. 66. LORD TRAYNER and LORD KINCAIDNEY concurred.

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THE COURT dismissed the appeal, and affirmed the judgment of the Sheriff-substitute.

EMSLIE & GUTHRIE, S.S.C.—RUSSELL & DUNLOP, W.S.—Agents.

No. 67. THOMAS WOOD AND OTHERS, Claimants (Appellants).—*A. J. Young*
—*Macaulay Smith*.

Jan. 19, 1897.
Wood v.
Laing.

THOMAS LAING (Respondent).—*Boyd*.

Election Law—Appeal—Jurisdiction—Municipal Roll—Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. cap. 48), sec. 22.—Held that the Registration Appeal Court has no jurisdiction under sec. 22 of the Representation of the People (Scotland) Act, 1868, to entertain an appeal from a judgment of the Sheriff in adjusting the list of voters for a municipal election.

Registration
Appeal Court.
Lord Kinnear.
Lord Trayner.
Lord Kin-
caidney.

At a Registration Court for the city of Edinburgh, held on 8th October 1896, Thomas Wood and others claimed to have their names put on the list of persons entitled to vote at the next municipal election for the City and Royal Burgh of Edinburgh under section 17 of the Edinburgh Municipal Extension Act, 1896.*

The Sheriff-substitute (Rutherford) repelled the claims.

The claimants obtained a case, and appealed to the Registration Appeal Court.

At the hearing of the appeal, counsel for the appellants was requested by the Court to address himself to the question whether the Court had jurisdiction to entertain the appeal, seeing that the Sheriff-substitute's decision related to the municipal and not to the parliamentary roll. Counsel thereupon cited section 22† of the Repre-

* The Edinburgh Municipal Extension Act, 1896 (59 and 60 Vict. c. ccciii.), enacts, sec. 17,—“In addition to the register of voters for Members of Parliament for the existing burgh, and the register and lists of voters for municipal elections in the existing burgh, which shall be made up and completed as at present, the assessor for the existing burgh under the Election Acts shall, on or before the 15th day of September in the year 1896, and in every subsequent year, make out, or cause to be made out, a list of all persons in the districts annexed who shall be entitled to vote in the election of councillors for the city and royal burgh, and the same procedure shall be applicable and be followed in reference to such list as is followed with reference to the said register of voters for Members of Parliament for the existing burgh, and the said register and lists of voters for municipal elections in the existing burgh. And on such lists being completed and lodged with the town-clerk, the town-clerk shall sign the same; and the last mentioned lists, and the register and lists of voters for the existing burgh, shall together form the list or roll of persons entitled to vote at the next ensuing municipal election for the city and royal burgh. . . .”

† The Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. cap. 48), sec. 22, enacted,—“All enactments at present in force regarding appeals from the judgments of Sheriffs in Registration Courts for counties and burghs are hereby repealed, and in lieu thereof it is enacted as follows:—‘If any person whose name shall have been struck out of any register or list of voters by the Sheriff, or who shall claim or object before the Sheriff at any Court, shall consider the decision of the Sheriff on his case to be erroneous in point of law, he may, either himself or by some person on his behalf, in open Court, require the Sheriff to state the facts of the case and such question of law and his decision thereon in a special

sensation of the People (Scotland) Act, 1868, and argued that the appeal was competent. No. 67.

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Wood v.
Laing.

LORD KINNEAR.—This Court is the Court established for the purpose of hearing appeals under the 22d section of the Representation of the People Act, 1868 (31 and 32 Vict. cap. 48). That is a provision for appeals from the decisions of Sheriffs in revising the roll of electors for parliamentary purposes. That section is the sole source of jurisdiction to which we have been referred. We have asked the counsel for the appellants whether there was any other statutory provision on which they can found as enabling us to entertain this appeal, and they say that there is none. We have been in the habit of reviewing the decisions of Sheriffs in striking a name off or adding a name to the parliamentary roll. But the decision, and the only decision, here is one by which the Sheriff has rejected the claim of the appellant to be entered as a voter on the roll for municipal purposes. We have no jurisdiction under the 1868 Act to review the decision of a Sheriff in regard to the municipal roll which I have mentioned, and counsel have been unable to shew that we have such jurisdiction from any other source. I think therefore we must dismiss the appeal on the ground that it has not been shewn that this Court, which is a Court sitting for special purposes, has jurisdiction to entertain it.

LORD TRAYNER and **LORD KINCAIRNEY** concurred.

THE COURT pronounced this interlocutor:—"Dismiss the appeal as incompetent, and decern."

DAVID CRAWFORD, S.S.C.—**THOMAS HUNTER, W.S.**—Agents.

WALTER MACKAY, Pursuer (Appellant).—*G. Watt—Blair.*
JOHN WATSON, LIMITED, Defenders (Respondents).—*Salvesen.*
JOHN BOLTON, Defender (Respondent).—*A. Moncrieff.*

No. 68.

Jan. 20, 1897.
Mackay v.
John Watson,
Limited.

Reparation—Master and Servant—Relevancy—Proximate cause of injury—Allegation of incompetency of fellow-servant.—A pit-bottomer sued his employers and the engineman at the pit for damages for personal injuries, averring that while the pursuer was engaged at the bottom of the pit in replacing a hutch on the rails close to the cage, the engineman at the pit-head, without awaiting a signal, raised the cage, which caught the pursuer and forced him upwards between the shaft and the scaffolding for three feet before the engine was stopped, and that he was thereby injured. He further averred that the derailment of the hutch was caused by defects in the rails, and that there was a defect in the checking power of the engine which prevented or hindered or interfered with its prompt stopping . . .

case; and the Sheriff shall prepare and sign and date such special case, and deliver the same in open Court to the Sheriff-clerk or the town-clerk, as the case may be; and such person, or some person on his behalf, may thereupon in open Court declare his intention to appeal against the said decision, and may within ten days of the date of such special case, lay a certified copy thereof before the Court of Appeal hereinafter constituted for their decision; and the said Court shall, with all convenient speed, hear parties and give their decision on such special case, and shall specify exactly every alteration or correction, if any, to be made upon the register in pursuance of such decision."

No. 68. and that the engineman was not sufficiently qualified for the duties entrusted to him.

Jan. 20, 1897. *Mackay v. John Watson, Limited.* Held that there were no relevant averments of fault against the employers in respect that (1) the pursuer's averments shewed that the derailment of the hutch was not the proximate cause of the accident, and (2) the averments of defect in the engine and the want of sufficient experience on the part of the engineman were not sufficiently specific.

2D DIVISION.
Sheriff of
Lanarkshire.

WALTER MACKAY, bottomer, Earnock Colliery, Hamilton, raised this action in the Sheriff Court at Hamilton, against his employers, John Watson, Limited, and John Bolton, engineman in the colliery. The pursuer concluded against John Watson, Limited, for payment of £500, or £186 under the Employers Liability Acts, and against Bolton for £500, or otherwise against both jointly and severally, or severally, for £500.

The pursuer averred that on 29th July 1896 he was engaged with another man at the bottom of the pit in replacing a hutch which had fallen off the rails close to the cage, and that while lifting the hutch with his back to it he was caught by the cage in front, which, without warning, began to ascend. That the pursuer was forced up about three feet between the cage and the back scaffolding, and was seriously injured.

The pursuer further averred that the derailment of the hutch was caused by the defective state of the rails. "The pursuer believes and avers that there was a defect in the checking power of the engine, which prevented or hindered or interfered with its prompt stopping. . . . Denied that the engineman was sufficiently qualified for the duties entrusted to him, his previous experiences not warranting such a responsible position."

This last sentence was in reply to statement for John Watson, Limited, in answer 6,—“The said John Bolton was competent to act as winding engineman.” (Cond. 7) “In consequence of the defective condition of the defenders’ (John Watson, Limited’s) plant at the pit bottom as described, and in the engine, or in the brake, and the want of sufficient qualification on the part of the engineman, the pursuer received the injuries complained of. The defenders the said John Watson, Limited, are responsible for the defect complained of, and for reparation for the injuries sustained in consequence by the pursuer.” (Cond. 8) “Alternatively, the other defender John Bolton, who acted as engineman, and in charge of the engine at the said pit by which the cages were lifted and lowered, is responsible for the injuries sustained by the pursuer, and liable in reparation to him therefor. The defender, as engineman, when working his engine for regulating the position of the two cages in the shaft of the pit, lifted the cage at which the pursuer was engaged without receiving a signal to do so, or otherwise so worked the engine under his charge in the condition in which it then was in an improper manner. By lifting the cage without receiving a signal, or by his want of care or mismanagement, or want of sufficient control of his engine, the said defender, as engineman foresaid, caused the injuries to the pursuer.”

The pursuer pleaded;—(1) The plant of the defenders John Watson, Limited, having been defective, or the want of sufficient qualification of their engineman, for whom they are responsible, and thereby leading to and inducing the injuries sustained by the pursuer, the pursuer is entitled to damages against them either at common law or under the Employers Liability Act as libelled.

The defenders John Watson, Limited, pleaded ;—(1) The pursuer's statements and action are irrelevant. No. 68.

The Sheriff-substitute (Davidson) pronounced this interlocutor :—
 “ Having heard parties' procurators and made avizandum, repels the first plea in law for the defenders John Watson, Limited : Allows a proof before answer *quoad* them, and a proof *quoad* the other defender.” * Jan. 20, 1897.
Mackay v.
John Watson,
Limited.

The pursuer appealed to the Second Division of the Court of Session for jury trial.

The defenders John Watson, Limited, maintained their first plea in law, and argued ;—Under the Employers Liability Act no relevant case had been stated against them. Neither were there relevant averments at common law. No ground of fault was alleged against them which contributed to the accident. It was not their duty to supply rails which would never go out of repair. This must happen sometimes, and even admitting that the rails were defective, the pursuer made it clear that this fact was not the cause of the accident. While it was true that the accident would not have happened had the rails been good, it was also true that it would not have happened unless the cage had been raised. The engineman raised it without a signal ; this was a fault, and it was this which was the cause of the accident ; but as the engineman was a fellow-servant of the pursuer the defenders were not liable. Regarding the defect in the engine, the averments were not sufficiently specific. Besides, the averments shewed that there was a fair checking power, for the cage was only raised three feet before it was checked. Further, the pursuer failed to aver that with perfect checking power the accident would not have occurred. This ground of objection was only competent if the engineman had properly started the engine, but the basis of the action was that the engine was improperly started. The defect could only be very remotely the cause of the accident, because it would have been unnecessary to check the engine unless the engineman had been in fault. The averments respecting the engineman's qualification were irrelevant. No particulars were stated. A master did not warrant a servant as competent. It was enough if he exercised reasonable care to select a competent man. The mere fact of this one mistake was not proof of his incapacity.

Argued for the pursuer ;—There was a relevant averment of defect in the rails, and it was plain that this was the cause of the accident, for owing to their disrepair it was necessary for the pursuer to assume a position in which he was liable to injury should the cage be raised by mistake, which was quite likely to happen. He was hurt while restoring defective plant of his employers, who were accordingly liable to him in damages.¹ If a servant is subjected to risk from a

* “ NOTE.—I am very doubtful if the pursuer has a relevant ground of action against John Watson, Limited, on the ground that the engine was not in proper order, for he is not clear in his statement as to how any defect in the engine affected him, his case being evidently that the engineman started the cage without a signal. I do not think that the alleged defect in the rails is relevant, because the accident cannot be said to be directly due to it even if the pursuer's averments are all made good. But he has a statement that the engineman was not a sufficiently qualified person for his post through lack of experience, and it seems to me that he is entitled to a proof on that point.”

¹ Wallace v. Culter Paper Mills Co., Limited, June 23, 1892, 19 R. 915.

No. 68. defect for which the master is responsible, the latter cannot plead collaborateur even although the fault of a fellow-servant is the proximate cause of the accident.¹

Jan. 20, 1897.
Mackay v.
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LORD JUSTICE-CLERK.—There are three points raised here in the condemnation. The first is, that the rails close to this place at the pit-bottom, where the hutches had to be put on to the cage, were in a defective state, and that, in consequence of their being in a defective state, the injured man had to do something to put them right, which brought him into such a position that if the cage was moved at the time he was in that position he might be caught and injured. The second point stated is that the engine was defective as regards its checking power. And the third point is that the engineman was not sufficiently qualified.

Now, as regards the first, it appears to me that, assuming the defects as stated by the pursuer, they do not constitute an averment of proximate cause of the accident at all. The cage was at the bottom of the pit, resting there, and the engineman had no duty, and no right, to move that cage at all until he received a proper signal from the pursuer himself, who was the bottomer, and who was responsible to give the directions for the starting of the cage from the bottom. Therefore no movement of the cage could be expected. Such a movement could only happen by the fault of someone. Therefore, so far as I can see, there was no proximate danger to the pursuer at all from the cage. If, of course, while he was occupied in that particular piece of work the cage was improperly moved, a situation of danger arose at once, created entirely by the breach of duty of the person who moved it. That this is a relevant case against the engineman I have no doubt whatever; but I cannot see how it can be held a relevant case against the defenders Watson, Limited. It is quite true it is alleged that there were defects in the rails, but that, as I think, cannot be held to be a proximate cause of the accident which happened.

Then, as regards the engine, there is no specific averment—no averment that can be remitted to probation at all—for it is not said in what any defect in the engine consisted. Anything required to check the running of the rope could not have been of much use here, because if the engine was started at all it must go some distance, and being started it moved the cage, in point of fact, only three feet, and in doing so caught the pursuer and injured him.

Lastly, there is an averment which certainly would have been a perfectly relevant ground for charging the defenders Watson, Limited, with the consequences of the accident which occurred, if stated properly and distinctly, and with that specification which the defenders are entitled to in such circumstances, viz., that the engineman was not a person fit to be in charge of the engine. But the only averment of that is that the accident occurred in consequence of the defective condition of the rails, and the want of sufficient qualification on the part of the engineman. That is all that is averred upon that matter, except in answer to defenders' statements, where it is said that the engineman's previous experience was not

¹ *Murdoch v. Mackinnon*, March 7, 1885, 12 R. 810; *Edgar v. Law & Brand*, Dec. 15, 1871, 10 Macph. 236, *per* Lord Ardmillan, p. 240.

such as to warrant him being placed in such a responsible position. I do not think that is an averment suitable or sufficient for our sending the case to trial against the employers of this engineman on the ground that he is not fit for his duty.

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Limited.

Therefore I think we ought to hold this summons irrelevant, in so far as it professes to make a case against the employers Watson, Limited. As regards the engineman, of course, there is no objection to send the case to trial. He is alleged to have committed a breach of duty, and he is liable if he injured anybody thereby. The case must therefore go to trial as against him.

LORD YOUNG.—I agree.

LORD TRAYNER.—I also agree. I think that in this record there is no relevant averment inferring liability on the part of John Watson, Limited. The two averments that are intended to strike at them are the insufficiency of the rails, in the first place, and the want of qualification in the engineman, in the second. With regard to the first, it appears to me that there is nothing set forth in the record to connect the faulty condition of the rails with the accident that took place. So far as averment goes, the alleged defective state of the rails was not the cause of the pursuer's injuries, which are said to have resulted from the improper conduct of the engineman, which conduct was not influenced or affected by the state of the rails. With regard to the second, the pursuer's averments are wanting in sufficient specification. It is not enough merely to say that the engineman was not qualified. The defenders are entitled to know in what respect it is alleged that the engineman was not qualified, in order that they may meet the case so far as it is based on this ground. They are entitled to know in what respect it is alleged that they failed in their duty in selecting a proper man for the place of engineman. I therefore think with your Lordship that there is no relevant case here averred against John Watson, Limited, and that the action must be dismissed as against them.

LORD MONCREIFF.—I agree, and have the less hesitation in doing so, that it appears from the petition that originally the only ground of action against John Watson, Limited, was the defective state of the rails, and that ground of action, I agree with your Lordships, is not sufficient.

THE COURT pronounced this interlocutor:—"Sustain the first plea in law for the defenders John Watson, Limited, dismiss the action, and disallow the issue against them, and decern: Find them entitled to expenses," &c.

ROBERT MACDOUGALD, S.S.C.—GILL & PRINGLE, W.S.—SIMPSON & MARWICK, W.S.—
Agents.

No. 69. THE PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF THE BURGH OF KILMARNOCK, Pursuers (Appellants).—*Ure—Wilson.*

Jan. 22, 1897.
Magistrates of
Kilmarnock v.
Reid.

WILLIAM ANDREW REID, Defender (Respondent).—*C. J. Guthrie—James Reid.*

Process—Failure to execute contract—Averments of Fraud—Proof—Remit to man of skill—Competency.—A contractor executed certain excavation and drainage work for the owners of a cemetery under a specification prepared by the owners' engineers, which provided that the work was to be executed under the directions of and to the entire satisfaction of the engineers. Two years after the work had been completed and duly certified by the engineers, the owners presented a petition in the Sheriff Court against the contractor, in which they averred that the work done was dis-conform to contract in many important particulars, which they set forth, and that the defender, taking advantage of the absence of supervision on the part of the engineers, scamped the work, and "by means of fraudulent devices succeeded in palming off the work as being executed according to contract," and that there was urgent necessity for the work being completed forthwith in terms of the specification. The prayer of the petition was that the Sheriff should remit to a man of skill to inspect and value the work and report upon its present state, and also what was necessary to bring it into conformity with the specification; that the pursuers should be authorised to do whatever required to be done in accordance with such report, and to apply the balance of the contract price still in their hands to the completion of the work, in so far as it might be shewn by the reporter to be defective. The contractor lodged defences in which he denied the pursuers' averments.

Held that the action was incompetent.

Per the Lord President,—"No one would think of laying it down as a general proposition, that it is necessarily incompetent to grant a remit to a reporter to report on an existing state of facts unless both parties consent to the remit. The practice is quite against that, and recognises that there are cases, of a somewhat limited class, where, even though there may be objection, the Court does attempt to 'place on record,' as it is expressed, what is patent and visible to any accurate observer."

1st DIVISION.
Sheriff of
Ayrshire.

IN July 1896 an action was raised in the Sheriff Court of Ayrshire, at Kilmarnock, by the Provost, Magistrates, and Town-Council of the burgh of Kilmarnock and the Parish Council of the parish, as the parties empowered to carry into execution the purposes of the Burial Grounds (Scotland) Act, 1855, within the parish, against William Andrew Reid, contractor.

The prayer of the petition was:—"To remit to such person as the Court shall appoint to inspect the work at the new cemetery situated near Kay Park, Kilmarnock, executed by the defender for the pursuers or their predecessors under a contract in regard thereto between them, dated 16th and 30th June 1892, and to value the work which has been done by the defender under and in terms of said contract and relative specifications and schedule, and to report upon the present state of said work; also to report what, in the reporter's opinion, is still necessary to be done to complete and put the said work in a sufficient state in accordance with the provisions of the said contract and relative specifications and schedule; and upon such report being received, to grant warrant to the pursuers to proceed to carry out, at their own hands or otherwise, at the sight of the reporter, whatever work may require to be done in accordance with such report in order to complete the said work in conformity with the said contract, speci-

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fications, and schedule; and, on the expense of said work in connection with completing the contract as aforesaid, and also the expenses of this application and consequent procedure being ascertained and fixed by the Court, to authorise the pursuers to set off *pro tanto* against the said cost and expenses any sum at present in the hands of the pursuers remaining due or unpaid to the defender under or in connection with the said contract, and to find that the pursuers are not liable to the defender except to the extent of any balance which may remain in their hands after meeting the said cost of completion and expenses as aforesaid, and to interdict the defender from interfering with the pursuers in any way in the completion of the said contract as aforesaid, and to reserve to the pursuers all claims competent against the defender, and against all others concerned, for whatever balance of cost of completing the work may remain after crediting, as aforesaid, any sum at present in their hands remaining due or unpaid to the defender, and also to reserve all claims of damages against the defender and others in connection with said contract and work."

Jan. 22, 1897
Magistrates of
Kilmarnock v.
Reid.

The pursuers averred that they had acquired 6½ acres of additional ground for their cemetery at Kay Park, Kilmarnock. That they employed Messrs Mitchell & Laugharne, civil engineers, to prepare plans and specifications for the work in connection with this extension. That on 16th June 1892 the defender made a tender for the work which had to be done, and that the pursuers accepted the same "in terms of the specification." That the work was of the nature of excavation, drainage, and road-making, and that the specification contained provisions, *inter alia*, that the whole of the work should be executed to and under the directions of the engineers, and to their entire satisfaction.

The pursuers then averred that on 10th May 1894 the engineers forwarded to them the final measurements of the work done by the contractor, the sum due to him being certified as correct, and amounting to £1968, 16s., with the further addition of a sum of £143, 12s. 4d. for extra work rendered necessary by alterations in the plans. Of this sum £1800 had been paid to the defender on account, leaving a balance outstanding of £312, 8s. 4d.

(Cond. 15) "The pursuers or their authors or predecessors not being satisfied with the report furnished to them by the engineers, refused to pay the balance, and decided to employ a neutral engineer to go over the measurements and compare the same with the account as scheduled. They accordingly appointed Mr James Barr, civil engineer, Glasgow, for this purpose, and generally to test whether the work had been carried out in conformity with the plans and specification. As the result of examinations made by Mr Barr and of other investigations, the pursuers believe and aver that the drains have not been properly laid and connected; that they have not been laid at the depths stipulated for; that the pipes have not been cemented and jointed as specified; that the covering of ashes on the top of the under drainage is not to the stipulated depth; that the stones or other obstructions found in line of cutting drains have not been removed; and that the earth forming the ornamental plots is not of the character specified or of the depth stipulated for. The defender, taking advantage of the absence of supervision on the part of the engineers entrusted with the duty of superintending the work, deliberately set himself to scamp the work as after mentioned, made a mere pretence of executing it in accordance with the provisions of the

No. 69. specification, and, by means of fraudulent devices, succeeded in palming off the work as being executed in a workmanlike manner, and according to contract.”—(Here followed a statement of the particulars in which the work executed was disconform to the specification.) (Cond. 17) “The defender was well aware all along that he had not executed the works in terms of his contract, in the several respects before mentioned. He concealed, however, all of his said failures from the pursuers or their authors or predecessors, and claimed and accepted payment of the instalments of the contract price on the fraudulent representation that he had in every respect observed the conditions of the contract, and done all the work conform to contract requirements and measurements and of contract materials. If the defender had duly and properly or fairly performed his duties, the defects and failures now complained of could not have happened. The certificates granted to the defender were not accepted by the pursuers as final, and the payments made under them were simply provisional, and subject to adjustment at the final completion of the contract. Moreover, the said certificates and payments were obtained by the defender at the time by his said fraudulent representations, and by reason of his palming off the work as done in accordance with the contract as aforesaid. . . .” (Ans. 17) “Denied. . . . The whole work was carried out according to the instructions, and under the supervision of the engineers, and it was executed to and under their directions, and to their entire satisfaction. It was approved of by them from time to time, and certificates granted that it was carefully and well executed, and after completion the whole was accepted and passed by them as being conform to contract. . . .” (Cond. 18) “There is urgent necessity for additional lairs being at once provided in the said cemetery, and it is expedient that the contract work should be proceeded with and completed without further delay, in order that the new portion of the cemetery may be made available. In these circumstances, and in view of the position taken up by the defender as before explained, the pursuers are desirous to have the state of the contract work judicially ascertained, and to obtain authority thereafter to proceed to complete the work in terms of the contract and specifications.”

The defender averred in his statement of facts that in October 1895 the Magistrates of Kilmarnock had raised an action in the Court of Session against him and Messrs Mitchell & Laugharne for,—(1) performance of the contract in question in conformity with the specification, (2) with an alternative conclusion for damages; and that on 7th March 1896 Lord Kyllachy had sustained the defenders’ plea of no title to sue, and had dismissed the action.

To this averment the pursuers answered;—“Admitted that the action referred to was raised in the Court of Session, and was dismissed. *Quoad ultra* the closed record in that action is referred to for its terms, beyond which no admission is made. Explained and averred that, although it was the duty of the engineers to see that the work was duly executed, they failed to do so. The slightest inspection on their part would have revealed the fact that the defender was grossly and flagrantly disregarding the provisions of the contract. In point of fact, it is believed and averred that Mr Mitchell, who was the partner of the firm of Mitchell & Laugharne who took the chief superintendence of the work, was aware at the time of the various facts set forth in the condescendence, and of the deception which was

being practised by the defender, and, nevertheless, failed either to have the work executed in terms of the contract, or to inform the pursuers of the said circumstances.”

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The pursuers pleaded;—(1) The pursuers are entitled, *ante omnia*, to have the present state of the said contract works judicially ascertained, and to obtain judicial authority to complete the same, all as prayed for, in respect that questions have arisen between the parties as to whether the defender has duly implemented his contract, and as to the condition and value of the work done by him. (2) The defender having failed to execute the work undertaken by him in terms of his contract, and having refused to do so, the pursuers are entitled to obtain warrant for its inspection and due completion, and to the other warrants, all in manner prayed for.

The defender pleaded;—1. The action is incompetent. 2. The pursuers' statements are irrelevant, and insufficient to support the conclusions of the summons. 3. The defender having (1) fulfilled his contract with the pursuers, and (2) not having acted fraudulently in carrying out the same, he is entitled to be assolizied.

On 11th November 1896 the Sheriff-substitute (Hall) found that the pursuers had failed to set forth a relevant ground of action against the defender, and therefore sustained the defender's second plea in law, and dismissed the action.

The pursuers appealed, and argued;—The action was competent and relevant. It was competent for the Court to make the remit craved without requiring the consent of both parties.¹ The pursuers were desirous of having the existing state of the drains in question put upon record by a careful and competent reporter. The facts regarding them were of a “fugitive” character,² which it was desirable should be placed on record. Such remits had been made when the questions involved were the ascertainment of the meliorations,³ the existing condition of fences and buildings on a farm,⁴ or of the state of repair of premises.⁵ The facts to be here inquired into were exactly of the class in which remits were granted.⁶ The case of *Muldoon v. Pringle*,⁷ relied on by the defenders, was an authority for the pursuers. In it the contractor was held not entitled to recover payment of remaining instalments due to him in respect he had failed, as the defender had done here, to carry out his part of the contract. In any view there were not as in the present case averments of a conspiracy between the defender and the engineers.

Argued for the defender;—The action was incompetent. The general rule was that a remit to a reporter was not final unless it was consented to by both parties.⁸ There was nothing in the circumstances here to make a remit suitable.⁹ If the reference were one of

¹ *Quin v. Garden & Sons*, June 22, 1888, 15 R. 776, *per* Lord Shand, p. 780.

² *Gordon's Trustees v. Melrose*, June 25, 1870, 8 Macph. 906, *per* Lord Neaves, p. 909.

³ *Fraser v. Mackay*, Feb. 13, 1833, 11 S. 391, 5 Scot. Jur. 240.

⁴ *Gordon's Trustees v. Melrose*, *supra*, note 2.

⁵ *Lees v. Marr Typefoundry Co.*, July 14, 1877, 4 R. 1088.

⁶ *Lees' Sheriff Court Styles*, pp. 135 and 136; *Dove Wilson's Sheriff Court Practice*, p. 267.

⁷ *Muldoon v. Pringle*, June 9, 1882, 9 R. 915.

⁸ *Mackay's Manual of Practice*, p. 275.

⁹ *Galbreath v. Taylor*, Jan. 20, 1843, 5 D. 423, 15 Scot. Jur. 215; *McGillivray v. Soutar*, June 2, 1860, 32 Scot. Jur. 634.

No. 69. matter of law it was incompetent; if of matter of fact so as to bind the parties to the result, it could not be made without their consent, express or implied.¹ Here the matter which it was proposed to refer to the reporter was a mixed question of fact and law, both parties did not consent, and the question involved was not of a "fugitive" nature. The distinction the pursuers endeavoured to draw between this and *Muldoon's* case² was of no avail to them, because the averment of conspiracy between the defender and the engineers was not relevant, and even if it was, that would be the strongest reason for an inquiry conducted in the usual manner. As between the pursuers and defender, the engineers' certificate was final, but that did not solve the question between them and the engineers,³ and the pursuers were not entitled to obtain evidence under a remit for a future action against the engineers.

At advising,—

LORD PRESIDENT.—We have to consider first of all whether this is a competent application, and the conclusion I have come to is that it is not. No one would think of laying it down as a general proposition that it is necessarily incompetent to grant a remit to a reporter to report on an existing state of facts unless both parties consent to the remit. The practice is quite against that, and recognises that there are cases of a somewhat limited class where, even though there may be objection, the Court does attempt to "place on record," as it is expressed, what is patent and visible to any accurate observer. Such are the cases to which we have been referred on the authorities and in argument. Such is the question of what fences existed on a farm, the question of what articles of machinery were in a factory at a particular time, and the like. But the rather curious expression "placing on record" may be useful as indicating that the thing to be put on record is something plain-sailing, and about which there is no presumable contrariety of opinion on the part of truthful observers.

Now, in most of the cases, as was very justly pointed out, there is another "note" which points out the class of facts to be recorded and the reason for adopting this summary mode of doing it. As Lord Neaves says,⁴ the things to be noticed are of a "fugitive" character, and accordingly, especially having regard to the fact that this proceeding is most common in agricultural questions, it would appear that there must be some present danger of the existing state of matters being changed by the necessary use of the subject in order to induce the Court to allow this report to be made.

When we turn to the present application, it will hardly do, as Mr Ure ingeniously argued, to break this petition into pieces, and make out that it looks like a modest and innocent proposal for informing the Court without prejudice to anybody's rights. We must look at the application as a whole, and the proceeding is a perfectly coherent and logical one from the beginning to the end of the prayer. What is proposed is, that the reporter is to

¹ *Mushet v. Duke of Buccleuch*, Feb. 18, 1851, 13 D. 713, *per* Lord Fullerton at p. 715, 23 Scot. Jur. 313.

² *Muldoon v. Pringle*, June 9, 1882, 9 R. 915.

³ *Rogers v. James*, 1891, 56 J. P. 277.

⁴ 8 Macph. 909.

be sent down to report on the present state of these drains ; that he is to give in such a full report as will cover the allegations made on this record about the state of matters ; that when this is got the Court is to find and declare that the existing state of things is as per report, and then the unfortunate defender is to be allowed, that first proposition having been determined past recall, to shew, not that this is wrong, or that the account is exaggerated, but that the state of affairs was different when he finished his work. Accordingly, the inutility of this proceeding is made very clear when it appears that the report would, as it were, merely throw an *onus* upon another party starting from the point of the existing state of matters.

When, in that very unsatisfactory way, the evidence on the case is before the Court, the Court are to determine that the work has not been properly done, and that the remaining part of it must be done by the pursuers at the expense of the defender, and so on. Why should this course be taken ? The pursuers set out in great detail that they have had their place examined themselves by a very competent observer, and the contentious nature of the facts to be examined is seen by this, that it takes two pages of the record to set out the various particulars, some of them of degree and quality, which form the heads of accusation against the execution of the contract. Again, I think we cannot throw out of account this fact, that the works were finished some years ago, and that the pursuers have spent their time in going into the Court of Session with an abortive action, which, if it had not been thrown out on title, would have had the very question now to be inquired into tried and decided according to the ordinary methods. In that procedure I should be much surprised if your Lordships would have made any such remit as is now proposed.

Therefore, when I express the opinion that this action is incompetent, it is with due regard to the true nature of the process which is instituted. I am not to be held as at all doubting the competency of a remit, even against opposition, in the limited class of cases to which I have referred. But this action contains highly contentious matter ; there are allegations of fraud, and this enhances the inappropriateness of what would be an element in the ultimate decision of the issue being dealt with in a manner different from the ordinary course.

I am for recalling the interlocutor of the Sheriff-substitute, and sustaining the first plea in law for the defenders. Accordingly, there will be no occasion for entering upon the dubious question raised by the case of *Muldoon*.¹

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT pronounced this interlocutor :—" Recall the interlocutor of the Sheriff-substitute dated 11th November 1896 : Sustain the first plea in law for the defender : Dismiss the action, and decern."

CAMPBELL & SMITH, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 70. THE INCORPORATED SOCIETY OF LAW-AGENTS IN SCOTLAND, Petitioners.

—*Macfarlane.*JOHN FRASER PURVES, Respondent.—*Forsyth.*

Jan. 22, 1897.
Incorporated
Society of
Law-Agents v.
Purves.

Administration of Justice—Petition for removal of law-agent's name from roll—"Written application"—Law-Agents (Scotland) Act, 1873 (36 and 37 Vict. c. 63), sec. 14.—The Law-Agents Act, 1873, by section 12, provides for a register being kept of law-agents practising in the Court of Session, and section 13 provides for a register being kept of law-agents practising in any Sheriff Court. Section 14 enacts, *inter alia*,—"The name of any person shall be struck off the said rolls (1) in obedience to the order of the Court, upon application duly made, and after hearing parties or giving them an opportunity of being heard; (2) upon his own written application."

The written application by an agent to have his name removed from any of the said registers may be made directly to the keeper of the register.

1ST DIVISION. ON 8th January the Incorporated Society of Law-Agents in Scotland presented a petition to the First Division of the Court of Session praying the Court "to direct the Keeper of the Roll of Law-agents practising in the Court of Session, and also the Keepers at Edinburgh and Haddington of the Rolls of Law-agents practising in the Sheriff Court of the Lothians and Peebles, to strike the name of John Fraser Purves, law-agent, off the said respective rolls made up under the provisions of the Law-Agents Act, 1873.*

After the petition had been served upon Purves, he presented a note to the Lord President, in which he craved his Lordship "to direct the Keepers of the Registers of Law-agents practising in the Sheriff Court of Midlothian and Haddington, and in the Court of Session, to strike off" his "name from said respective registers."

It was explained at the bar by counsel for the petitioners that the petition had been rendered necessary by the refusal of the Keeper of the Roll for the Sheriff Court of the Lothians at Edinburgh to strike Purves' name off the roll on his own written application to that official, and that the practice in Edinburgh differed in this from the practice in other Sheriff Courts, where an application by the agent himself was given effect to at once, and his name struck off.

Argued for Purves;—The petition of the Incorporated Society was unnecessary. The Sheriff-clerk ought under section 14 of the Act of 1873 to have struck his name off the roll upon his own written application. As this had been refused, he was compelled to apply to the Lord President, as had been done in the unreported case of *Dunlop* in 1881.

The Incorporated Society intimated that they had no desire to press their petition, but merely desired a judicial decision on the question

* The Law-Agents (Scotland) Act, 1873 (36 and 37 Vict. c. 63), enacted, sec. 14,—“It shall be lawful for the Lord President of the Court of Session, from time to time, to issue rules and directions with respect to the keeping and subscription of the rolls directed to be kept by the two preceding sections [i.e. the roll of law-agents practising in the Court of Session and the rolls of law-agents practising in the Sheriff Courts], and such rules and directions shall be observed and obeyed by the several keepers of the said rolls. The name of any person shall be struck off the said rolls (1) in obedience to the order of the Court, upon application duly made, and after hearing parties or giving them an opportunity of being heard; (2) upon his own written application.”

whether the "written application" referred to in section 14 meant application to the Court or to the keepers of the respective rolls. No. 70.
 They referred to section 11 of the Law-Agents Act, 1873,* and argued that where an agent desired his name to be struck out it was the obvious intention of the statute to enable him to have it done in as simple a way as possible. Jan. 22, 1897.
 Incorporated Society of Law-Agents v. Purves.

LORD PRESIDENT.—It is quite clear that this gentleman was entitled to have his name struck off these two rolls, the roll of the Court of Session and the roll of the Sheriff Court of Midlothian, upon his own written application, and the written application is made not to the Court, but to those responsible for the keeping of the roll.

An application has been made to me as Lord President, in similar terms to that which was presented to and granted by Lord President Inglis in 1881; and I am prepared, seeing there is this precedent, to follow the course taken by his Lordship. The intervention of the Lord President seems appropriate enough, as he is the official charged with the duty of regulating the keeping of the roll. But I should not suppose it to be less regular for the application to be made to the Keeper of the Roll, who would doubtless take the instructions of the Lord President (in the absence of any general regulation). As regards the application by the Incorporated Society of Law-agents, it seems to me that the proper course is, in respect this gentleman has made application to have his name struck off, to find it unnecessary to proceed with this petition.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE LORD PRESIDENT granted the following order upon the note:—

"The Lord President having considered the foregoing note, grants the prayer thereof, and directs the Keeper of the Register of Law-Agents practising in the Sheriff Courts of Midlothian and Haddington and in the Court of Session to strike off the name of John Fraser Purves from the said respective rolls."

Thereafter the Court, in respect that the prayer of the note had been granted, found it unnecessary to proceed further with the petition.

CARMENT, WEDDERBURN, & WATSON, W.S., Agents.

MRS MARGARET JERDON, Petitioner (Appellant).—*Salvesen*—*P. J. Blair*.

No. 71.

THOMAS FORREST, Petitioner (Respondent).—*Jameson*—*A. S. D. Thomson*.

Jan. 23, 1897.
 Jerdon v.
 Forrest.

Succession—Testament—"My heir"—Executor—Competition.—A holograph will provided, *inter alia*,—"My cousin Thomas Forrest is to be my heir. I leave £1000 to Mr Archibald Bonar, senr., our kind and best friend. £1000 to Thomas Forrest. The rest to Mary Leslie, if she will have it, and if not, to the Bible Society. . . . My house at

* "It shall be the duty of the registrar [of law-agents] to keep an alphabetical register of all enrolled law-agents, and enrolment in such register shall be deemed to be enrolment under this Act, and he shall strike out the name of any law-agent on an order of the Court, or on application made to him by such agent in writing to that effect . . ."

No. 71. Brighton to my sister Mrs Jerdon." Various special legacies were left, including several to Thomas Forrest. The house at Brighton was the only heritable property possessed by the testatrix, who was predeceased by Mary Leslie and Archibald Bonar. Mrs Jerdon, the testator's sister, craved to be appointed executrix-dative *qua* next of kin of the testatrix.

Jan. 23, 1897.
Jerdon v.
Forrest.

Thomas Forrest, who was thirty-eight years of age, and had lived with the testatrix since he was three years old, craved confirmation as executor-nominate, or as executor-dative *qua* general disponent and universal legatory of the deceased.

The Court *preferred* the claim of Mrs Jerdon, on the ground that it was not clear from the terms of the will that the testatrix had conferred on Thomas Forrest the character claimed by him.

2D DIVISION.
Sheriff of Rox-
burghshire.

MISS JANE HALL died at Bonjedward Cottage, Jedburgh, on 25th September 1896, leaving the following holograph will:—"My Will.—*I leave** My cousin Thomas Forrest is to be my heir. I leave £1000 to Mr Archibald Bonar, senr., our kind and best friend. £1000 to Thomas Forrest. The rest to Mary Leslie if she will have it, and if not, to The Bible Society. My Bible to Tooty; my house at Brighton to my sister, Mrs Jerdon; My furniture to my *niece* cousin, T. Forrest; my watch *and chain* to Tooty; my chain and gold pencil to my niece, Gertrude Jerdon; my books to Tooty; my pictures to Tooty; my jewels to Tot; Edward's ring to Mag.; Aunt Boswell's to Blanche E.; my large sofa to Mrs Jerdon; my reading glass to Mrs Jerdon; my blue inkstand to Mrs J. [Here followed other small legacies.] JANE HALL. Octr. 1863."

Mrs Margaret Hall or Jerdon, the only surviving sister-german and next of kin of the testatrix, who was resident, as she averred temporarily, in Canada, presented a petition in the Sheriff Court at Jedburgh for confirmation as executrix-dative *qua* next of kin of the deceased.

Answers were lodged by Thomas Forrest, who pleaded, *inter alia*;—(3) The petitioner being resident outwith Great Britain, is ineligible for the office of executor-dative, especially of a deceased in whose estate she has no pecuniary interest.

He also presented a petition craving confirmation as executor-nominate or as executor-dative *qua* general disponent and universal legatory of the deceased.

He averred;—(Cond. 3) "The petitioner, who is thirty-eight years of age, with the consent of his father and mother, resided with and was brought up by the deceased Miss Jane Hall, otherwise Miss Jane Theresa Hall, from in or about the year 1862, when he was three years of age or thereby, and continued to reside in family with her until her death on 25th September 1896."

Mrs Jerdon answered;—"Not known, but believed to be true."

Mr Forrest pleaded;—(1) The deceased Miss Jane Hall, otherwise Miss Jane Theresa Hall, having appointed the petitioner her heir, and it being implied by the terms of her will that he should be and act as her executor, he is in respect thereof, and of the circumstances condescended on, entitled to have the prayer of the foregoing petition granted. (2) The petitioner being the general disponent and universal legatory of the deceased Miss Jane Hall, otherwise Miss Jane Theresa Hall, should be decerned executor-nominate or executor-dative in that character.

It was admitted that the expressions "my cousin, T. Forrest," "Tooty," and "Tot," applied to him. Archibald Bonar and Mary

* The words printed in italics were deleted.

Leslie both predeceased the testatrix. The house at Brighton was the No. 71.
only heritable property possessed by the deceased.

The petitions were conjoined, and on 26th November 1896 the Sheriff-substitute (Speirs) pronounced this interlocutor:—"Finds in point of fact (First) That No. 5 of process for petitioner Forrest purports to be a copy of a holograph will left by the late Miss Jane Hall, in which she states that her 'cousin' Thomas Forrest is to be her heir, but in which no executor is actually appointed; (Second) That the Thomas Forrest referred to in said will is the petitioner; (Third) That it was admitted that Mr A. Bonar and Miss Mary Leslie are both dead, and consequently any legacies left to them by the will in question lapse; (Fourth) Finds that it was evidently the intention of the late Miss Hall to make Thomas Forrest her heir, and that he should succeed to whatever she had not willed to others; in fact he was to be her 'universal donee or residuary legatee,' and that the word 'heir' must thus be interpreted: Finds in point of law that the Court is bound to prefer the claim of Thomas Forrest, as universal donee, to be executor-nominate to the late Miss Hall, to that of the petitioner Mrs Jerdon, who is undoubtedly the next of kin: Therefore sustains plea in law 2 for petitioner Thomas Forrest, and appoints the said Thomas Forrest executor-dative *qua* general donee and universal legatory." Jan. 23, 1897.
Jerdon v.
Forrest.

Mrs Jerdon appealed to the Court of Session, and argued;—(1) Forrest's confirmation as executor-nominate would be inconsistent with his appointment as heir. When so appointed he was three years old, and the testatrix could not use the term "heir" as equivalent to "executor." (2) He was not general donee, but a special legatee. The residuary legatee was Miss Mary Leslie, or the Bible Society. At least Forrest raised a doubtful question of construction, which the Court would not decide now. Mrs Jerdon's absence abroad was only temporary.

Argued for Forrest;—The will and the general circumstances shewed the testator's primary intention to benefit him. His construction alone gave effect to the leading provision. "Heir" could fairly be read as either "administrator of the estate," or "general donee." It was a flexible term, and must be construed *secundum subjectam materiam*,¹ especially where the testator was probably ignorant of any technical meaning attaching to it. An intention to appoint as executor was as good as an actual appointment. Here the appointment only referred to moveables, for the will disposed of the heritage.

LORD JUSTICE-CLERK.—It is quite impossible at this stage that we can formulate, still less express, any opinion as to the ultimate effect of the provisions of this will, or the legacies therein set forth. Certainly we cannot decide now as to the legacy in favour of the Bible Society. Thomas Forrest claims here to be heir to this lady, and says that in the circumstances "heir" is equivalent to universal legatee, the expression "heir" being construed, in accordance with the well-known general rule, with reference to the subject-matter dealt with by the testatrix. If it were quite plain from the rest of this will that such was the intention of the testatrix, I think Thomas Forrest would be entitled to prevail. But so far as we can see at present

¹ Blair v. Blair, Nov. 16, 1849, 12 D. 97; Irvine v. Irvine, July 15, 1851, 13 D. 1367.

No. 71. that was not her intention. Her intention appears to have been that the residue of her estate, after deducting special legacies, should go to a certain person named ; and that if she would not take it, then it should go to the Bible Society. I do not see any ground for holding that we must interpret a will containing such provisions as meaning that Thomas Forrest was to be the testator's universal legatee. It cannot be said that that can be safely held on the terms of the will as we find them. Mrs Jerdon, on the other hand, apart from the will, would be entitled as next of kin to be decerned executrix-dative to the deceased. The only objection stated to her being appointed is, that she is resident in Canada. We are told that she is not settled there permanently, and that she intends to return to this country. In any case she cannot be decerned executrix-dative without finding caution, and the actual management of the estate is a matter of business which will be carried on by business men in the ordinary way. In these circumstances my opinion is that Mrs Jerdon is entitled to be decerned executrix-dative, and that we should recall the Sheriff-substitute's interlocutor, and remit to him to decern her executrix-dative accordingly.

Jan. 23, 1897.
Jerdon v.
Forrest.

LORD YOUNG.—The Sheriff-substitute has found “that it was evidently the intention of the late Miss Hall to make Thomas Forrest her heir, and that he should succeed to whatever she had not willed to others ; in fact he was to be her ‘universal disponee or residuary legatee,’ and that the word ‘heir’ must thus be interpreted” ; and found “in point of law, that the Court is bound to prefer the claim of Thomas Forrest, as universal disponee, to be executor-nominate to the late Miss Hall, to that of the petitioner Mrs Jerdon, who is undoubtedly the next of kin.” I dissent entirely from these findings. If we are not in a position to affirm that Thomas Forrest by being named heir has been appointed universal legatee, then we cannot pronounce a judgment which will preclude other persons from taking under the will. I am not prepared to affirm the proposition that Thomas Forrest was intended by the deceased to be her universal legatee. Unless we are prepared to affirm that, we cannot sustain his petition to be decerned executor as against the claim of the next of kin. I therefore think that the Sheriff-substitute's interlocutor should be altered, and that we should remit to him to decern the other claimant executrix-dative. The decision leaves the question open whether anything is given to Thomas Forrest by the will beyond £1000. So much is clear that he gets £1000. Whether he gets more or not is a question still quite undecided.

LORD TRAYNER and LORD MONCREIFF concurred.

THE COURT pronounced the following interlocutor:—“Having heard counsel for the parties on the appeal, sustain the same, and recall the interlocutor of the Sheriff-substitute of Berwickshire, &c., dated 26th November 1896, and remit to the said Sheriff to appoint Mrs Margaret Hall or Jerdon executrix-dative *qua* next of kin to the deceased Miss Jane Hall, otherwise Miss Jane Theresa Hall, in terms of her petition : Find the petitioner entitled to the expenses incurred by her in this and in the inferior Court in consequence of the respondent's opposition to her petition.”

STRATHERN & BLAIR, W.S.—W. & J. L. OFFICER, W.S.—Agents.

No. 72.

SAMUEL ORMOND, Pursuer (Appellant).—*Blair*.
 ALEXANDER HENDERSON & SONS, Defenders (Respondents).—
E. F. Macpherson.

Jan. 23, 1897.
 Ormond v.
 Henderson &
 Sons.

Poor's Roll—*Reporters equally divided in opinion on an appeal direct from Sheriff-substitute to Court of Session*.—An action of damages for personal injury was dismissed by a Sheriff-substitute as irrelevant, and the pursuer appealed to the Court of Session, and applied for admission to the poor's roll. The reporters on *probabilis causa* were equally divided as to the relevancy of the pursuer's averments. The Court *refused* the application.

SAMUEL ORMOND, jute-worker, Dundee, raised this action in the Sheriff Court there against Alexander Henderson & Sons, his employers, concluding for £100 as damages for personal injuries suffered by him. 2D DIVISION,
Sheriff of Forfarshire.

The Sheriff-substitute (Campbell Smith) dismissed the action as irrelevant.

The pursuer appealed to the Court of Session, and applied for admission to the poor's roll. The reporters on *probabilis causa* reported that they were equally divided in opinion regarding the relevancy of the pursuer's averments.

The pursuer moved for admission.

The defenders opposed the motion, and argued;—When there were judgments of both Sheriffs against an applicant, and the reporters were equally divided, the rule was that the application should be refused.¹ The pursuer should be regarded as occupying a similar position, because he had appealed directly from the Sheriff-substitute without taking the judgment of the Sheriff.

At advising, the opinion of the Court was delivered by

LORD TRAYNER.—This is an application for the benefit of the poor's roll, and as the reporters on *probabilis causa* are equally divided in opinion, the question is whether the applicant is entitled to the privilege which he seeks.

On the authorities cited to us at the discussion, it appears that the Court has laid down what I think I may venture to call a rule, that where the judgments of the Sheriff and the Sheriff-substitute are against the applicant, and the reporters are equally divided in opinion, the application for admission to the benefits of the poor's roll is refused.

That rule appears to me to be a sound rule, with which I would not interfere. This case, however, is not exactly in the position of the cases to which the rule has hitherto been applied, because the applicant has appealed directly from the Sheriff-substitute, who has found his case to be irrelevant, and has not taken advantage of the appeal to the Sheriff, which was open to him. I think that an applicant who does not avail himself of the right to appeal to the Sheriff must be held to occupy the same position as if he had exhausted the resources of the inferior Courts—as if he had appealed to the Sheriff, who had affirmed the judgment of his Substitute. If the Sheriff on appeal had differed from the Sheriff-substitute, there would have been no need of further appeal. The pursuer would then have had

¹ Carr v. North British Railway Co., Nov. 1, 1885, 13 R. 113; Watson v. Callander Coal Co., Nov. 17, 1888, 16 R. 111.

No. 72. a judgment to the effect that his case was relevant. If the Sheriff had agreed with the Sheriff-substitute, and held the action irrelevant, then the pursuer would have been within the rule which I have mentioned. But as the applicant has not taken advantage of the appeal afforded by the Sheriff Court procedure, I think he must be taken as if he acknowledged that the Sheriff would on appeal have been of the same opinion as his Substitute. I am accordingly of opinion that the application should be refused.

The COURT refused the application.

R. MACDOUGALD, S.S.C.—CHARLES T. COX, W.S.—Agents.

No. 73. **ASSETS COMPANY, LIMITED, Pursuers (Reclaimers).—Balfour—Salvesen.**
WILLIAM OGILVIE AND OTHERS, Defenders (Respondents).—
C. J. Guthrie—Younger.

Jan. 23, 1897.*
 Ormond v.
 Henderson &
 Sons.
 Assets Co.,
 Limited, v.
 Ogilvie.

Superior and Vassal—Building Restrictions—Ground-annual.—By contracts of ground-annual, the City of Glasgow Bank disposed certain building lots in Carlton Terrace, Glasgow, part of the lands of North Woodside, belonging to the bank. By the contracts, the disponees were taken bound in the second place to “erect on the said steading of ground hereby disposed a good and substantial dwelling-house of stone and lime”; “(third), the front of the house or houses to be erected . . . shall be placed upon the building line, and in all parts and portions thereof shall be built, erected, and finished in every respect in conformity with the designs and building plans” “so as not to be inferior in character and design” to the houses already built on Carlton Terrace, “the first party (the City of Glasgow Bank) being bound to take their disponees in the other steadings fronting Carlton Terrace already built upon or yet to be built upon, bound to observe similar conditions and to maintain and erect houses not inferior in character and design to the houses built as aforesaid”; “and further, declaring that the second party in building shall be bound to conform to the general feuing-plan of North Woodside; and the first party bind themselves and their successors to insert in all future conveyances to be granted by them or their fore-saids of their said lands of North Woodside, as shewn on the said feuing-plan, similar conditions, provisions, obligations, and others, as herein expressed.”

In 1895, when certain of the building lots in Carlton Terrace and also certain of the building lots on the remaining lands of North Woodside were as yet unbuilt on, the Assets Company, which had taken over the whole rights and obligations of the City of Glasgow Bank, proposed to erect tenements of dwelling-houses and shops on these unbuilt-on lots, and brought an action for declarator that the ground was free of restrictions. The Carlton Terrace proprietors maintained that only self-contained dwelling-houses could be erected on the unbuilt-on ground, whether in Carlton Terrace or in the rest of North Woodside.

Held that, as regarded the unbuilt-on lots in Carlton Terrace, the pursuers were entitled to erect tenements of dwelling-houses, provided that in doing so they observed the existing building line in front, and that the houses so to be erected were not inferior in character and design to the houses already built and forming part of said terrace; but that, as regarded the rest of the lands of North Woodside, the pursuers were entitled to erect tenements of dwelling-houses and shops.

Process—Declarator—Building Restrictions.—In an action for declarator that certain building ground within a burgh was not subject to any building restrictions, the Lord Ordinary (Kincairney) was of opinion that the ground

was subject to certain restrictions and not to others, but he pronounced an interlocutor assailing the defenders, holding that it was incompetent to pronounce a limited decree unless the pursuers restricted their summons, which they declined to do.

Held (rev. the judgment) that it was competent to pronounce a limited decree, and that decree fell to be pronounced accordingly.

(*See ante, Assets Co., Limited, v. Lamb & Gibson, March 6, 1896, 23 R. 569.*)

No. 73.
Jan. 23, 1897.
Assets Co.,
Limited, v.
Ogilvie.
2nd Division.
Lord Kin-
cairney.

In June 1895 the Assets Company, Limited, singular successors of the City of Glasgow Bank, and as such proprietors and superiors of the lands of North Woodside, Glasgow, brought an action against their feuars in the said lands concluding for declarator that the pursuers were duly vest and seized in and were in right of fee of certain pieces of ground, being the unbuilt-on portions of the lands of North Woodside, and were "entitled to erect on the said subjects tenements of dwelling-houses or tenements of dwelling-houses and shops, or such other buildings as they think fit, provided that such tenements or buildings are not inferior in character and design to the houses already built upon the said subjects."

Separate defences were lodged for three sets of defenders, namely (a) Lamb & Gibson and John and James Anderson, whose case was disposed of by the Second Division on March 6, 1896 (23 R. 569); (b) the feuars in Carlton Gardens and Doune Gardens, whose case was disposed of in the Outer-House at a former stage of the action, and need not be farther referred to; and (c) the present defenders, who were disponees of subjects in Carlton Terrace.

The questions raised by the present defenders were whether, and to what extent, they were entitled to enforce building restrictions against the pursuers (a) as regarded the unbuilt-on portions of Carlton Terrace, and (b) as regarded the remaining lands of North Woodside.

The titles of the defenders were contracts of ground-annual between the City of Glasgow Bank and the several defenders or their authors.

The following were the material clauses as set forth in the contract of ground-annual relating to No. 5 Carlton Terrace between the City of Glasgow Bank and John Charles Robertson, merchant in Glasgow, dated in August and September 1872:—"(Second) The said" disponent "and his foresaids shall, so far as not already done, be bound and obliged, within one year from and after the date hereof, to erect and finish on the said steading of ground hereby disposed a good and substantial dwelling-house of stone and lime, covered with slates, and with polished ashlar fronts, and the back wall of striped ashlar, and which house shall yield a yearly rent equal to at least double the amount of the said ground-annual payable therefrom, and to maintain and uphold, and, if necessary, repair and rebuild the said house, so that it shall be in such good order and repair as will make it yield the said rent in all time coming: (Third) The front of the house or houses to be erected on the said steading hereby disposed shall be placed upon the building line, and in all parts and portions thereof shall be built, erected, and finished in every respect in conformity with the design and building plans exhibited by the said" disponent "to Alexander Stronach, the manager of the said bank, and approved of by him, and so as not to be inferior in character or design to the plans exhibited to and approved of by the said Alexander Stronach, with reference to the steadings of ground already built upon part of said lands, or to the houses already erected on said steadings, the first

No. 73.

Jan. 23, 1897.
 Assets Co.,
 Limited, v.
 Ogilvie.

party and their foresaids being bound, as they hereby bind and oblige themselves and their successors, to take their disponees in the other steadings fronting Carlton Terrace, already built upon or yet to be built upon, bound to observe similar conditions and to maintain and erect houses not inferior in character and design to the houses built as aforesaid: (Fourth) No back house or back buildings or erections of any kind shall be erected on the said steading of ground other than" (Then followed a specification of the back buildings which might be erected, and a prohibition against the carrying on in the buildings of trades or operations which would be a nuisance): "(Fifth) The said" disponee "and his foresaids shall be bound in all time hereafter to contribute a rateable proportion of the expense of maintaining the said street called Wilton Terrace Road or Carlton Terrace," and also of maintaining a bridge across the River Kelvin. Then after certain further provisions regarding the bridge the disposition continued,— "And further, declaring that the second party and his foresaids shall be bound in building on the said steading of ground to adhere to the general feuing-plan of the said lands of North Woodside, and also declaring that the said first party and their foresaids shall not be entitled to communicate the benefit of access to the said proposed road or street called Carlton Terrace to the proprietors of the lands to the west and north of the lands of North Woodside, unless and until the said proprietors to the west and north create a servitude over their said lands to the west and north restricting themselves from erecting any other class of houses or buildings thereon, so far as extending along the street to be formed in prolongation of Carlton Terrace or Wilton Terrace until said road or street strikes the Kelvin at a point at or near to the Pear Tree Well, other than self-contained lodgings or villas of a class of not less value than £1500 each, in which event the right of access may be communicated to the proprietors of such lodgings or villas." Then followed provisions for the enforcement of the payment of the ground-annual, which was declared to be a real lien and burden on the subjects disposed, "and which other burdens, conditions, provisions, restrictions, limitations, declarations, and obligations are hereby created real liens and burdens in favour, not only of the first party and their foresaids, but also of their feuars and disponees, of the said lands upon and affecting the steading of ground above disposed, and houses and buildings erected or to be erected thereon, and the said real liens and burdens are hereby appointed to be recorded as part of these presents, and also to be recorded as part of all the future conveyances . . . and the first party hereby bind themselves and their successors to insert in all future conveyances to be granted by them or their foresaids of their said lands of North Woodside, as shewn on the said feuing-plan, similar conditions, provisions, obligations, and others as herein expressed."

The defenders averred (and the pursuers did not dispute) that the pursuers intended to erect tenements of dwelling-houses and shops on the unbuilt-on portions of Carlton Terrace, and also on the remaining unbuilt-on portions of North Woodside. The defenders maintained that only self-contained dwelling-houses were permitted, and pleaded; —(2) The pursuers and their authors having contracted with the defenders on the basis of said feuing-plan, the defenders should be assoilzied. (3) On a sound construction of the contracts of ground-annual and dispositions above mentioned, the defenders should be assoilzied.

On 23d December 1895 the Lord Ordinary (Kincairney) pronounced an interlocutor which, besides findings regarding the other defenders (see 23 R. at p. 570), contained the following findings regarding the present defenders:—“(6) Finds as regards defenders, who are feuars or disponees of portions of the said subjects in Carlton Terrace, that the pursuers are bound by the conditions and restrictions which by the rights and titles granted to the said parties the granter thereof undertook to impose on his disponees: (7) Finds that before disposing further of the action as laid against the said last-mentioned defenders, it is necessary to ascertain if possible what the general feuing-plan is which is referred to in the said rights and titles: Therefore allows the pursuers and the last-mentioned defenders a proof with a view to the identification of the said feuing-plan, the pursuers to lead in the proof.”*

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The pursuers reclaimed against this interlocutor.

At the hearing on the reclaiming note the attention of the Court was not specially directed to the findings above quoted, and the Court, on 6th March 1896, while they recalled the findings of the interlocutor relating to the defenders Lamb & Gibson, *quoad ultra* adhered to the interlocutor reclaimed against, and remitted to the Lord Ordinary.

Thereafter the parties, by joint minute, agreed that a particular plan produced was the plan referred to in the contract of ground-annual above quoted, and a proof, subsequently allowed, shewed that this plan disclosed only superficial area and building lines, and indicated nothing as to the character of the buildings to be erected. There was a conflict of evidence as to whether the frontages of the areas shewn upon the plan were of a size suitable for tenements of houses.

On 18th July 1896 the Lord Ordinary (Kincairney) pronounced this interlocutor:—“Finds that the conclusions of declarator are inconsistent with the conditions and restrictions which by the rights and titles granted to the proprietors in Carlton Terrace and Doune Terrace the granter thereof undertook to impose on his disponees in the lands of North Woodside: Therefore assoilzies the defenders from the conclusions of declarator in the summons, and decerns: Finds the defenders entitled to expenses,” &c.†

* In his note the Lord Ordinary, after referring to other provisions of the defenders' ground-annual, quoted the clause last above quoted, beginning “And the first party,” and continued,—“It was argued that this clause does not restrict the superior himself in building on the ground, but only binds him to impose restrictions on his feuars. I am prepared to repel that argument, and to hold that the superior is himself bound by the restrictions which he undertakes to impose on his disponees, and it may be of use to pronounce a finding to that effect. But beyond that I am unable to go. I am not in a position to construe the clause, because parties are not agreed as to the general feuing-plan to which it refers. I cannot in this question with the Carlton Terrace and Doune Terrace feuars assume its identity with the reduced feuing-plan signed with reference to Baird and Brown's [i.e., Lamb & Gibson's] feu-disposition. There is not in this case any question about the right of a feu to enforce conditions in other feu-rights, but only as to his right to enforce the obligations undertaken by the superior in his contract with himself.”

† “OPINION.— . . . Both parties appealed to the previous interlocutor. The pursuers contended that the decision against Lamb & Gibson ruled the question against the Carlton . . . Terrace proprietors also. These proprietors, on the other hand, contended that the latter part of the

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The pursuers reclaimed, and argued;—The question here arose under a contract of ground-annual,—that was to say, a disposition; that was sufficient to take the case out of the English decisions mentioned by the Lord Ordinary,¹ for they were cases of contracts upon which no conveyance had followed. Then *Henderson v. Nimmo*,² in which a feu-contract was construed against a superior upon the principle of *bona fides*, would not be repeated now. The only question was what did this contract of ground-annual mean on a sound construction of its terms. In considering this question it was necessary to distinguish between the unbuilt-on ground in Carlton Terrace and the unbuilt-on ground in the rest of North Woodside. The question as to the Carlton Terrace ground depended primarily on the clause at the end of article 3 of the contract of ground-annual, under which the Bank were taken bound to take their disponees bound “to observe similar conditions, and to maintain and erect houses not inferior in character and design to the houses built as aforesaid.” The defenders said that that was a prohibition against the erection of anything but self-contained dwelling-houses. But there was nothing

judgment was conclusive in their favour. These contentions cannot both be sound, because the two decisions are unquestionably consistent, seeing that they are contained in one interlocutor.

“The first question is, What are the conditions which the pursuers by the title-deeds now under consideration bound themselves to impose on their disponees? It is sufficient to refer to the conditions in the Carlton Terrace titles which are printed in statement 3. Now, the clause is long and complicated and confused, and as ill-drawn as possible. No titles of Carlton Terrace have been produced, which is to be regretted, as the quotation on record is only partial. [The titles were subsequently produced.]

“Assuming the quotation in the statement to be sufficiently complete, it appears that the clause is divisible into two parts. By the first part it is declared (1) that the disponee shall be bound within a year from the date of the contract to erect a ‘dwelling-house’ of the character and quality described; (2) that the front of the house or houses to be erected ‘shall be placed upon the building line, and in all parts and portions thereof shall be built . . . in conformity with the design and building plans exhibited by the said Bruce Miller to Alexander Stronach, the manager of the said bank,’—which plans are, I am informed, No. 30 of process. It is not necessary to quote the rest of the clause about these buildings. But it proceeds ‘The first party (i.e. the Bank) and their foresaids being bound, as they hereby bind and oblige themselves and their successors, to take their disponees on the other steadings fronting Carlton Terrace already built upon, or yet to be built upon, bound to observe similar conditions and to maintain and erect houses not inferior in character and design to the houses built as aforesaid.’ This is a clause of restriction in reference only to Carlton Terrace, not to the rest of North Woodside. This clause may perhaps not mean that the clauses in the new dispositions should be absolutely identical with those quoted; but I think that, fairly construed, it does mean that they shall be substantially the same, and that they shall at least stipulate that dwelling-houses shall be erected on the remaining stances, and that a building line shall be preserved.

“Considering that the question is merely a question between two contracting parties, I fail to see why this clause should not be binding on the

¹ Baskcomb v. Beckwith, 1869, L. R., 8 Eq. 100; Piggott v. Stratton, 1860, 29 L. J. Ch. 1; Peacock v. Penson, 1848, 11 Beav. 355.

² Henderson v. Nimmo, May 20, 1840, 2 D. 869, 12 Scot. Jur. 433.

in article 3 to prohibit either tenements of houses or shops. The word "self-contained" was not used, whereas it was used in the subsequent clause relating to the prolongation of Carlton Terrace, from which the fair inference was that when self-contained houses were intended they were so described. Then article 3 in terms contemplated that more than one house might be erected on each stead- ing, for "houses," in the plural, were referred to. Article 2, no doubt, contemplated only one house, but the purpose of article 2 was to impose an obligation on the disponee in order to secure the ground-annual, and if he fulfilled that obligation he was at liberty to erect as many more houses as was possible either on the same level or on the top of one another, which last were tenements of houses. The defenders admitted that there was no effectual prohibition against the use of the buildings as shops, but it was said that they must not be constructed as shops. The deed, however, did not say so. All it said was that the buildings must not be inferior in character and design to those already existing. But shops were not necessarily "inferior" to dwelling-houses, nor were tenements of houses

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pursuers if it be intelligible at all. It was their bargain,—they chose to make it—that they should insert such conditions in the dispositions of the remaining stances in Carlton Terrace. I am unable to see why they should not be held to their bargain. The present defenders, who are owners of houses in Carlton Terrace, no doubt relied on it when they made their purchases. There might be a question whether one disponee could enforce the conditions against another. But where is the question whether a disponee could enforce them against the disponent? I think the clause must be held obligatory if it be intelligible. Now, it has been decided that, if the disponent obliged himself to impose these conditions on the disponees, he imposed them on himself.

"Pausing at this point, the question is whether the declaratory conclusions are consistent with these conditions. I cannot see that they are. The declarator asked is extremely wide. It is really a conclusion that the pursuers are entitled to erect whatever buildings they please, provided they are not inferior in character and design to the houses already built on the subjects. Such a declarator would enable them to disregard the building line of Carlton Terrace, and it would enable them to build shops where dwelling-houses are stipulated for. I cannot but think that it would be against the good faith of the contract with the proprietors of the houses in Carlton Terrace to fill up the vacant stances with tenements and shops. It is true that the declarator would be quite consistent with the clause so far as I have considered it, if Carlton Terrace were excepted. But I have not been asked to pronounce a declarator excepting Carlton Terrace. The decision against Lamb & Gibson and John and James Anderson does not seem to affect this question, because of the marked difference between the provisions of the dispositions.

"The clause proceeds to mention other conditions. It contains important restrictions as to back building on the steadings, which I take to be material to the general plan, and certain other obligations, which I need not mention specially, because they seem reconcilable with the declaratory conclusions; and there is the declaration 'that the second party and his foresaids shall be bound in building on the said steadings of ground to adhere to the general feuing-plan of North Woodside,' and there follows the obligation to insert in all future conveyances of the lands of North Woodside, as shewn on the feuing-plan, similar conditions, &c.

"Now, as the obligation on the disponee in this contract measures the obligation to be imposed on other disponees, it seems to follow that the pursuers are here bound to impose on their future disponees of any part of

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necessarily "inferior" to self-contained houses. Nearly every street in the New Town of Edinburgh—which was conspicuous for its regularity—had tenements at the corners at all events. In short, the clause did not secure the uniformity, but at most the general character and value of the buildings; a very much superior self-contained dwelling-house would destroy the uniformity, but even on the defenders' construction it would not violate the deed. As regarded the remaining lands of North Woodside, they were under no restriction at all. No doubt, in the clause towards the end of the deed the Bank took themselves bound to insert similar conditions, &c., in all future conveyances of North Woodside, but then as this clause applied to the whole of North Woodside, including Carlton Terrace, it could not be supposed to refer to conditions, &c., regarding the main buildings, for that construction would render the concluding portion of article 3 unnecessary. The later clause, therefore, referred to the stipulations which followed article 3, *i.e.*, the stipulations regarding the back buildings, the opening up of roads, bridges, &c., and to these only, which consequently

North Woodside an obligation to adhere to the general feuing-plan, and, by force of the interlocutor already pronounced, this infers that the pursuers are themselves bound to observe the general feuing-plan.

"But then it is said that it has already been decided in the question with Lamb & Gibson that an obligation to observe a feuing-plan was not binding on the pursuers, and it is argued that it follows that, in this question with the Terrace proprietors, an obligation to observe the general feuing-plan must be held equally ineffectual. I feel that this argument is embarrassing, but it seems to be an argument from one finding in an interlocutor against another, and I think I cannot but hold that seeing that the pursuers are bound to impose this obligation on their disponees, they are bound by it themselves. I think I would contradict the finding in the previous interlocutor which relates to the present proprietors if I did not hold that.

"It is to be observed, however, that the general feuing-plan No. 10 is materially different from the feuing-plan referred to in Lamb & Gibson's disposition. It shews not only the lines of the terraces and the roads and ornamental ground, but also the various stances, and it was to explain the various lines shewn on the plan that the evidence was led.

"I do not clearly see why, when a party binds himself to abide by a general feuing-plan, he should not in a question with the person with whom he contracts—so long as the plan has not been infringed on—be held to his bargain; and looking to the differences between the contract and the plan in this part of the case, and in that relating to Lamb & Gibson, I do not think I am bound to hold,—and indeed I do not think I can hold,—that the pursuers are not bound by the general feuing-plan.

"The question remains, however, what is it that the general feuing-plan indicates, and what is the obligation which an adherence to it involves? This is the subject-matter of the proof. On this point, however, I think there is little to be said. I think the proof is of no great value, and weighing the evidence on both sides, I am satisfied that the plan does not indicate with sufficient distinctness, for the imposition of a building restriction, that nothing but dwelling-houses were to be permitted on the line of Carlton Terrace and Gardens and Doune Terrace and Gardens. In particular, I am not satisfied that an obligation to adhere to the plan involves a prohibition against tenements of dwelling-houses or tenements of dwelling-houses with shops; and if the pursuers had asked only for a declarator that the titles did not prevent them from building tenements of dwelling-houses and tenements of dwelling-houses and shops on their lands,

were the only stipulations binding on the pursuers, except as regarded the unbuilt-on part of Carlton Terrace. The pursuers did not dispute that the decree might be qualified so as to preserve to the defenders such rights as they might possess under these later clauses; a formal restriction of the summons was not necessary; the Lord Ordinary's ground of judgment was not well founded.

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Argued for the defenders;—The Lord Ordinary's ground of judgment was well founded. This was not a petitory action, but an action relating to title; and the pursuers were bound to set forth in their summons what they wanted, and were not entitled simply to table the deed and leave the Court to discover what it meant. Then on the merits, the defenders put their case upon contract, and not upon the doctrine of real burden. The pursuers or their authors, the City of Glasgow Bank, whose obligations they were bound to fulfil, had contracted to do certain things, and the question was what, upon a fair reading of the contract had they contracted to do? Now, what the defenders had contracted to do was to build a good and substantial dwelling-house, *i.e.*, a self-contained house, which was a house for the occupation of a single family, and what the pursuers had contracted to do was to build, or to see to the building of, a similar dwelling-house on each of the remaining steadings. It was admitted that there was no prohibition against the use of the dwelling-house by more than one family, or as shops; but while that was so, the buildings to be erected must in outward appearance be like those already erected,—that was to say, self-contained dwelling-houses. The case for restriction might be stronger as regarded the remainder of Carlton Terrace than as regarded the other unbuilt-on ground. The pursuers' only argument, however, against taking the general clause of restriction towards the end of the deed as applying to the main buildings as well as to the other restrictions was, that this construction involved a surplusage of restriction as regarded

I do not say that that might not have been granted. Such a declarator would leave untouched all the conditions of the deed. It would only involve an interpretation of the plan. But that is not the nature of the pursuers' demand in this action. They ask a declarator which would in truth free them from the conditions of the contract altogether, and enable them to disregard the building line shewn on the plan, and also all the restrictions and conditions in reference to the back buildings.

"The pursuers declined to restrict their conclusions; but it was suggested that I might give decree under such qualifications as I considered imposed by the contract. But I do not think I can be called on to do that.

"My view is that, while the pursuers may not be restricted from building tenements of dwelling-houses, or of dwelling-houses with shops, except on Carlton Terrace, as to which there is, in my opinion, such a restriction, they are bound to adhere to the building-lines shewn on the plans, and to conform to the conditions as to back buildings. But I have not been asked to embody these opinions in a decret of declarator. The result is, in my opinion, inevitable, that the present defenders are entitled to absolvitor. . . .

"I have dealt with this case as entirely special, and I do not think it much affected by any of the cases quoted. On the part of the pursuers, reference was made to *Henderson v. Nimmo*, 20th May 1840, 2 D. 869; *Baskcomb v. Beckwith*, 1869, 8 Eq. 100; *Piggott v. Stratton*, 1860, 29 L. J. Ch. 1; *Peacock v. Penson*, March 1848, 11 Beav. 355; *Millar v. The Endowment Committee*, 4th March 1896, 23 R. 557; and by the defenders to *Middleton v. Leslie*, 23d May 1894, 21 R. 781."

No. 73. **Carlton Terrace.** This was a dangerous rule of construction to apply to an obviously inartistically framed deed. The anxious clauses guarding against the undue admission of strangers to the benefits of the North Woodside streets, &c., plainly shewed the intention of the parties to these deeds to be that the estate of North Woodside should be confined to streets of high class residences, which a miscellaneous collection of shops, tenements, and self-contained houses would not be.

At advising,—

LORD JUSTICE-CLERK.—The pursuers in this case do not now insist on declarator in the full terms of the conclusions of the summons, but are willing, if they can obtain a judgment on the main point at issue, which regards the character of the buildings they are entitled to erect, that the rights of the defenders as regards the line of buildings, erections on back ground, &c., should be reserved. But they adhere to their demand for a declarator of their right to erect tenements of houses and shops on the lands in question, and this is resisted by the defenders, who maintain that only self-contained dwellings may be erected.

On the question whether houses of the tenement class may be erected, if similar in style and design to those already on the ground, I have come to the conclusion that there is nothing in the conditions to prevent the pursuers from having their right to do so declared, and that if in the words of the deed “good and substantial dwelling-houses of stone and lime, and covered” with slates are erected, that would be within the feuars’ rights, although the buildings were so arranged internally that the different flats could be inhabited as separate houses.

Upon the question whether shops may be erected as part of the buildings, I have, as regards Carlton Terrace, had very considerable difficulty and doubt, but I have come finally to the conclusion that the terms of the feu-contract are such as not to warrant the erection of buildings other than dwelling-houses, and that any plans which would present an external appearance inconsistent with the expression “dwelling-house” would not be in conformity with them.

LORD TRAYNER.—I am not prepared to dispose of this case in the manner in which the Lord Ordinary has disposed of it. His Lordship has assoilzied the defenders from the conclusions of the summons altogether, because he is of opinion that the pursuers are not entitled to a decree to the full extent concluded for, and because the pursuers declined to restrict their conclusions. It is clear, from the opinion of the Lord Ordinary, that he thought the pursuers were entitled to a decree of declarator somewhat within the terms of the conclusions, but because they have asked more than they were entitled to, and would not ask less, he has refused them everything. I say I am not prepared to deal with the case in this way, but, on the contrary, am prepared to give the pursuers such a declarator within the limits of their conclusions as they may have established their right to have, although their demand is for something more. Apart from this difference as to the mode in which the case should be dealt with, I concur generally in the views of the Lord Ordinary (as expressed in his opinion) as to the extent of the pursuers’ rights. The main contention on the part of the defenders was that the pursuers were restrained, under their titles, from building anything upon the

ground in question except self-contained dwelling-houses. This argument was maintained on a construction of the clauses contained in the ground-annual between the City of Glasgow Bank (the pursuers' authors) and John Charles Robertson, the defenders' author, dated in August and September 1872. The import of these clauses may be shortly stated thus :—(1) Mr Robertson bound himself, within a year, to erect "a good and substantial dwelling-house," which would yield a rent equal to double the ground-annual ; (2) the front "of the house or houses" so to be erected was to be on the building line, and in every respect erected and finished in conformity with the design and building-plans specially designated, and so as not to be inferior in character or design to houses already erected in Carlton Terrace ; and (3) the first party—that is, the pursuers' authors—obliged themselves and their successors to take their disponees in the other steadings fronting Carlton Terrace bound "to observe similar conditions, and to maintain and erect houses not inferior in character and design to the houses built as aforesaid."

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From a consideration of these clauses, it appears that the only obligation imposed on the disponers was to take their disponees bound to observe similar conditions to those imposed on Mr Robertson, and to erect and maintain houses not inferior in character and design to those already built in Carlton Terrace. I assume with the Lord Ordinary that the disponers were themselves bound to observe similar conditions to those they had undertaken to impose on their disponees. Beyond this, it is not pretended that under the clauses I have referred to there is any obligation on the disponers (now represented by the pursuers) which restrains them from the freest use of their property. The extent of their restriction therefore is to be found in the restriction placed on Mr Robertson—the restrictions on Mr Robertson and the pursuers are co-extensive. Now, Mr Robertson was bound in the first place to erect a "good and substantial dwelling-house." The defenders say that this means a single self-contained dwelling-house, which they define to be a house fitted for the occupation of one family only, and occupied by one family. The first answer to that is, that the defenders read into the deed a qualification which is not there. The descriptive phrase "self-contained" was well known and in common use at the date when the ground-annual was executed, and presumably would have been used had it been intended to put on Mr Robertson the restriction which it implies. But in the next place, the opening words of the second clause (as quoted by me above) evidently contemplate that Mr Robertson would or might build more than one house upon the ground disposed to him. But, further, suppose that Mr Robertson had erected a semi-detached villa there, good and substantial in itself, and yielding a rental of at least the double of the ground-annual, could it have been reasonably maintained that he had gone beyond his right, or failed to fulfil his obligation? I think not. And yet such a building would not have been within the defenders' definition of a self-contained dwelling-house, for it would have been one fitted for the accommodation of, and would have been occupied by, two families. The defenders' main contention, therefore, seems to me to be unsound. This leads directly to the question whether there is any restriction on the pursuers disentitling them to build tenements of houses, and I am of opinion that

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there is not. If it cannot be affirmed that the pursuers by the terms of their titles are restrained from building any but self-contained dwelling-houses, there is no restraint upon them building any other kind of dwelling-house they please. To revert to the illustration I have already given, if the pursuers are at liberty (as Mr Robertson was in my opinion) to build a house for the accommodation of two families, they are equally entitled to build a house to accommodate four or six families. And if they are at liberty to build two houses (as in a semi-detached villa) alongside of each other, why may they not build two or three houses, one on the top of the other, which is just a tenement of dwelling-houses. Such tenements, however, must be on the existing building line of Carlton Terrace, and not be inferior in character and design to the houses already built there. These limitations I understand the pursuers are willing to observe.

There remains the question whether the pursuers are entitled to build in Carlton Terrace a tenement of houses, the lower or ground floor of which should be occupied as shops. On this question there is more room for doubt. Shops and dwelling-houses are certainly not the same thing. But the same premises, occupied by one tenant, may be both house and shop—the shop in front, the dwelling-rooms behind. The defenders admit that if the pursuers build a tenement of dwelling-houses, their tenants may, without objection, exhibit in their windows, either on the ground floor or above, articles of merchandise for sale. If it is only built as a dwelling-house it may be used as a shop. A shoemaker or tailor may carry on his calling at the front window of his house, and have his signboard above it without objection. But what is that after all but a shop? I fail to see any interest which the defenders can qualify to maintain such a restriction, if such a restriction exists, it being one so easily evaded. But in truth I think the objection resolves itself into one as to the use to which the building can be put; and I think there is no restriction imposed on the use by the clauses I have referred to. There is in another part of the deed an express restriction as to the erection of factories, &c., or to the carrying on of certain trades, but this restriction the pursuers do not wish to violate. On the contrary, they expressly stated that such restriction is to be observed, and they are willing to take their declarator subject to it. The Lord Ordinary seems to be of opinion that the pursuers are entitled to build tenements of houses with shops, and I am rather inclined to agree with him. But I do not press that view, as I understand your Lordships are of a different opinion.

Apart, however, from Carlton Terrace, I think the pursuers are not prohibited from erecting on their ground tenements of houses and shops by anything in their titles which the present defenders have any interest or title to plead.

LORD MONCRIEFF.—In deciding on the respective contentions of the parties I think that a distinction may be made between the steading fronting Carlton Terrace and the remaining ground belonging to the pursuers not yet built upon.

As regards the steadings fronting Carlton Terrace, I agree with your Lordships that there is not sufficient warrant in the feu-contract to restrict the pursuers to erecting self-contained dwelling-houses.

I think they are entitled to erect tenements of dwelling-houses not inferior in character and design to the houses already built. But I do not think they are entitled to build shops. Reading the second, third, and fourth heads of the contract, I think it is stipulated with sufficient distinctness to be binding upon the pursuers that the houses to be erected by them or their disponees on steadings fronting Carlton Terrace shall not only be placed on the same building line as those already erected, and be not inferior in character and design to them, but shall, externally at least, be dwelling-houses; the object of the stipulation being to preserve the residential appearance of the locality.

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It may be that when tenements of houses are erected they may be used as shops. The contract does not contain any general prohibition against such a use, and the provisions of the fourth head of the contract are by no means inconsistent with it. But as regards Carlton Terrace I do not think that the pursuers are entitled to a decree which would enable them wholly to disregard what I take to be the contract of parties as to the external appearance of the buildings.

As regards the pursuers' ground unbuilt on, other than Carlton Terrace, I should have been content to grant decree of declarator in the same terms as that applicable to Carlton Terrace. But possibly a distinction may be drawn between the two cases; and as I understand that your Lordships are prepared to give the pursuers a wider decree as regards the remaining subjects, I do not press my doubts as to them.

The result is that I agree in the judgment which is proposed, which is very nearly in accordance with the Lord Ordinary's views.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor reclaimed against: Find and declare (1) that as regards that part of the subjects described in the conclusion of the summons, of which the pursuers are proprietors, fronting Carlton Terrace, the pursuers are entitled to erect thereon tenements of dwelling-houses, provided that in doing so they observe the existing building line in front, and that the houses so to be erected are not inferior in character and design to the houses already built, and forming part of said Terrace; and (2) that as regards the other parts of said subjects, the pursuers are entitled to erect thereon tenements of dwelling-houses and shops: Reserving to the defenders any right which they may have to enforce any other conditions, provisions, and obligations imposed on the pursuers or their authors by the titles granted by them, or either of them, in favour of the defenders or their authors: *Quoad ultra* dismiss the action."

J. SMITH CLARK, S.S.C.—MORTON, SMART, & MACDONALD, W.S.—Agents.

ROBERT NISBET (Miss Agnes Nisbet's Executor), Petitioner.—*Aitken*. No. 74.

Writ—Authentication—Deed partly written and partly printed—Attestation—Conveyancing Act, 1874 (37 and 38 Vict. c. 94), sec. 39.—A person died leaving a will and codicil partly written and partly printed, bearing to be subscribed by herself and attested by two witnesses, but the witnesses' Jan. 23, 1897.
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No. 74. designations were neither contained in the deeds nor appended to their signatures. Her executor presented a petition under section 39 of the Conveyancing Act, 1874, stating that the will and codicil were subscribed and witnessed by the persons whom he mentioned in the petition, and craving a proof, and thereafter to have it declared that the deeds were subscribed by the grantor and by the persons by whom the deeds bore to be attested. The Court allowed a proof by commission, and thereafter *found and declared as craved*.

1ST DIVISION. THIS was a petition presented by Robert Nisbet, executor of the deceased Miss Agnes Nisbet, Glasgow, under section 39 of the Conveyancing (Scotland) Act, 1874.*

The petition stated that Miss Nisbet died on 6th January 1896, leaving testamentary writings consisting, *inter alia*, of a will and codicil, both dated 26th November 1892; that each of these deeds was subscribed by Miss Nisbet, and bore to be attested by "William Barton" and "Dorothea S. Kerr"; and that the designations of these witnesses were not contained in the will and codicil, and were not appended to their signatures; that the signatures were the genuine signatures of the said Agnes Nisbet and of the two witnesses who were designed; that the will was partly printed and partly written, the written part being in the handwriting of Mr William Meikle, actuary to the Glasgow Savings Bank, with the exception of the date in the testing-clause, which was written by David Smith, doctor of medicine, 48 Dundas Street, Glasgow, and that the codicil was also written by Mr Meikle, with the exception of the place and date, which were also written by Dr Smith.

The prayer was in these terms:—"To allow the petitioner a proof of the averments contained in this petition, and thereafter to declare that the will and codicil above mentioned were subscribed by the said Agnes Nisbet, the grantor or maker thereof, and by the said William Barton and the said Dorothea Stewart or Kerr, the witnesses, by whom the said will and codicil bear to be attested."

On 16th December 1896 the Court pronounced this interlocutor:—"Allow the petitioner a proof of the averments contained in the petition, that the will and codicil mentioned and founded on therein were written, subscribed, and witnessed by the persons, and as mentioned in the petition, and granted diligence and commission to examine witnesses and havers."

The proof reported by the Commissioner (Professor Moir) established, in the opinion of the Court, that the will and codicil had been signed by Miss Nisbet and the witnesses as averred in the petition.

* The Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. c. 94), sec. 39, enacted,—"No deed, instrument, or writing subscribed by the grantor or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the grantor or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such grantor or maker and witnesses."

The petitioner cited the case of *Addison, &c.*, Feb. 23, 1875, 2 R. No. 74. 457, and argued that in terms of the statute the petition fell to be granted.—[LORD M'LAREN having called the attention of the petitioner's counsel to the fact that the will was partly printed and partly written, LORD KINNEAR referred to section 149 of the Titles to Land Consolidation (Scotland) Act, 1868 *].—The petitioner maintained that it made no difference that the will was partly printed and partly written.

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LORD ADAM.—I think this petition should be granted. In my opinion the petitioner has discharged the burden placed upon him by the latter clause of the 39th section of the Conveyancing Act, 1874, and has proved that the deed was subscribed by the granter and witnesses by whom it bears to be subscribed. That is all the statute requires of him.

LORD M'LAREN.—I agree with Lord Adam. In calling attention to the fact that the deed was partly written and partly printed, I did not intend to suggest any doubt that such a deed was valid if authenticated by two instrumentary witnesses; but of course it is always right to look at the statutory enactments when such a difficulty occurs.

LORD KINNEAR.—I am of the same opinion. We are not at present called upon to express any opinion as to the legal effect of the instrument when it has been so far set up as the declaration which Mr Aitken asks for will set it up. At the same time, as the question has been mooted, I do not think it out of place to say that, so far as I see, there probably would have been a question under the Titles to Lands Acts of 1858 and 1868 which the petitioner desires to remove by proceeding under the Act of 1874. Whether it has been effectually obviated, we cannot determine in this process.

The LORD PRESIDENT concurred.

THE COURT pronounced this interlocutor:—"Having resumed consideration of the petition, together with the report by Professor Moir, and the will and codicils of Miss Agnes Nisbet produced by the Depute-Clerk Registrar, and heard counsel for the petitioner, find and declare that the said will and codicil, dated 26th November 1892, of Miss Agnes Nisbet, were subscribed by her as granter or maker thereof, and by William Barton and Dorothea Stewart or Kerr, the witnesses by whom the said will and codicil bear to be attested, and decern; and find the petitioner entitled to the expenses of the present proceedings out of the funds of the trust-estate of the said Agnes Nisbet."

BELL & BANNERMAN, W.S., Agents.

* Titles to Land Consolidation Act, 1868 (31 and 32 Vict. cap. 101), sec. 149:—"All deeds and conveyances, and all documents whatever, mentioned or not mentioned in this Act, and whether relating or not relating to land, having a testing-clause, may be partly written and partly printed . . . provided always that in the testing-clause the date, if any, and the names and designations of the witnesses, and the number of the pages of the deed or conveyance or document, if the number be specified, and the name and designation of the writer of the written portions of the body of the deed or conveyance or document shall be expressed at length, and all such deeds, conveyances, and documents shall be as valid and effectual as if they had been wholly in writing. . . ."

No. 75. STEWART, BROWN, & COMPANY, Pursuers (Respondents).—*Ure—Deas.*
JAMES GRIME, Defender (Appellant).—*D. Dundas—Craigie.*

Jan. 27, 1897.
Stewart,
Brown, & Co.
v. Grime.

Contract—Sale—Construction—Clause of Reference.—On 27th May 1895 A, a member of the Beetroot Sugar Association, by contract with B, who was not a member, sold to him sugar at 10s. 9d. per cwt., to be delivered in October-December 1895. The contract incorporated the rules of the association as fully as if these had been expressly inserted therein, and further provided that the Council of the London Association was the referee of all disputes.

Rule 32 provided,—“If any member liable on the face of unmatured contracts shall suspend payment . . . the Council of the United Kingdom Association to which he belongs shall, as soon as possible after the suspension . . . meet, fix, and publish official quotations and due dates for all periods of delivery that may be in question; the prices to be according to the average buying and selling market value of the day on which the member defaulted or suspended payment. The contracts in question shall then be closed upon the terms so fixed.”

A suspended payment in June 1895, and the Council of the London Association fixed the market price of sugar at 10s. 3d., at which the contract fell to be closed, the purchaser, if the rule applied, thus becoming liable for the difference between that and the contract price. B refused to pay the difference, alleging that rule 32 only applied to contracts between members. A, after intimation to B, referred the dispute to the London Council, who decided that the rule applied, and ordained B to pay the sum so fixed.

In an action by A for implement of the award, *held* that under the contract the Council was constituted referee of all disputes, and that their decision was final.

Opinions that the decision of the Council was sound, and that rule 32, having been imported into the contract, applied to B, although he was not a member of the association.

2d Division.
Sheriff of
Lanarkshire.

ON 27th May 1895 Stewart, Brown, & Company, merchants, Glasgow, members of the Beetroot Sugar Association, entered into a contract with James Grime, Rosebank, Busby, who was not a member of the association. The contract bore,—“Subject always to the printed rules, regulations, and bye-laws of the Beetroot Sugar Association, and of the clearing department thereof, we, acting on account of ourselves, have this day sold to you, acting on account of yourself (150 tons), 1500 bags of beetroot sugar of 100 kilos. nett each, fair quality of first products of the crop of 1895-96, at 10s. 9d. per cwt., free on board at Hamburg. . . .

“The sugar to be at shipping port, ready for shipment, in October-December, in equal quantities per month.

“The above-mentioned rules, regulations, and bye-laws are incorporated in this contract as fully as if the same had been expressly inserted herein.*

* The Rules, Regulations, and Bye-laws of the Association provided as follows:—“32. If any member liable on the face of unmatured contracts shall suspend payment or be declared a defaulter, or when through death his firm ceases to exist, the Council of the United Kingdom Association to which he belongs shall—as soon as possible after the suspension, or default, or death has become officially known, or be satisfactorily proved to the Council by other members concerned in such contracts—meet, fix, and publish official quotations and due dates for all periods of delivery that may be in question; the prices to be according to the average buying and selling market value of the day on which the member defaulted or suspended payment. The contracts in question shall then be closed upon the terms so

"The Council of the Beetroot Sugar Association of London is the referee of all disputes." No. 75.

Stewart, Brown, & Company suspended payment on 15th June 1895, and according to rule No. 32 the contract fell to be closed at a price to be fixed by the Council of the London Association. The price was fixed at 10s. 3d. per cwt., and intimated to Grime, and on applying this price to the contract there appeared a balance of £73, 6s. due by him to Stewart, Brown, & Company. Grime refused to pay this sum on the ground that rule 32 did not apply to contracts between members of the association and non-members. Jan. 27, 1897.
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Stewart, Brown, & Company, with due notice to Grime, submitted the matter to the Council of the London Association for arbitration, and on 16th June 1896 the Council issued an award ordaining Grime to pay the sum as the difference in price between his contract and that fixed by the Council.

Grime refused to recognise the award as applicable to him, and Stewart, Brown, & Company raised this action against him for £73, 6s. in the Sheriff Court at Glasgow.

On 24th November 1896 the Sheriff-substitute (Strachan) found that the award was valid and binding on the defender, and that he was indebted to the pursuers in the sum thereby decided to be paid by him.*

fixed. It shall also on any given day be in the power of any member, on payment of fees according to Rule 45, to call upon the Council of his Association to fix official prices and to certify thereto. Such certificates may be used for the closing of contracts with non-members, who may have suspended payment, or may have been declared defaulters. . . . 35. Any disputes that may arise out of or in relation to any contract shall be referred either to such member of the Association at the port of destination as both parties may agree on; or else to two members thereof, one to be chosen by each party; or else to the Council. . . . 41. A registration fee of ten shillings shall be paid upon each application to the secretary for arbitration, and shall follow the fees in the award. Non-members of the Beetroot Sugar Association who have entered into contracts with members may apply to the Council for arbitration, paying at the time of application a registration fee of one pound and eleven shillings, which will not follow the award."

* "NOTE.— . . . The referees have already decided that the clause in question is applicable to this particular contract, and, in my opinion, it was quite within their power to do so.

"But even were it to be held that this is a matter which requires to be decided by the Court, I must say that I see no good reason for holding that the rule is limited to the parties *inter se*, and has no reference to this contract. The rules are, no doubt, primarily applicable to members of the association, and intended to regulate their rights and liabilities *inter se*, but it appears to me that a special provision in a contract that it includes the rules and regulations to the same effect as if they were incorporated therein has the effect (unless there is something special in the rules to prevent it) of putting the parties in the same position as members, in so far as regards that particular contract, by giving them the same rights and imposing on them the same liabilities. Under the 32d rule, if the parties to the contract are members, and one of them is declared a defaulter or suspends payment, the contract is closed on certain fixed terms. Why should not the same provision apply to a contract entered into between a member and an outsider, which is specially declared to be subject to the same rules? I must confess my inability to understand why this particular

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The defender appealed, and argued ;—There was no valid reference. Arbitration was limited to contracts falling under the rules, and it was enough for him to shew that this contract was not under the rules, and had been referred without his consent.¹ Rule 32 only applied to members. He was probably bound by rules relating to matters incidental to sale, *e.g.*, sampling and delivery, but rule 32 was not concerned with such matters. Rule 41 recognised the difference between members and non-members, and shewed that the latter were only subject to arbitration on their own application. He had never consented to arbitration, and he could not be bound by the award.² Rule 32 might have applied to him had he been insolvent, but that had not happened.

Argued for the pursuers ;—The contract referred all disputes. The dispute as to the application of rule 32 had been referred and decided. That was enough, but even on the merits it was clear that rule 32 was binding on the defender, as the rules had been incorporated in the contract.

LORD JUSTICE-CLERK.—The pursuers in this case, who are members of the

rule should not apply to the defender as much as the other rules which he admits are binding on him.

“It appears to be settled that the rules of an association imported into a contract, as in this case, are not held binding on an outsider unless they are reasonable and in conformity with the law (Leake's Law of Contracts, p. 436, and the cases therein cited). Now, the defender maintains that this is not the case here. He even goes the length of saying that the rule in question is *contra bonos mores*. It must be conceded that the rule is somewhat anomalous, and runs counter to the rules by which contracts are regulated. According to the ordinary law, the bankruptcy of one of the parties entirely terminates the contract, and may give rise to a claim of damages at the instance of the other party. By the rule in question the contract is terminated, but with the result, that in place of being liable in damages for failure to fulfil it, the bankrupt may get a profit solely in consequence of his being a defaulter. This the defender maintains is nothing else than a premium on insolvency. But the rule is not illegal; although it alters the incidence it does not change the character of the contract, and it appears to me that the mere fact of its being adopted as a rule of this association is in itself sufficient to prevent the Court refusing to give effect to it as unreasonable. The association does not consist of brokers. It includes generally buyers and sellers of sugar who choose to become members. Now if these parties—many of them are persons of great experience in this trade—have adopted and acted on this rule as beneficial *inter se*, how can I say that it is unreasonable when applied to a person who buys sugar but is not a member of the association. As was said by Chief Justice Cockburn in the case of *Grinsell against Bernston*, L. R., 4 C. P. C. 48, ‘a usage founded on the general convenience of all parties cannot be said to be unreasonable.’

“The defender founded very strongly on the case of *Duncan v. Hill*, L. R., 8 Ex. 242. . . . Had the pursuers acted as brokers on behalf of the defender in the transaction in question, this decision would have been very much in point, but both parties having expressly acted as principals, the *ratio decidendi* does not apply. Besides, if the clause in question applies to this contract, the defender agreed to pay the pursuers any difference that might arise from the closing of the accounts even by the pursuers' defeasance. . . .”

¹ Howden & Co. v. Dobie & Co., March 16, 1882, 9 R. 758.

² Duncan v. Hill, 1873, L. R., 8 Exch. 242.

Beetroot Sugar Association, entered into a contract with the defender, who is not a member of that Association. This contract provided that the rules, regulations, and bye-laws of the Association should be incorporated in the contract as if the same had been expressly inserted therein, and that the Council of the Association was to be the referee of all disputes. The defender therefore entered into this contract on the footing that the rules of the Association applied to the contract; he accepted the rules as applying to him as if he had been a member of the Association. It is quite plain on the face of the rules that they contemplated that persons who were non-members of the Association might enter into a contract under which they were to be bound by and have the benefits of the rules.

It is contended that the rules, although incorporated in the contract, only apply to the defender where there is an express reference to non-members in the rules themselves. I cannot accept that argument. If such a qualification was intended it could easily have been expressed in the contract. But what the contract does is to import the whole rules as binding on both parties.

Besides, it is expressly provided that the Council of the Association is to be the referee in all disputes. The matter has been considered and decided by them; I see no ground for interfering with their judgment.

LORD YOUNG.—I am of the same opinion. The introductory words of contract are "subject always to the printed rules, regulations, and bye-laws" of the Association, and the contract ends with a provision that these rules are incorporated into it. There is no dispute as to the identity of these rules or bye-laws. The contract further provides that the Council of the Association is to be the referee in all disputes. A dispute arose between the parties to the contract as to the effect of this reference to the rules. What was the consequence of that? The dispute was referred to the Council as referee. The Council decided that the rules applied. I agree that their decision is final. I also agree that the view which the Council took is right. The case is as clear as if this was a contract between dealers in stocks made subject to the rules of the Stock Exchange. In such a case the rules of the Stock Exchange would be imported into the contract, and if the contract further provided that all disputes under it were to be referred to A B, it is plain that if any difference arose under the contract, A B would be the proper person to decide it.

On the whole matter I am of opinion that the judgment of the Sheriff is right.

LORD MONCREIFF.—I am of the same opinion. It is probably sufficient for the decision of the case that in terms of the contract the Council of the Association is made the referee of all disputes, and that the Council has already decided on the matter under discussion.

On the merits I am of opinion that the decision of the Council was sound. I think the defender clearly brought himself under the rules of the Beetroot Association. It is admitted that if the contract had been between members of the Association, rule 32 would undoubtedly have applied. It is provided that the rules of the Association may be applied to contracts between members and non-members, and this rule having been imported

No. 75. into the contract between the parties, it applies just as if they both had been members of the Association.

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LORD TRAYNER was absent.

THE COURT dismissed the appeal, and affirmed the interlocutor appealed against.

MORTON, SMART, & MACDONALD, W.S.—JAMES RUSSELL, S.S.C.—Agents.

No. 76. ASSETS COMPANY, LIMITED, Pursuers (Reclaimers and Respondents).—*D.-F. Asher—Sol.-Gen. Dickson—Salvesen.*

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JOHN LESLIE AND OTHERS (Shirres' Trustees), Defenders (Respondents [and Reclaimers]).—*Balfour—C. J. Guthrie—Cook.*

Assignment—Title to sue—Statute—Construction—"Assets"—Claims of damages—City of Glasgow Bank Liquidation Act, 1882 (45 and 46 Vict. cap. clii.).—In 1882 the Assets Company, Limited, under a private Act of Parliament, took over the outstanding assets of the City of Glasgow Bank, which had gone into liquidation in 1878. The Act proceeded on the narrative, *inter alia*, that "a large amount of the outstanding assets of the bank, though believed to be of increasing value, cannot at present be advantageously realised," and defined "assets" to mean "all lands and heritages, debts, bonds, mortgages, securities, moneys, effects, choses in action, claims and demands whatsoever, including claims for unpaid calls, and in general all property, real or personal, heritable or moveable, whether situate in the United Kingdom or elsewhere, belonging to or vested in the bank or the liquidators, or which the bank has power to acquire." The Act incorporated an agreement between the Assets Company and the liquidators of the bank, and appended to the agreement, and referred to therein, was a state of affairs of the bank, setting forth its assets and its liabilities as at 22d October 1881. In the specification of assets in this state of affairs, claims against contributories of the bank who had fraudulently settled with the liquidators were not expressly mentioned.

In 1896 the Assets Company brought an action against the trustees of a contributory who had, in 1879, been discharged of his liabilities to the bank upon a compromise with the liquidators, concluding for a reduction of the discharge, or for damages, on the ground that the contributory in transacting with the liquidators had fraudulently understated the amount of his property.

The defenders pleaded no title to sue, maintaining that upon a sound construction of the Act read in connection with the agreement and relative state of affairs, such claims had not been assigned to the company.

The Court *repelled* the plea of no title to sue.

Fraud—Reduction—Restitutio in integrum—Relevancy—General averments of fraud—Mora—Diligence for recovery of documents.—The City of Glasgow Bank went into liquidation in 1878, and in 1879 A, one of the contributories, settled with the liquidators, and was discharged of his liabilities to the bank, which amounted to £27,000, on payment of £11,250, that being the value of A's property as disclosed in a state submitted by him to the liquidators.

In 1896 the Assets Company, which had in 1882 taken over the assets of the bank, brought an action against A's testamentary trustees concluding for reduction of the discharge, or, alternatively, for damages. The pursuers averred that A had fraudulently concealed from the liquidators items belonging to him which the pursuers specifically mentioned and alleged to be of the value of £3282, and "in addition to the assets above specified, the said" A "concealed other assets belonging to him and money in his possession to the extent of at least £40,000." They further averred that, according to a declaration made by A before he arranged with the liquida-

tors, he was a man advanced in years, incapable of work, and with no expectations; and yet that he died leaving £43,000. No. 76.

The defenders—who admitted that A had died leaving the amount averred, and that certain of the specific items of property founded on by the pursuers stood in his name at the time of his discharge, and were not mentioned in his state of affairs—pleaded;—(1) that the reductive conclusion was incompetent, in respect that *restitutio in integrum* was impossible; (2) that the averments—at least the general averment—of fraudulent concealment were irrelevant for want of specification; and (3) *mora*. Jan. 28, 1897.
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The Court allowed (*aff. judgment of Lord Kyllachy*) a proof before answer, and thereafter granted (*rev. judgment of Lord Kyllachy*) a diligence entitling the pursuers to recover not merely documents relative to the specific investments alleged to have been concealed by A, but also documents for the purpose of prosecuting a general inquiry into the completeness of the disclosures made by A to the liquidators.

Appeal—Leave to appeal.—Leave to appeal against an interlocutor repelling a plea of no title to sue, and *quoad ultra* allowing a proof before answer, refused.

By the City of Glasgow (Liquidation) Act, 1882, and relative discharge by the liquidators of the bank, recorded 30th December 1882, the assets of the bank, as defined in the Act, were vested in the Assets Company, Limited, at that date.* 2^d DIVISION.
Ld. Kyllachy.

* The City of Glasgow (Liquidation) Act, 1882 (45 and 46 Vict. cap. clii.) proceeded on the preamble, *inter alia*, that “whereas a large amount of the outstanding assets of the bank though believed to be of increasing value, cannot at present be advantageously realised, and the committee of contributories, in order to enable the liquidation of the bank to be finally closed, so as to prevent accumulation of interest on the amount of claims unpaid, and the possibility of any further call on the remaining partners of the bank, and in order to preserve these assets for more advantageous realisation than could be effected in the ordinary course of liquidation, proposed to form and register under the Companies Acts, 1862 to 1880, a company to be called ‘the Assets Company, Limited’ (hereinafter referred to as the ‘company’), with a memorandum of association in the form set forth in the first schedule to this Act, with relative articles of association, to take over the assets subject to the conditions contained in the agreement set forth in the second schedule to this Act . . . And whereas many of the contributories and of the creditors of the bank are under legal disability to invest in or contribute to the shares of the company, or to accept or take debentures of the company, and it is desirable that power should be given to persons under such legal disability to acquire and hold the shares or the debentures of the company, and so not only to assist in expediting the conclusion of the liquidation, but to share in such benefit as may be derived from the ultimate realisation of the assets. . . .”

The Act enacted, *inter alia*, as follows:—Sec. 1. “In this Act . . . ‘the assets’ shall mean all lands and heritages, debts, bonds, mortgages, securities, moneys, effects, choses in action, claims and demands whatsoever, including claims for unpaid calls, and in general all property, real or personal, heritable or moveable, whether situate in the United Kingdom or elsewhere, belonging to or vested in the bank or the liquidators, or which the bank has power to acquire, or which are or is held in trust for or to be realised solely for account of the bank at the date of the vesting hereinafter mentioned, but shall not comprise the liability of any contributory to calls except such as have been made by the liquidators before the passing of this Act.”

Sec. 2 confirmed the agreement referred to in the preamble, and set forth in the second schedule.

This agreement, on the narrative, *inter alia*, that “whereas, from the

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In May 1895 the Assets Company brought an action against the trustees of the late William Shirres, manufacturer in Aberdeen, who died on 1st January 1895, concluding for reduction of (1) an interlocutor of the First Division, dated 10th June 1879, sanctioning an arrangement for compromise between the liquidators of the bank and Mr Shirres; and (2) an agreement and discharge between him and the liquidators, dated 27th June and 1st July 1879; further concluding for an accounting by the defenders as to their intromission with his estates, and failing an accounting for payment to the pursuers of £28,498, 10s. 11d. as the balance of their intromission; and further concluding alternatively for payment of £28,498, 10s. 11d. as damages.

The pursuers averred (cond. 1) that Mr Shirres was a holder of £1200 of the capital stock of the City of Glasgow Bank when it

report (and relative appendices) for the year ending 22d October 1881, being the third year of the liquidation, issued by the liquidators to the contributories, it appears that the total assets of the bank as at that date amounted to £1,508,698, 12s. 1d., and the total liabilities to £1,338,116, 6s. 9d., as is more particularly shewn by the state of affairs appended to said report, a copy of which state is also appended hereto: And whereas the said liabilities are almost entirely long past due, and the amount thereof is increasing by reason of interest accruing upon some of them, and it is the duty of the liquidators to take measures for paying the same; but they are satisfied that if they were at present to force the realisation of some of the assets, such enforced realisation would not produce, by a considerable sum, the amount at which the said assets are entered in said state of affairs,"—provided, *inter alia*, as follows:—"First, In the event of the said company being formed and carried out, the second parties [the persons acting for the company] hereby undertake that it shall pay to the first parties [liquidators], on or before the 1st day of October 1882—first, a sum sufficient to enable them to pay and discharge the whole liabilities of the bank which shall previous to said date have been claimed for and admitted in the liquidation. . . . Second, In respect of said payments the first parties shall, if and when required, transfer, dispoise, convey, and make over to the said company, or to their nominees or assignees, the whole assets and property, of whatever nature and wheresoever situated, including all rights, claims, and privileges of every description to which the said City of Glasgow Bank, or anyone on their behalf, shall then have right; and the company shall thereafter be entitled to the income or annual produce which may be received or which may accrue upon the said assets and property. . . . Eighth, It is hereby agreed that the first issue of the capital of the said company shall be £500,000 sterling, and that in issuing the same the shares shall be offered thus—(1) to the solvent contributories of the bank; (2) to the surrendering contributories; and (3) to the public. . . . And it is also agreed that the first issue of debentures of the said company shall be in total amount £580,000 sterling, and that they shall be offered thus—(1) to the creditors of the bank; (2) to the solvent contributories; and (3) to the surrendering contributories, and thereafter to the public. . . ."

Appended to the agreement, and referred to therein, was a state of the affairs of the bank shewing liabilities amounting in all to £1,338,116, 6s. 9d.; and assets amounting in all to £1,508,698, 12s. 1d., under the heads (1) cash due by bankers and cash on hand; (2) bills current; (3) bonds, debentures, stocks, &c.; (4) estates of large debtors; (5) heritable properties in Scotland; (6) balances of credit accounts and overdrafts; (7) bills current at the stoppage of the bank considered good; (8) past-due bills; (9) New Zealand and Australian Land Company's stock; (10) amount estimated as recoverable from contributories,—estimated surplus, £170,582, 5s. 4d.

went into liquidation on 22d October 1878, and he was placed upon the list of contributories as a holder of that stock, and thus became liable for calls amounting to £33,000. (Cond. 2) "The said William Shirres represented to the liquidators that he was unable to pay the said calls in full, and he emitted a solemn declaration," dated 15th April 1879, "under which he declared that his whole property and estate were truly and correctly disclosed in the answers which form part of said declaration. The property thus disclosed consisted of" (1) heritable property; (2) the surrender value of life policy; (3) shares of companies; (4) shares of ships; and (5) household furniture; the total net value, after deduction of preferable debts, being £11,210, 0s. 10d. That in reliance upon the said answers and relative declaration the agreement and discharge under reduction was executed, with the sanction of the Court, under which the said William Shirres was discharged of his liabilities on payment of £11,250 in addition to £6000 already paid.*

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* The agreement and discharge sought to be reduced proceeded on the narrative that Mr Shirres had made the declaration, that the liquidators had agreed to accept the payment to be made by him as a compromise of the claims against him, and that the Court had interposed authority to the agreement, and exonerated and discharged him from all calls made (so far as unpaid) and to be made; Mr Shirres on the other hand assigning to the liquidators "his whole interest in the capital stock of the said bank, and in particular, without prejudice to the foresaid generality, all claims competent to him on any eventual surplus of the assets of the said bank, or of the calls made or to be made by the liquidators of the said bank . . . and renouncing all right which he, as a partner or contributory of the said bank, or his heirs, executors, or successors, has, have, or may have to participate in any benefits arising out of the assets of the said bank, or in virtue of the aforesaid assignation, or in any way connected with the said bank."

Among the answers were the following:—"(4) What is your regular or average annual income; and from what sources is it derived? (Specify the particulars, if necessary, in the separate signed list or schedule marked B.) (Ans. 4) My annual income previous to the bank's failure was about £1200, derived from the property now surrendered by me, but that is now gone. Having retired from business some years ago, and being now deprived of all my capital, I am without the means of earning an income, and am thus ruined." "(6) Have you any expectation of funds or property of any kind coming to you by succession or otherwise? If so, state its nature and probable value. (Ans. 6) None." "(8) State any circumstances connected with yourself, or those dependent on you, which you may wish to be considered along with your application. (Ans. 8) I refer to what is stated above under answer 4. I was induced to become a director in Aberdeen, and to purchase stock of the City of Glasgow Bank, and was, like others, deceived to my ruin by those at the head office. I am now penniless at sixty-seven years of age, with a family of seven children, one of whom is in feeble health, and unable to support himself, and three are still at their education." "(9) What sum or other consideration do you offer for a discharge in full of all claims by the liquidators against you as a shareholder of the City of Glasgow Bank; and in what manner do you propose it shall be secured or paid? Or, in view of continuing liable as a partner, what sum do you offer to pay to account; and in what manner and at what terms do you propose that it shall be secured or paid? (Ans. 9) Many of my shares of companies and ships are at present unrealisable, excepting at a great sacrifice, especially as my local stocks are also held largely by other Aberdeen shareholders of the bank, who have now to surrender. Most of the friends who might have helped me are involved with the bank, but if the

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The pursuers further averred;—(Cond. 3) “The said declaration and relative answers did not contain a true, accurate, and complete statement of the said William Shirres’ affairs, means, and property. The said William Shirres did not disclose his whole assets, but, on the contrary, he fraudulently concealed several important assets belonging to him. In particular, at the date of the said declaration he held the following estate and effects, or the proceeds thereof, which were so concealed by him, viz.”—(1) A dwelling-house in Bon Accord Square, Aberdeen, value £1300; (2) two bonds and dispositions in security, dated in 1863 and 1864, and for £450 and £350 respectively; (3) shares in six companies specified of a value of £1182, of which shares amounting to £895 were in four companies mentioned in the list given up by the deceased with his declaration, and the remaining £287 were in companies not included in that list. “In addition to the assets above specified, the said William Shirres concealed other assets belonging to him and money in his possession to the extent of at least £40,000. The said William Shirres was well aware of the existence of the foresaid assets at the time when he emitted the said declaration and made the foresaid settlement with the liquidators. Explained that the property in Bon Accord Square, Aberdeen, remained vested in the said William Shirres till 19th October 1878, and that he did not account for or hand over to the liquidators either (1) the said property or the proceeds thereof, or (2) the sum contained in the said bond for £350. *Quoad ultra* the statements in answer, so far as inconsistent herewith, are denied.”

The defenders answered:—(Ans. 3) “The declaration and relative answers are referred to. Denied that the deceased fraudulently concealed any part of his estate. With reference to the particular items condescended on, the pursuers having raised no question until after the death of the said William Shirres, it is impossible for the defenders to give complete and detailed explanations, but they have ascertained the following facts”:—(1) The house in Aberdeen was sold in June 1878, before the liquidation, and the price was dealt with as part of Mr Shirres’ estate in the ordinary way. (2) The bond for £450 represented a loan to a relative. “At the date of the said declaration and answers the bond had been in existence for a period of sixteen years, and the deceased had never received any interest upon it. It is believed that in these circumstances this item had either escaped the deceased’s recollection, or was considered by him of no value, or that he had previous to that date resolved not to enforce the obligation.” The amount of the bond for £350 was paid to the deceased on 25th March 1879, before the date of the declaration and answers, and thus formed part of his general estate. (3) The defenders

sum of £11,000 were accepted by the liquidators, I am hopeful that I should get friends to help me by advancing that sum, payable at one, four, and six months. They would do so in the expectation that if an improvement in the prices of my stocks shall occur, there will be a small balance for me, but looking to the probability of local stocks still falling, my friends are unwilling to undertake the risk of lending me the money on the shares at higher prices than those stated in my schedule.”

The declaration was a declaration to the effect that the answers “are true and correct answers to the printed queries prefixed thereto, to the best of my knowledge and belief; and I make this solemn declaration conscientiously believing the same to be true.”

admitted that, with the exception of 50 shares in one company valued at £387 (which the defenders averred neither belonged to the deceased nor stood in his name) the shares specified by the pursuers stood in his name at the date of the declaration and were not included in his state of affairs, but the defenders averred that they believed that all the shares specified by the pursuers were held by the deceased in trust for other persons. No. 76.
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The pursuers further averred ;—(Cond. 4) “ At the date of the said discharge Mr Shirres was a man of advanced years. In his said answers he stated that having retired from business some years before, and being deprived of his capital, he was without the means of earning income, and was thus ruined. The pursuers believe and aver that he did not save any money out of the earnings subsequent to the date of the discharge, and no means accrued to him by succession, gift, or otherwise. Nevertheless, at the date of his death on 1st January 1895, he was possessed of free assets (including the house 32 Bon Accord Terrace, Aberdeen) amounting to at least £43,000. He also left other heritable estate of considerable value, but the pursuers are not in a position to give specific details thereof. The statements in answer, so far as inconsistent herewith, are denied.”

The defenders answered :—(Ans. 4) “ The said answers are referred to. The deceased's age at the date of his discharge was sixty-seven. Admitted that deceased left estate amounting in value to about £43,000, including heritable property. *Quoad ultra* denied.” The defenders then proceeded to explain in detail that in consequence of exceptionally profitable transactions in relation to the property mentioned in his state of affairs, and particularly his shipping property, he had come to be possessed of £43,000 at his death.

The pursuers then averred ;—(Cond. 5) “ Neither the liquidators nor the pursuers became aware or had any means of informing themselves that the said William Shirres had concealed means and estate as aforesaid, until shortly after his death. The pursuers then became aware of the fact that he had left estate of the value of upwards of £40,000. This led to inquiries being made, and these inquiries resulted in the present action being instituted within a few days of the pursuers becoming aware of the fact that estate of great value had been concealed.”

The pursuers further averred ;—(Cond. 7) “ The pursuers are now in right of the whole assets of the City of Glasgow Bank, under and in virtue of the City of Glasgow Bank (Liquidation) Act, 1882, and relative discharge by the liquidators thereof in their favour, dated 12th October, and registered in the Books of Council and Session 30th December 1882, which are herewith produced and referred to. With reference to the statement in answer, it is denied that the pursuers are unable to put the defenders in the position in which Mr Shirres was at the date of the discharge. *Quoad ultra* reference is made to the discharge for its terms. In the event of its being held that the pursuers are bound to give *restitutio in integrum*, they are ready and willing and hereby offer to do so. Explained that Mr Shirres, as a contributory of the bank, was liable along with the other contributories to make good a deficiency of assets as compared with liabilities to the extent of nearly £6,000,000 sterling. The capital stock in the bank which he held was thus not merely of no value, but involved the foresaid large liability of the holder to contribute towards payment of the bank's debts. Mr Shirres purchased all his shares in

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the open market prior to 1873. Explained that even if Mr Shirres had paid up his calls in full, he would not have participated in any profits made by the pursuers' company, unless he had taken shares in same, and had paid up the full amount of the calls on said shares. Any benefit to be derived from holding said shares Mr Shirres could have obtained, if he had desired, either by obtaining an allotment of shares when the Company was formed, or by purchasing shares in the open market, which he could easily have done at or a little over par for a considerable time after its formation. The defenders may still, if they choose, participate in the future profits of the pursuers' company by purchasing shares therein."

The defenders answered ;—(Ans. 7) "The said Act and relative discharge are referred to. It is denied that the said Act gave the pursuers any right to sue the present action. The liquidation of the said bank came to an end, and the bank was dissolved on 14th March 1883. It is impossible for the pursuers to put the defenders in the position in which Mr Shirres was at the date of the discharge to him."

The pursuers pleaded, *inter alia* ;—(4) *Separatim*, the said William Shirres having fraudulently concealed estate and effects belonging to him, and having thereby induced the liquidators of said bank to enter into the agreement and discharge libelled, and to obtain the sanction of the Court thereto, the pursuers, as now in right of the said liquidators, are entitled to decree of reduction as concluded for. (7) In any event, the pursuers having suffered loss and damage through the fraudulent misrepresentations and concealment of the said William Shirres to the amount of the sum concluded for in the alternative conclusion of the summons, decree should be pronounced in terms thereof.

The defenders pleaded, *inter alia* ;—(1) No title to sue. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) The pursuers not offering, and it being impossible for them to give, *restitutio in integrum*, the defenders are entitled to be assoilzied from the reductive and accounting conclusions of the summons. (5) The pursuers not having relevantly averred, and not having in fact suffered, any damage by the acts of the defenders' author, the defenders should be assoilzied. (10) *Mora*.

On 10th January 1896 the Lord Ordinary (Kyllachy) pronounced this interlocutor :—"Before answer, allows the parties a proof of their averments, and the pursuers a conjunct probation."

The pursuers thereafter lodged the undernoted specification of documents, for the recovery of which they craved a diligence.*

* "1. The whole books of the said William Shirres, and all balance-sheets, memoranda, jottings, or other writings found in his repositories, that excerpts may be taken therefrom (1) of all entries relating to his affairs from 1st January 1878 to 1st June 1880 ; and (2) of all entries relating to the matters mentioned in the averments in articles 3 and 4 of the condescendence, and in the answers to said articles, between 1st January 1878 and 1st January 1895.

"2. The certificate or certificates of all stock, shares, or debentures of the public companies mentioned in condescendence 3, and the following, viz"—(Then followed the names of eighteen companies, none of which were mentioned on record)—"in name of the said James Shirres as an individual, or for behoof of others, together with all transfers by or to the said William

On 18th November 1896 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Having heard counsel on the specification as amended for the pursuers, No. 28 of process, and considered the same, finds that the pursuers are only entitled to recover documents relative to the specific investments said to have been concealed by the deceased, and are not entitled to recover documents for the purpose of prosecuting a general inquiry as to the completeness otherwise of the disclosures made in the deceased's declaration; therefore refuses diligence in terms of the said specification, reserving to the pursuers to move for diligence in terms of a restricted specification if so advised: Further, on the motion of the pursuers, the defenders not objecting, grants leave to reclaim."

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Shirres of the said stock, shares, or debentures, and warrants for payment of dividends thereon between 1st January 1878 and 1st January 1895.

"3. The certificates, bills of sale, and mortgages of ships, or shares of ships, and generally of all books or documents shewing or tending to shew (1) the extent of the said William Shirres' rights or interests in the ships named in the answer to condescendence 4; and (2) the dividends or other payments received by him in respect of his said interest between the last mentioned dates.

"4. The books of the said public companies, and of the companies or individuals who were owners, or part owners, or agents of said ships, or any of them, that excerpts may be taken therefrom of all entries relating to said stock, shares, debentures, rights or interests, and dividends, or other payments thereon between the last mentioned dates.

"5. The books of (a) the Bank of Scotland, (b) the Royal Bank of Scotland, (c) the British Linen Company, (d) the Commercial Bank of Scotland, Limited, (e) the Union Bank of Scotland, Limited, (f) the Caledonian Banking Company, Limited, (g) the Clydesdale Bank, Limited, and (h) the National Bank, Limited, 13 Old Broad Street, London, including those kept at the several branches of said banks, that copies may be taken therefrom of the accounts between the said banks, or any of them, and the said William Shirres, together with all deposit-receipts, cheques, counterfoils of cheques, bank drafts or letters of credit drawn by or in favour of the said William Shirres between 1st January 1878 and 1st June 1880.

"6. The title-deeds of all properties belonging to the said William Shirres between 1st January 1878 and 1st June 1880, including Dungeath, 5 Rubislaw Place, Bon Accord Crescent, Bon Accord Square, with all heritable or other bonds, or obligations, or securities granted in his favour, including the two bonds specified in condescendence 3, and discharges thereof.

"7. All letters, accounts, memoranda, I O U's, cheques, counterfoils of cheques, bank drafts, or other documents shewing, or tending to shew, what sums of money were lent or remitted by the said William Shirres (1) to Charles Shirres, his son, (2) David Shirres, his son, or any of his other sons, or by any of the said sons to him, between the last mentioned dates, and the books of the said William Shirres, that excerpts may be taken therefrom of all entries relating to said sums of money, all between the last mentioned dates.

"8. All inventories or other documents shewing, or tending to shew, what books, documents, and writings were in the deceased's repositories.

"9. The books of (1) the said Charles Shirres, (2) David Shirres, (3) Charles Walker, and (4) John Muill, mentioned on record, that excerpts may be taken therefrom of all entries, letters, or other writings relating to money passing between them, or any of them, and the said William Shirres, together with all letters passing between or among them in relation thereto, all between said last mentioned dates."

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The pursuers reclaimed, and the defenders took advantage of this reclaiming note to lodge a reclaiming note against the interlocutor of 10th January, allowing a proof.

Argued for the defenders;—(1) The pursuers had no title to sue. Their only title was their Act, and if their Act did not give them a title, it was irrelevant to inquire in whom, if in anybody, the title to bring such an action as the present lay. Now, the definition clause (section 1) of the Act might, *per se*, be wide enough to carry claims against contributories who had obtained a settlement fraudulently, but that clause was controlled and limited by the agreement which was incorporated in the Act, and the agreement in turn incorporated the state of affairs appended to it. It was clear from the preamble of the Act, and from the agreement, that the main purpose of the Act was to enable the outstanding assets of the bank to be realised more advantageously than they could be in a liquidation, which demanded expedition. But that *ratio* had no application to such actions as the present; on the contrary, delay in bringing such actions gave rise, as here, to the plea of *mora*. Hence in the specific enumeration of the assets transferred to the pursuers, contained in the state of affairs of the bank, claims against surrendering contributories on the ground of fraud were not mentioned, and consequently were not transferred to the pursuers. Head 10 of that state of affairs ("amount estimated as recoverable from contributories") meant arrears due by existing contributories, not claims against contributories who had surrendered. In the previous cases the title of the pursuers was either assumed or the question was not necessary for the judgment.¹ (2) The action *quoad* the reductive conclusions was incompetent, because *restitutio in integrum* was now impossible.² The pursuers could not restore Mr Shirres or his representatives to the position of a non-surrendering contributory of the bank. It was no answer to this objection to say, as the pursuers did on record, that the defenders might buy shares in the pursuers' company in the open market. (3) The averments were irrelevant. The action was based on fraudulent misrepresentation and concealment, which required very distinct specification. Tried by that test, the general averment that the deceased had concealed assets to the extent of at least £40,000 was plainly irrelevant. Of the items specifically mentioned by the pursuers, the house in Aberdeen and the bond for £350 had, as the pursuers admitted, ceased to belong to the deceased as a matter of title at the date of his declaration, and he must be assumed to have accounted for the price of the house and for the sum in the bond when he paid the liquidators the £6000 or the £11,250. Of the shares specifically averred by the pursuers, £895 worth were in companies mentioned in the state of affairs given up by the deceased to the liquidators, and the notion of fraudulent under-statement of the amount of a holding was on the face of it absurd. The deceased must have been well aware that the liquidators would search the books of the companies which he mentioned, and when they found

¹ Liquidators of the City of Glasgow Bank v. Assets Co., Limited, Feb. 27, 1883, 10 R. 676; Blair v. Assets Co., Limited, May 15, 1896, 23 R. (H. L.) 36.

² Western Bank of Scotland v. Addie, May 20, 1867, 5 Macph. (H. L.) 80, 39 Scot. Jur. 437; Erlanger v. New Sombrero Phosphate Co., 1878, L. R., 3 App. Cas. 1218; Adam v. Newbigging, 1888, L. R., 13 App. Cas. 308.

that his holding was larger than that stated by him, it could not be doubted that they satisfied themselves before accepting the surrender that the excess was not really the property of the deceased. There remained therefore only the bond for £450, and shares in companies not mentioned in the deceased's state of affairs of the value of £287; and it was out of the question to base a case of fraudulent concealment on the omission of these items alone. Lastly, there was the averment, or inference, in cond. 4. But as the basis of an action upon fraud, it was absurd to say that because a man died in 1895 worth £43,000 he was therefore guilty of fraud in 1879 when he arranged with the liquidators, or even that the circumstances raised such a presumption of fraud as to throw upon his executors the *onus* of shewing how he made his money. (4) At all events, the pursuers were barred by *mora*.¹ Had they brought their action in the lifetime of Mr Shirres his evidence would have been available, and he could have explained transactions regarding which there might be no books or other memoranda left. The theory of the pursuers seemed to be that surrendering contributories must either remain in poverty during the remainder of their lives or else that they were bound to keep full and accurate records of all their transactions with their property, otherwise they would be branded with the stigma of fraud after their death. To allow an action to proceed upon averments like those here, after the death of the person chiefly interested, would be contrary to the established rules of pleading. (5) Upon the question of the diligence, the Lord Ordinary's interlocutor was well founded, and ought to be affirmed. To certain parts of the specification the defenders could state no legitimate objection, assuming the relevancy of the action, but in so far as it was intended to support the pursuers' general averments of fraud, the diligence craved was nothing else than a fishing diligence of the most glaring description.

The pursuers were called upon to argue only the question of relevancy, and as to the diligence; and argued accordingly;—(1) The specific averments were in themselves clearly relevant. Then as to the general averments, the deceased, according to his answers in 1879, was an old man, incapable of earning anything and without expectations, yet he died in 1895 worth £43,000. That, taken in conjunction with the specific omissions, raised such a presumption as to entitle the pursuers to a general inquiry upon general averments. (2) If, then, the general averments were relevant, the pursuers' right to a diligence in terms of their specification followed as a matter of course. It was only by the aid of such a diligence that they could establish their general averments.

LORD JUSTICE-CLERK.—We had an argument stated to us on the first plea in law for the defenders that there was no title to sue. We did not call for a reply to that. It appears very clearly, I think, on the agreement and the Act of Parliament which followed upon it, that the assets of the bank, as regards any claim which the liquidators might have against any person who was a contributory to the liquidation, passed to the Assets Company, and that they could make it good. Now, that the liquidators in the liquidation would have a title to reduce a compromise made between them

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¹ Cook v. North British Railway, March 1, 1872, 10 Macph. 513, 44 Scot. Jur. 342.

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and a contributory, on the ground of fraudulent misrepresentation and concealment, seems to me to be clear. And I have no doubt that the Assets Company being in their shoes would have the same right, and therefore I think the first plea in law for the defenders is properly repelled.

In regard to the relevancy of the action, I think it relevant; but we are not in the position at present of disposing of that matter finally at all, because we are only dealing with an interlocutor in which the Lord Ordinary has before answer allowed a proof. I do not think the judgment on this point ought to be interfered with.

The only remaining question is the question about this diligence. A great deal of what Mr Balfour has said, and which was also said by Mr Guthrie, is very forcible in the ordinary case, but this case is certainly peculiar in many respects, and in material respects. The case is, as stated in the record, that the late Mr Shirres gave up a statement to the liquidators of all he was worth, and represented that if he gave up the whole of that he became a penniless man at sixty-seven years of age, and out of business, and that they ought to compromise with him on the footing of that being all that he possessed, and that the company discovered on his death that in the inventory of his estate given up is certain property which was in his possession at the date of his statement, and which was not disclosed at the time of the compromise which was made with the liquidators, and the pursuers say that they are therefore entitled to recover proof of their averments from his repositories and from his books, if such exist. Of that I think there is no doubt whatever. The other articles of the specification are for the purpose of clearing up matters in regard to this property, which he is alleged to have possessed at the time of the compromise. I think that is a specification which in the special circumstances of this case ought to be allowed.

LORD YOUNG.—I do not mean to decide anything more in this case, neither do I think it at all necessary to decide anything more, than that upon the record before us we cannot dismiss this action, but must allow an inquiry, and I do not see how it can in the legitimate interests of both parties be more safely allowed than the Lord Ordinary has done, as in allowing a proof at large before answer. I think there must be an inquiry, and that that is the most legitimate and reasonably safe mode of making the inquiry.

As to the diligence, I think the pursuers are entitled to the diligence which they ask in the circumstances of the case, but I repeat that everything is quite open except that the action is competent at the instance of a party having a title to sue, and that there must be an inquiry; all the observations which were made by Mr Guthrie upon what is necessary to be established in order to warrant the reduction of such a deed as that which was executed in 1879, is quite open to contention between the parties upon the ascertained facts.

LORD TRAYNER.—I agree. There are two reclaiming notes before us, the first for the representatives of Mr Shirres, under which it was maintained that this action ought now to be dismissed and the proof which the Lord Ordinary has allowed refused. That was maintained chiefly on the ground that the pursuers have no title to sue the action at all. That is a prejudicial plea, which if sustained would exclude all inquiry. I do not know if it was argued before the Lord Ordinary, but he takes no notice of

it. On that point I agree with your Lordships that there is a title in the pursuers, and that the defenders' plea should be repelled and the Lord Ordinary's interlocutor allowing a proof adhered to. In doing this nothing more is determined than that the case which the Assets Company have competently brought is one in which inquiry should be held, and that the proper form of that inquiry is as the Lord Ordinary has allowed it, proof before answer. That leaves open every possible argument, either as to competency of proof when tendered or sufficiency of proof when concluded.

The second reclaiming note is for the pursuers, against the Lord Ordinary's interlocutor refusing the diligence asked by them. I agree with your Lordships that this diligence is of a very sweeping kind, but in the peculiar circumstances of this case I think it is only justice to the pursuers, and only justice to the defenders, that the fullest inquiry should be made into the facts on which the action is based. Such inquiry cannot be made unless the pursuers are granted a diligence such as they propose. I think the pursuers are entitled to the diligence they have sought, and therefore that the Lord Ordinary's interlocutor refusing it should be recalled.

LORD MONCREIFF.—I agree to the course which your Lordships propose to take, on the understanding that everything is open except the questions of title and competency.

THE COURT, on 8th January 1897, pronounced the following interlocutors :—" Having heard counsel for the parties on the reclaiming note for the defenders against the interlocutor of Lord Kyllachy, dated 10th January 1896, refuse the reclaiming note, adhere to the interlocutor reclaimed against, and repel the first plea in law for the defenders, and remit to the said Lord Ordinary to proceed in the cause as accords."

" Having heard counsel for the parties on the reclaiming note for the pursuers against the interlocutor of Lord Kyllachy dated 18th November 1896 . . . find that the pursuers are entitled to a diligence in terms of their specification No. 28 of process : Therefore grant diligence in terms thereof."

On 26th January 1897 the defenders moved for leave to appeal to the House of Lords, arguing that it was proper to have the question of title to sue settled finally before any further procedure should take place in the case, as in the event of the defenders' plea to title being sustained further procedure would be unnecessary.

On 28th January the Court refused leave to appeal.

J. SMITH CLARK, S.S.C.—**ALEX. MORISON, S.S.C.**—**Agents.**

MRS SARAH MULHOLLAND OR WARWICK, Pursuer (Appellant).—*Jameson—Cullen.*

No. 77.

CALEDONIAN RAILWAY COMPANY, Defenders (Respondents).—*Balfour—Nicolson.*

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Warwick v.
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Railway Co.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Defenders (Respondents).—*C. J. Guthrie.*

Reparation—Negligence—Liability of railway company for injury caused by defect in one of their waggons while used by another company—Relevancy.

No. 77. —In an action by a widow against the Glasgow and South-Western Railway Company and the Caledonian Railway Company to make them liable jointly and severally, or otherwise severally, in damages for the death of her husband, a carter in the employment of the Glasgow and South-Western Railway Company, the pursuer made these averments:—That the Glasgow and South-Western Railway Company had a contract, of the exact terms of which the pursuer was ignorant, with the Gas Commissioners at Dumfries for the haulage of coal arriving for the latter by the lines of either of these railway companies from the goods yard of the Glasgow and South-Western Railway by a private line to the premises of the Commissioners; that the deceased while in charge of a waggon in the operation of haulage was killed owing to defect in the brake of his waggon and a defect in the brake of a waggon in charge of another man behind him; that it was the custom of the Caledonian Railway Company “for convenience” in loading and unloading the coal to permit their own waggons to be taken beyond their own lines on to the lines of other railway companies or of consignees of coal without any express contract or charge being made in respect of such use of the waggons; that it was “for the advantage of the railway companies to give this accommodation”; that as regarded coal carried for the Commissioners by the Caledonian Railway Company, it was the regular practice to give the use of their waggons which had brought the coal to Dumfries for the conveyance of it to the gas-works, the haulage being performed by the Glasgow and South-Western Railway under their contract with the Gas Commissioners; that in pursuance of this practice the Caledonian Railway Company had given the use of the waggons in question. “It was accordingly their duty to take care that the waggons were in proper condition, and in particular that the brakes thereof were in good working order, but they had negligently failed to perform their duty.”

The Caledonian Railway Company pleaded that in respect the waggons were not in their possession nor under their control when the accident happened, the action, in so far as directed against them, was irrelevant.

Held (diss. Lord Trayner) that the case could not be decided without an inquiry into the terms, conditions, and circumstances in which the coals were being carried when the accident happened, and issue *adjusted* against both defenders.

Expenses—Expense of debate on relevancy at adjustment of issues.—Where, at the adjustment of issues in an appeal from the Sheriff Court for jury trial, the defender objected to the relevancy of the action, and the Court repelled the objection, *held* that the pursuer was entitled to the expenses of the discussion.

2D DIVISION.
Sheriff of
Dumfries and
Galloway.

In July 1896 Mrs Sarah Mulholland or Warwick, widow of Andrew Warwick, carter, Dumfries, raised an action of damages for the death of her husband, in the Sheriff Court at Dumfries, against the Glasgow and South-Western Railway Company and the Caledonian Railway Company, in which she prayed the Court to grant a decree ordaining the defenders, jointly and severally, or otherwise severally, to pay to the pursuer the sum of £500 in name of damages, or otherwise, in the event of its being found that the pursuer has a claim only under the Employers Liability Act, 1880, to grant a decree against the defenders the Glasgow and South-Western Railway Company for payment of £140, 8s.

The pursuer averred that on 22d October 1895 her husband, who was in the employment of the defenders the Glasgow and South-Western Railway Company at Dumfries, was ordered by the foreman of the goods yard of that railway company, whose orders he was bound to obey, to assist in the haulage of certain waggons of coal from the goods yard of the railway company to the premises of the

Dumfries Gas Commissioners. (Cond. 4) "The said Dumfries Gas Commissioners, whose premises are situated about 400 yards distant from the said goods yard, and are connected therewith by a line of rails laid along a public street, have (or had at the time referred to) a contract with the defenders the said Glasgow and South-Western Railway Company for the haulage of coal consigned to them, and arriving at Dumfries either by the line of the defenders the said Glasgow and South-Western Railway Company or by the line of the defenders the said Caledonian Railway Company. The haulage under said contract is from the goods yard of the defenders the said Glasgow and South-Western Railway Company into the said Gas Commissioners' premises along the said line of rails, and the defenders the said Glasgow and South-Western Railway Company contract to perform this by means of their own horses and men. The precise terms of the contract are not known to the pursuer."

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The pursuer then averred;—On the 22d October there were four waggons of coal to be taken into the gas premises, and the deceased was put in charge of the first waggon.

The pursuer then set forth the way in which the accident happened, averring that it was caused by the brakes of the first and second waggons being defective;—(Cond. 13) "The said accident was caused by the negligence of the defenders. In the conduct of coal traffic it is the usual custom of the Caledonian Railway Company, and other railway companies, for convenience in the loading and unloading of coal, to send their waggons, or permit them to be taken, beyond their own lines on to the lines of other railway companies, and on to lyes or private lines or sidings belonging to consignors or consignees of coal, without any express contract or charge being made in respect of such use of the waggons. It is for the advantage of the railway companies to give this accommodation, as otherwise the trouble and expense of transhipping the coal from one waggon to another would be so great as to prejudice the trade of any railway company which refused it. In these circumstances, it is the duty, and is the practice, of the Caledonian Railway Company, and other railway companies, to take care that waggons, of which such use is given, are in proper working order, with a view to the safety of those who may have occasion to use and handle them in the loading, unloading, and delivery of the coal. As regards the coal conveyed by the defenders, the Caledonian Railway Company, for the Dumfries Gas Commissioners as consignees, it is, and for many years has been, the regular practice for the said defenders to give the use of the waggons belonging to them, in which coal has been carried from coal pits on their system of railway to Dumfries Station, for the conveyance of the coal from the station to the gas-works without necessity for any transhipment, the haulage being performed by the defenders the Glasgow and South-Western Railway Company under their contract before mentioned. And in pursuance of this practice, the defenders the Caledonian Railway Company gave the use of the foresaid two waggons, Nos. 34,547 and 59,394, on the occasion in question. It was accordingly their duty to take care that the said two waggons were in proper condition for use, and, in particular, that the brakes thereof were of proper construction and in good working order; but they negligently failed to perform this duty, the brakes of both waggons, and in particular of the [second] waggon in charge of Burns, having been unserviceable and out of proper repair. Explained that, with a view to handing over said

No. 77. waggons for such haulage, it is the practice, by arrangement between the two defenders, for coals coming by the Caledonian Company's line to be booked through for delivery, not at their own station, but at the station of the Glasgow and South-Western Company at Dumfries; and not merely at the station, but at the very point beside their gate at Leafield Road, where the haulage along the tramway is to commence. The greater number of waggons so hauled are Caledonian waggons, as most of the Gas Commissioners' coals come by their line." (Cond. 14) "It is the duty of the defenders the Glasgow and South-Western Railway Company before taking waggons belonging to the other defenders along the tramway line to the gas-works to inspect such waggons, and in particular to see that the brakes are in proper working order . . . The defenders were, however, at fault in having no such system of inspection, and on the occasion in question the said defenders did not inspect the foresaid two waggons, and took no steps to see whether the brakes thereof were in good working order. . . ."

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The pursuer pleaded, *inter alia*;—(3) The defenders the said Caledonian Railway Company, being the owners of the said insufficient and defective waggons, and having negligently allowed them to be used in their defective condition on the occasion in question, are liable to the pursuer in compensation for the loss sustained by her through said accident. (4) The defenders the said Glasgow and South-Western Railway Company, having adopted said waggons for their contract of haulage, and the same having formed part of their plant for the time being, with a corresponding duty of inspection thereof, are liable to the pursuer in compensation for the accident caused by the defective and insufficient condition of said waggons.

The defenders the Glasgow and South-Western Railway Company pleaded;—(2) The statements of the pursuer are irrelevant. (7) The said defenders not being owners of the waggons in question, and their contract in relation thereto being merely for haulage and not for carriage as common carriers, the waggons being the property of the Caledonian Railway Company, the Caledonian Company and the Gas Commissioners are responsible for their condition, and the South-Western Company are not liable for any accident occurring through any defect in them.

The defenders the Caledonian Railway Company pleaded;—(1) The averments of the pursuer are irrelevant. . . . (4) The waggons consigned on, not being in the possession or under the control of these defenders when the said accident occurred, they should be absolved. (5) The waggons consigned on having been in the possession and under the control of the other defenders, the Glasgow and South-Western Railway Company, when the accident occurred, they are alone responsible for the sufficiency of the said waggons, and these defenders should be absolved.

On 1st December 1876 the Sheriff-substitute (Campion) allowed a proof.

The pursuer appealed for jury trial to the Second Division of the Court of Session, and proposed a separate issue as applicable to each of the defenders.

Argued for the Caledonian Railway Company;—The action as directed against them was irrelevant, and no issue should be allowed. The waggons, doubtless, were their property, but no liability arose

merely *ex dominio*.¹ The work which was being done was not railway work, or work for which these defenders could be made responsible. On the averments, it was not a case of joint user on the defenders' respective lines, but a several user over each line. The obligations of the Caledonian Railway Company ceased when the waggons were brought to the station at Dumfries. No liability could attach to them because, as matter of convenience to the Glasgow and South-Western Railway Company, they had allowed them to pass on the waggons to the Gas Commissioners. *Heaven v. Pender*,² relied on by the pursuer, was inapplicable. In it the owner of the dock invited the public upon a warranty that all the dock's equipments were safe. Moreover, it was to be gathered from the opinions of Lord Justice Cotton and Lord Justice Bowen that the decision did not depend upon the reasoning of the Master of the Rolls.

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Argued for the pursuer;—The action was relevant against the Caledonian Railway Company. They knew that the waggons were to be used by the other defenders for their special purposes, and having supplied defective waggons in that knowledge, they were liable in the consequences.³ Both the companies were interested in seeing that the coal was conveyed to the gas-works, and there was a distinct averment that the Caledonian Railway Company benefited thereby, and agreed that their waggons should be used for the purpose. They were bound to see that they were in safe condition.⁴

At advising,—

LORD YOUNG.—This is an action of damages brought against the Glasgow and South-Western Railway Company and the Caledonian Railway Company claiming damages for a calamity which occurred in the course of hauling some waggons loaded with coal from the railway station at Dumfries to the gas-works, which were the destination of the coal. One of the grounds on which damages are sought—one of the faults alleged as the foundation of the claim of damages—is that the waggons were in a faulty condition, which made them unsafe to be used for the purpose of taking the coals from the station along the street tramway—I think said to be about 400 yards long—to the gas-works; that they were not provided with sufficient brakes necessary to prevent such danger as might arise in the course of the operation, and which did arise here, and was not prevented in consequence. So far as the Glasgow and South-Western Railway Company are concerned, there is no question; they admit the relevancy of the action, and the issue may be adjusted as with them. But the Caledonian Railway Company maintain that they are not responsible for the condition of the waggons; that they were not taking them along the street by the street tramways from the railway station to the gas-works; that they were in the hands of the Glasgow and South-Western Railway Company, and that that company must be liable for the condition of the waggons, and that if the waggons were in an unsafe state it was for the South-Western Company to see to it. The Glasgow and South-

¹ Campbell v. Kennedy, Nov. 26, 1864, 3 Macph. 121, per Lord Neaves, p. 125, 37 Scot. Jur. 62.

² Heaven v. Pender, 1883, L. R., 11 Q. B. D. 503.

³ Heaven v. Pender, 1883, L. R., 11 Q. B. D. 503, per Brett, M. R., 510.

⁴ Horn v. North British Railway Company, July 13, 1878, 5 R. 1055; Robinson v. John Watson & Co., Nov. 30, 1892, 20 R. 144.

No. 77. **Western Railway Company**, who do not object to the relevancy of the case, say that in point of fact they had nothing to do with the waggons except to supply horses and men to haul them from the railway station along the street to the gas-works ; that their contract was one of haulage only, and that they had only to put the horses into the waggons that were brought there to them, and haul them along the tramways to the gas-works, and that if there was any defect in the waggons it was the Caledonian Railway Company, to whom they belonged, that were to blame. Now, the Caledonian Railway Company say that they were not employed to furnish waggons to carry the coals from the station along the street to the gas-works, and that it was a matter, I think Mr Balfour put it, of favour on their part to allow the use of their waggons quite gratuitously for that purpose. Well, I am not prepared to decide anything about their liability without evidence such as will be adduced at the trial as to the contract or contracts upon which the coals were being taken from the station to the gas-works when the accident occurred. The pursuer says here very properly—the fact being so—that she is ignorant of the details of any contract in the matter, and all that she can affirm in point of fact is that the usage, the thing which was done daily, or at least constantly, was that the Caledonian Railway Company brought the coals along their line from Lanarkshire to Dumfries, supplying as far as the station there not only the line of railway, which was theirs, but also the waggons and the haulage, and after that the haulage was done by the Glasgow and South-Western Railway Company. The Glasgow and South-Western Company affirm that they had employment only to do the haulage—to furnish the horses and the men—and the pursuer says that the one or the other must be responsible to her for the condition in which the waggons were. I say I think we cannot decide upon the liability of the Caledonian Company or non-liability of the Caledonian Company without evidence as to the contract. *Prima facie* it seems improbable, to the extent of being absurd, to suppose that the Caledonian Company, from mere love and favour either to the coal owners or to the Glasgow and South-Western Company, or to the Gas Company in Dumfries, are to supply their waggons practically for nothing to carry coal along the 400 yards of tramway on the street, and to be brought back again. The coals cannot be carried to the gas-works without waggons as well as haulage, and mercantile companies and trading companies—and the Caledonian Railway Company and the Glasgow and South-Western Railway Company are just such, the one supplying the waggons and the other the haulage—will do nothing for love, favour, and affection for anybody, but will only act in the ordinary course of their business for a pecuniary consideration. Whether the payment to the Caledonian Company is made in their general charge for conveyance of coals or otherwise, or whether it is a mere consideration that on the whole it is profitable for them to furnish the waggons for this, they are paid for it, and it would be imputing something ridiculously weak to the managers of the company to say that they did this, not in the course of their business, and for their own advantage in the course of business, but as Mr Balfour put it, from love, favour, and affection for anybody in the world. But it is sufficient to say that I think we cannot decide the question which will really arise between the companies, one of whom is responsible for the state

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of the waggons, without an inquiry such as must take place in regard to the terms and conditions and circumstances in which the coals were being carried in these waggons when the accident happened. I am therefore of opinion that we must allow the case to go to trial at the pursuer's instance against both the defenders.

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LORD JUSTICE-CLERK.—I am of the same opinion.

LORD TRAYNER.—I am of opinion that no case has been averred by the pursuer relevant to infer liability on the part of the Caledonian Company for the damages claimed.

At the time the pursuer's husband was killed he was engaged in his ordinary employment as a servant of the other defenders, the Glasgow and South-Western Company, conveying coals from the Company's terminus to the premises of the Gas Company. The coals being so conveyed were in waggons belonging to the Caledonian Company, the same waggons in which they had brought the coals from the colliery to Dumfries. I assume that these waggons were defective, and that such defect occasioned or materially contributed to the death of the pursuer's husband. The waggons were not, however, at the time of the accident in the possession of or being used by their owners.

The connection of the Caledonian Company with the coals in question ceased when the coals reached the railway terminus at Dumfries. Their contract was to carry the coals to Dumfries—not to deliver them at the Gas Company's premises. This is obvious from the fact that the Glasgow and South-Western Company had a separate and independent contract for the conveyance of the coals from the terminus to the Gas Company's premises, which would not have existed had the Caledonian Company been bound to deliver them there. This, indeed, is not matter of inference; it is averred by the pursuer in cond. 13. Accordingly, it is clear that the pursuer's husband when he met with his death was acting as the servant of the Glasgow and South-Western Railway Company in the execution of their work,—work with which the Caledonian Company had no concern. But the work was being done with plant or appliances belonging to the Caledonian Company. How came they there? The pursuer explains this in cond. 13. For the convenience of the Glasgow and South-Western Railway Company, and to save transshipment of the coals, the Caledonian Company allowed their waggons, in which the coals had been brought from the colliery to Dumfries, to be taken beyond their own line and on to the lines of the Glasgow and South-Western Railway Company, and by the latter taken along the tramway through the public street to the Gas Company's premises. This use of the waggons was not given under any contract between the two railway companies—there was no obligation on the Caledonian Railway to give it—it was done, as the pursuer says, simply “for convenience.” It may be that it was ridiculous for them to do so, but we must take the facts to be as the pursuer states them. In these circumstances, how stands the matter of liability for the defective condition of the waggons, and the consequence of such defective condition? I have no doubt of the liability of the Glasgow and South-Western Railway Company. The work was theirs, the waggons were theirs, or under their sole control *pro tempore*, the servant

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who was injured was theirs, to whom they were under an obligation to provide safe and sufficient appliances for the work to be done. None of these things can be said of the Caledonian Company. All that can be said, and all that is said, against that company is, (1) that the waggons were their property, and (2) that they were defective. The first of these statements is irrelevant. No action of damages can arise *ex dominio*. The second appears to me to be just as irrelevant. The Caledonian Company were under no obligation to give waggons to the deceased or his employers. They had no duty whatever to fulfil towards the deceased or his employers in reference to the waggons. "For convenience" they lent their waggons to the other company, no "charge being made" for such loan. They did not guarantee or represent their waggons to be anything but what they actually were. "There are our waggons; use them if it is a convenience to you" was the only condition of the loan. Assuming the pursuer's statements, I do not question that the Glasgow and South-Western Railway Company were under obligation to see that the waggons they used under such a permission were fit for the use to which they put them. That was a duty which they owed to their own servants. But I think the Caledonian Company was not under such an obligation, and certainly not in any question like the present, arising out of a disaster resulting from the use of the waggon to one of the user's servants in course of their use. But it is averred that this lending of waggons was "the usual custom," and "the regular practice for many years." Take it so; the practice and custom had a beginning. If there was no obligation or duty on the part of the Caledonian Company to see that the waggons they lent were sufficient for the purpose to which somebody else was to put them at the beginning of the practice (as I think clearly there was not) the continuance of the practice would not create such an obligation. If one lends his carriage to another, and the borrower puts in his own horses, and has them driven by his own coachman on his own business or pleasure, and an accident follows through the breaking down of the carriage, I should have thought that the borrower of the carriage was liable, not the owner. The fact that this was done a dozen times would not alter the incidence of the liability. To sustain this action against the Caledonian Company is, however, to make the owner, not the borrower, of the carriage liable, and such a result is not, in my opinion, well founded or consistent with the rules of our law.

LORD YOUNG.—I wish to make an explanation. I did not state that it was ridiculous for the Caledonian Company for convenience to allow their waggons to be used for the business matter of carrying coals from the railway station to the gas-works. What I characterised as ridiculous was the statement that they did that gratuitously, and that remuneration for it was not included in their charges. I should like also to add that there is no suggestion of a loan by the Caledonian Railway Company to the Glasgow and South-Western Railway Company. The Glasgow and South-Western Railway Company repudiated the notion of any loan. They said they had no concern with supplying the waggons for carrying the coal; that they put their horses, guarded by their men, into the waggons which were brought there with the coal; that they had nothing to do with them, and were paid for

nothing but supplying the horses. They say so very distinctly. "The Glasgow and South-Western Company were engaged in merely performing the haulage of the waggons, which were not their own property, and the Gas Commissioners and the other defenders were solely responsible for the condition of the waggons, which were not lent to them." No. 77.
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LORD TRAYNER.—Allow me to say that my view is not changed. I think there is a distinct statement practically of loan, although the word loan may not be used. In looking at the relevancy of a record I should not consider it my duty to look at the statement of the defenders.

LORD MONCREIFF was absent.

Counsel for pursuer moved for the expenses of the discussion against the Caledonian Railway Company.

Counsel for the Caledonian Railway Company objected on the ground that the discussion took place on the adjustment of issues. He moved that the question of expenses be reserved.

LORD YOUNG.—It was a serious argument on relevancy and taken to avizandum. I think you are entitled to expenses. We should proceed by some rule. If we are to give expenses when the relevancy is disputed and we sustain the relevancy and adjust the issue, then this is a case for it. If we are, as a rule, to reserve the expenses, then this is a case for reserving them. I thought the rule was to give expenses when we rejected the argument against the relevancy.

LORD TRAYNER.—I think so.

LORD JUSTICE-CLERK.—It is a general practice.

THE COURT approved of the issues, and found the Caledonian Railway Company liable to the pursuer in the expenses of the discussion.

EMSLIE & GUTHRIE, S.S.C.—HOPE, TODD, & KIRK, W.S.—
JOHN C. BRODIE & SONS, W.S.—Agents.

ALLAN WILLIAM FREER AND OTHERS (John Freer's Trustees), No. 78.
First Parties.—*A. S. D. Thomson.*

MRS HARRIETTE M'EWEN OR FREER, Second Party.—*Sym.*

Succession—"Free liferent use of residue"—*Profits of law business*—*Income or Capital*.—A law-agent in his trust-settlement directed that his widow should "enjoy the free liferent use and enjoyment of the residue" of his estate. Under a contract of copartnership current at his death his trustees were entitled to receive from his surviving partner a share of the future profits of his business for several years. *Held* that the share of profits did not belong to the widow as income, but fell as capital into residue. Jan. 28, 1897.
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Strain's Trustees v. Strain, July 19, 1893, 20 R. 1025, distinguished.

JOHN FREER, solicitor, Melrose, died on 2d February 1893, leaving a trust-disposition and settlement dated 16th October 1891, with two codicils annexed, both dated 13th October 1892. By the trust-deed he disposed his whole means and estate, heritable and moveable, to trustees for the purposes therein mentioned, and directed them:—
"(Fourth) With regard to the residue and remainder of my whole

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By his first codicil the truster authorised his trustees "as they shall think best, either, first, to dispose of my business in Melrose at any time, or second, to make arrangements for carrying on the same until one or other of my sons, if they elect to follow out the profession, is ready to take it up for himself or in partnership; and in so carrying on said business I authorise my said trustees to allow any sum not exceeding £2500 to remain as capital in said business on such terms as they may arrange."

The truster had for many years carried on business as a solicitor and bank-agent in Melrose. Prior to the death of his father, which took place in 1881, he carried on business in partnership with his father under the firm name of Allan & John Freer. After the death of his father, and until a few weeks before his own death, he carried on the business for his own behoof, without any partner, under the same firm name, and he was doing so at the date of the execution of the trust-disposition and settlement and codicils.

Shortly before his death the truster assumed as a partner Mr Thomas Temple Muir, S.S.C., the business being thereafter carried on under the firm of Freer & Muir. By the contract of copartnership between Mr Freer and Mr Muir, dated 31st December 1892, and 2d January 1893, the copartnership was to endure to 31st December 1906, but with power to either party to put an end to it at 31st December 1899. The contract contained the following articles:—
(Eighth) "In the case of the death of the said John Freer during the currency of this contract, two-thirds of the future profits of the business shall thereafter belong to the said Thomas Temple Muir, and one-third thereof to the representatives of the said John Freer during the remaining period fixed for the endurance of the copartnership. . . .
(Ninth) In the event of the death of the said John Freer during the currency of this contract, his representatives shall be entitled to require the said Thomas Temple Muir at any time during its currency, or at the end of the period fixed for the endurance of the copartnership, to assume as a partner one of the said John Freer's sons, and that for a period of seven years after the date of the expiry of this contract, and to give to the son so assumed" a certain proportion of the profits, "and that on terms and conditions similar to those contained in this contract; and on such assumption taking place, the right and interest of the said John Freer's representatives in the profits of the said business shall thenceforth cease, or otherwise in lieu of such assumption it shall be in the option of the representatives of the said John Freer to require the said Thomas Temple Muir to pay to them the sum of [sum stated] per annum out of the profits of the said business for a period of five years after the date of the expiry of this contract." The powers referred to in the ninth article of the contract had not been exercised by Mr Freer's representatives at the date when this case was presented.

A question having arisen as to whether the share of the profits of the business to which Mr Freer's representatives were entitled

under the contract of copartnery ought in a question with the life-
 rentrix, Mrs Freer, to be treated as income, and so fall to her, or as
 capital of which she was merely to have the life-rent or annual in-
 come, this special case was presented to the Court by (1) Mr Freer's
 trustees, and (2) his widow.

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The first parties contended that the share of profits was of the nature of an annual payment out of profits by Mr Muir in respect of goodwill, and ought to be treated as capital, and that it was the intention of the truster that it should form part of the capital of his estate, in respect it was not a permanent, but merely a temporary source of income.

The second party contended, on the other hand, that it was her husband's intention that the whole annual income to be derived from his means was to belong to her, that the share of annual profits which fell to be paid "to the representatives of said John Freer," formed part of the income of his means, and was to be treated as income of which she was to have the "free life-rent use and enjoyment" (subject to the maintenance and education of her children) as provided in Mr Freer's settlement.

The question of law for the opinion of the Court was,—“Is the share of the profits to which Mr Freer's representatives are entitled to be treated as capital or income by his trustees?”

Argued for the first parties;—The power which the truster had given to his trustees by his codicil was entirely superseded by the contract of copartnery, and the goodwill had passed to the surviving partner. The trustees had a mere *jus crediti* in respect of the business, a right to call upon the surviving partner, to whom the goodwill had accrued, to pay one-third of the profits. These profits did not represent income accruing from residue in the hands of the trustees, nor were they the profits of a business belonging to and administered by the trustees. They were merely debt which the trustees under the copartnery contract had right to ingather as it accrued. Where profits arose from a going business which the trustees were carrying on, they were no doubt to be treated as income. But unless they were the produce of means and estate held and administered by the trustees, they could not be considered as the income of the capital held by them under the will. The second party was only entitled to the life-rent or annual income of the profits treated as capital.¹

Argued for the second party;—The terms of the codicil shewed that the truster intended that the capital of his estate should remain in the business, of which he was then sole partner, and be administered by the trustees until it should be seen if one of his sons should elect to take up the business. The reasonable view was, that whatever profits came in in the interval should go to his widow, to whom he had left the life-rent of the residue in his trust-settlement. This intention could not be defeated by the subsequent contract of copartnery, and must receive effect in the altered circumstances. It followed, then, that the profits of the business must be treated as income, of which the second party was to have the free life-rent use, as provided by the trust-settlement. There was no "goodwill" in a solicitor's business,² and the

¹ *Ferguson v. Ferguson's Trustees*, Feb. 23, 1877, 4 R. 532; *Campbell v. Wardlaw*, July 6, 1883, 10 R. (H. L.) 65.

² *Bain v. Munro, &c.*, Jan. 10, 1878, 5 R. 416.

No. 78. case of *Ferguson v. Ferguson*¹ had been disapproved in *Strain's Trustees v. Strain*,² which ruled this case.

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LORD ADAM.—The question submitted to us in this special case arises thus. Mr Freer, who was a law-agent and solicitor, left a trust-disposition by which he conveyed his estate to trustees, and after directing certain small payments, made the following provision as to the residue :—[His Lordship here quoted the terms of the fourth purpose of the trust, and proceeded.] He also left a codicil, dated 13th October 1892, at which time he was carrying on business alone. But before his death the position of matters changed, for in December of 1892 he entered into partnership with Mr Muir, with whom he executed a contract of copartnery. That contract is not fully set out, but we see from the 8th and 9th provisions that on the death of Mr Freer two-thirds of the future profits of the business were to belong to Mr Muir and one-third was to be paid to Mr Freer's representatives. His trustees were entitled to require Mr Muir to take into partnership one of Mr Freer's sons, and the duration of the contract was to be for fourteen years, with power to either party to break it at the end of seven.

The question before us is whether the one-third of the profits payable by Mr Muir to Mr Freer's trustees, which will be payable alternatively till the year 1899 or 1906, is capital or income.

My view is that these payments are part of the residue of the estate, and that accordingly Mrs Freer is only entitled to the enjoyment of the interest on them. So far as we have seen from the contract, Mr Muir became the sole partner on Mr Freer's death. The trustees are not partners, and are not entitled to interfere with the management of the business; and accordingly Mr Muir is entitled to uplift the whole profits, and only then does the claim of the trustees to one-third come in. It appears to me that that is only a debt due by Mr Muir to the trustees, which they can enforce against him every year, and that it is like any other debt, as if he had bound himself under a bond to make such payment to the trustees. It is part of the residue, and it follows that the provisions of the codicil apply to a state of affairs which has ceased to exist. There might have been a different question if the trustees had carried on the business in accordance with the terms of the codicil, and had allowed certain capital to remain in the business, and in that case the profits might have gone to Mrs Freer. But that consideration does not apply now, and accordingly the case must be determined in accordance with the terms of the settlement and of the obligations in the contract. Construing the two together, I come to the conclusion that the share of profits falls into the residue, and that Mrs Freer is only entitled to the income therefrom.

LORD M'LAREN.—The late Mr Freer made a will and codicil some years before his death, but within a month of that event he entered into a contract of copartnery which was to endure for fourteen years, with right to himself or his partner to terminate the contract at the end of seven years.

¹ *Ferguson v. Ferguson's Trustees*, 4 R. 532.

² *Strain's Trustees v. Strain*, July 19, 1893, 20 R. 1025.

The right of Mr Freer's representatives under the contract of copartnery is a right to receive a share of profits, and it is to last for seven years in any event, and possibly for fourteen years. Part of that time has expired, but we have to consider the case as at the testator's death. The right of the trustees at the present time is to receive one-third of the profits of the business carried on by the partner of the deceased Mr Freer, and the question is, whether this annual payment is to be made over to Mrs Freer as "liferent of residue," or whether it is to be considered residue, so that the lady shall only enjoy the annual return from this sum treated as capital or residue.

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Freer.

There have been, as counsel stated, decisions upon questions which are nearly related to this, but I think in common with Lord Adam that the questions are not identical.

A testator who wishes to give the income or interest of his estate to his widow or child may express his intention to do so in different ways. He may give a share of the income of the trust, or he may give a provision in the form of the liferent or annual return from the capital of the estate. At first sight it may seem that there is not much difference between these. But when one comes to deal with a terminable interest the distinction arises very sharply between the two forms of expression, because according to the latest decision, if the testator gives the income, it would include everything coming in within the year, whether of the nature of annual return or capital payment.

Of course there is no absolute rule, but according to *Strain's*¹ case the presumption seems to be that recurrent payments fall under income. But if the annual interest which is given to the widow or child is clearly marked as the return on the capital of the estate, I cannot see how such a provision could be construed so as to include capital sums coming to the trust in the shape of annual instalments.

We are not favoured with a complete copy of the contract of copartnery, and I have no doubt the parties were well advised that it was not necessary for the question which they desired to submit that the Court should have it. Without seeing the whole contract, I am unable to offer an opinion as to whether the payment which the trustees are now receiving is of the nature of goodwill or debt, or whether it is such a share of the profits as would make the trustees partners. I daresay it is not a very practical question, because a law-agent's business is usually not a hazardous one. But for the purposes of the present question it is not material to consider what is the true nature of the claim. We can at least predicate of the payment that it is one which will probably end in seven years, and that it is not derived from the investment of part of the capital of the trust-estate. It is a payment under contract, and I cannot see how an annual payment under contract can be treated as a liferent of residue. If that is so, it leads necessarily to a determination against Mrs Freer and in favour of the trustees.

The LORD PRESIDENT and LORD KINNAR concurred.

THE COURT gave an affirmative answer to the first alternative of the question of law.

ANDREW TOSH, S.S.C.—JAMES SKINNER, S.S.C.—Agents.

No. 79.

SAMUEL M'INULTY, Pursuer (Appellant).—*Baxter—Hunter.*GEORGE PRIMROSE, Defender (Respondent).—*Sym.*

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M'Inulty v.
Primrose.

Reparation—Master and Servant—Master's liability for plant—Employers Liability Act, 1880 (43 and 44 Vict. cap. 42), sec. 1, subsec. 1—Defect in "ways" and "works."—A labourer, employed by the contractor for the brickwork in an unfinished house, was injured by the breaking of a step while carrying a load of bricks up the stair of the house.

In an action of damages brought by the labourer against his employer, on the ground that the step was defective, and that the accident had been caused by the defender's negligence in not having the ways to be used by his workmen inspected, it was proved that the stair was the permanent stair of the house, and had been completed two days before the accident by the mason employed by the builder, and that there was nothing to lead the defender to suspect that the stair was defective.

Held that no negligence had been proved on the part of the defender, he being entitled to rely on the fact that the stair was constructed by a competent tradesman, and was the permanent stair of the house.

1ST DIVISION.
Sheriff of Ren-
frew and Bute.

In May 1896 Samuel M'Inulty, labourer, Paisley, raised an action of damages in the Sheriff Court at Paisley against George Primrose, brickbuilder and contractor there, at common law and under the Employers Liability Act, 1880.

The pursuer averred that he was on 11th March 1896 employed by the defender, who was contractor for the brickwork at the building of a tenement of dwelling-houses in Paisley, and that while he was carrying a hod full of bricks from the street to an upper storey, the bottom step of the staircase broke in the centre, causing him to fall to the ground, and that he sustained injuries.

He further averred that the accident was caused by a defect in the step, which arose from, and was not discovered and remedied owing to, the negligence of the defender, "who in no way inspected or examined as to the condition or sufficiency of the ways over which his workmen were required to travel."

The defender in answer stated,—“Explained that the step in question was part of the permanent stair erected for the purpose of giving access to the upper storeys of the building, and that it was not made nor built in by the defender nor under his supervision. The erection of the stair was not part of his contract.”

The pursuer pleaded;—(1) The injuries sustained by the pursuer having been caused through the fault or negligence of the defender, or those for whom he is responsible, the pursuer is entitled to compensation as craved. (2) The pursuer having sustained injuries in the manner libelled, the ways, works, and plant in use by the defender being defective, he is entitled to compensation for said injuries.

The defender pleaded;—(2) The pursuer's alleged injuries not having been caused by any fault or negligence of the defender, or of anyone for whom he is responsible, the defender should be assoilized from the conclusions of the action.

¶ A proof was allowed, from which the following facts appeared:—The steps of the stair were formed of granolithic, and were placed in position two days before the accident by Mr Barr, builder, Paisley, proprietor of the tenement, who was himself doing the mason work, and the defender was employed by him generally to supply certain brickwork for the support of the stair. It was proved that the accident happened to the pursuer through the breakage from some cause—

probably internal defect—of the step. The step was apparently in good condition when the pursuer used it. The staircase was the regular access to the upper storeys of the building, and had been used as such since its construction by the different classes of tradesmen working at the tenement. The defender deposed,—“I supposed that the stair being the permanent stair intended for the building would be quite capable of supporting all that went on it. I assumed, seeing that it was being erected by Mr Barr, who was also proprietor of the building, that it was all right and good and sufficient.”

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On 7th July 1896 the Sheriff-substitute (Cowan) found that the defender was responsible for the accident on the ground that “the step apparently gave way through a defect in it, which might have been discovered if properly examined, and also because of the want of a centre butt to support it, it being the bottom step of the stair,” and assessed the damages at £50.

On appeal the Sheriff (Cheyne) pronounced this interlocutor on 9th September:—“Finds (3) that the said stair was erected two days before the accident, by the proprietor of the building, who is a builder to trade, and was doing the mason work himself: Finds (4) that, though the defender made no examination of the said stair before permitting his servants to use it, no negligence has been established against him inferring liability for the consequences of the accident, he being entitled to rely on the fact that the stair was constructed by a competent tradesman, and was intended for the use, not only of the workmen connected with the building operations, but also of the future occupants of the building, and it not being proved that an examination would have disclosed any defect in the condition of the step which gave way: Therefore assoilzies the defender from the conclusions of the action.”

The pursuer appealed, and argued;—The accident was one which would not happen in the ordinary course of things where proper care was used. It afforded reasonable evidence of negligence, and placed the *onus* of explaining it upon the defender.¹ It had been laid down that where an accident happened of this nature,—*e.g.*, in the case of a man ordered by his employer to mount a ladder which collapsed,—it was not necessary for the pursuer to prove the specific defect which caused the accident.² Here, within two days of the construction of the stairs, the pursuer had mounted them by the defender's orders, and the defender clearly had a duty of inspection to see that they were in sound condition, or he should have supplied an independent scaffolding for his own labourers. No action could lie at the pursuer's instance against the actual builder of the steps,³ and consequently he must have a title to sue the defender, who was responsible to his servant.

Argued for the defender;—He had nothing to do with building the stair beyond putting up the brick supports, which had remained firm. The fact that the accident was extraordinary was really a favourable feature for the defender. The cases of *Fraser*⁴ and *Olsen*⁵ had been

¹ *Scott v. London Dock Co.*, 1865, 34 L. J. Exch. 220; *Walker v. Olsen*, June 15, 1882, 9 R. 946.

² *Macaulay v. Buist & Co.*, Dec. 9, 1846, 9 D. 245, *per* Lord Fullerton, p. 248, 19 Scot. Jur. 81; *Great Western Railway Co. of Canada v. Braid and Another*, 1863, 1 Moore's Privy Council Reports, 101.

³ *Campbell v. A. D. Morison*, Dec. 10, 1891, 19 R. 282.

⁴ *Fraser v. Fraser*, June 6, 1882, 9 R. 896.

⁵ *Walker v. Olsen*, June 15, 1882, 9 R. 946.

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explained in *Macfarlane v. Thompson*,¹ and the rule now was that where the cause of the accident was not ascertained, the fact that it took place did not raise any presumption that it was caused by a defect in the plant for which the master was responsible, but that the pursuer must prove that the cause of the accident was some defect for which the master was responsible. Here the defender was called in to work in another man's premises, and was entitled to hold, without special examination, that the work done by a competent tradesman was sufficient for the purpose for which it was intended, *e.g.*, that the stair was strong enough to give safe access to the upper storeys.²

LORD PRESIDENT.—Responsibility is sought here to be attached to the respondent on two grounds.

First, it is said that this step, which in the event broke down, was weak on account of deficient support, and it is sought to connect the respondent with it. He did not supply the step, but was ordered by a builder to perform certain brickwork for its support.

Now, if the pursuer is to make anything of this, it is incumbent upon him to shew that the respondent had the option to determine what amount of brickwork was necessary to support a given staircase. But his case is deficient in this part of it. As I read the evidence, he was not instructed to consider as to what support was needed, nor informed of the strength or the weight of the step which was to be supported. He was merely bidden to build certain brickwork which his employer considered adequate to support the step. This seems a mere incident in the case, and does not make the respondent responsible for the staircase as a whole. It is not very well made out what was the reason of the breakdown, although I should be disposed to think, as did the Sheriff, that it was due to some internal defect in the step itself. But inasmuch as it was the stair which gave way, and not the brickwork, which stood till it was pulled down by the fall of the step, there can be no question of liability on that head.

But turning to the second and more important question, I deal with it upon the assumption which I have now made, that the respondent was not in fault in the construction of the fabric. What was his duty in allowing the men to use the stair as an access to the upper storey? We could not support the pursuer without affirming so wide a proposition as to lead to unforeseen and ludicrous consequences. As I read the evidence, there was work to be done upon the upper part of the building, and the staircase was completed. It is clearly proved that all which was ever to be done to build the staircase had been done when the men used it.

Accordingly, the case is substantially in the same position as it would be where a contractor had agreed to do certain work in the upper part of a dwelling-house. Could it be said that he was to go and test the staircase which had been used by the inhabitants of the house? Good sense revolts against the idea, and yet upon the facts in question it appears that

¹ *Macfarlane v. Thompson*, Dec. 6, 1884, 12 R. 232.

² *Nelson v. Scott, Croall, & Sons*, Jan. 30, 1892, 19 R. 425; *Simpson v. Paton*, March 12, 1896, 23 R. 590; *Robinson v. Watson*, Nov. 30, 1892, 20 R. 144; *M'Lachlan v. s.s. "Peveril" Co., Limited*, May 27, 1896, 23 R. 753.

the construction of the staircase was complete. It is a mere circumstance, perhaps, but it had been already used by workmen carrying loads up it. It is enough that the staircase of the house had been built, and that it was the stair of a dwelling-house, and that the defender had no reason to suspect its stability. In these circumstances I cannot lay it down that a prudent man would either test the staircase or resort to the absurd superfluity of building a scaffolding for gaining access to the upper storey of a house which had already a staircase. I am for adhering to the Sheriff's interlocutor.

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LORD ADAM.—I am of the same opinion. The defender was under a contract to execute the brickwork, and the pursuer was employed by him to carry out that work, and in the course of the work he met with an accident resulting in injuries, in consequence of which he has raised the present action. I agree that it has not been proved that the defender was responsible for the absence of that part of the brickwork which was erected to support the step after the accident happened. Accordingly, if the alleged injury was caused by a defect in the broken step, the defender has not been connected with such defect, and the accident was not due to his direct negligence.

But what happened was, that after the brickwork had been finished and the staircase had been completed, forming a permanent access to the upper storeys of the house, the defender sent the pursuer to execute some work in the upper storeys, and while he was using the staircase in the ordinary course, it so happened that a step broke. Now, there was no fault on the part of the defender, unless it can be shewn that he ought not to have allowed his workmen to go on the stair before he had personally examined it. There is no rule of law of that sort upon which the pursuer can rely. In a case like this, one tradesman is entitled to assume that material supplied by another tradesman is sufficient for the purpose for which it is supplied. There may be exceptions to this rule, it is difficult to figure circumstances which would give rise to them, but this case falls under the general rule, that there is no duty of personal inspection.

LORD M'LAREN.—I think that there is no reason to doubt the generality of the rule that an employer of labour, engaging men to work for him on property which he hires or purchases for the purposes of his business, is responsible at common law for the sufficiency of what are termed in the statute the "ways, works, machinery, or plant." The liability is a common law one, but the words are specifically used for the first time in the statute. That statute intended only to displace the objection that might be raised of "common employment," and thus to give to the workman the same remedy as he would have had if he had not been employed at the time of meeting with an accident. Now, a great part of the trade of this country is done by employers in property which is not their own, nor subject to their control. That is very commonly the case in the building trade, where work is constantly done by employers on the property of others. There is no doubt that as to the sufficiency of scaffolding, ropes, or other plant which he brings to the ground, an employer is just as responsible as when he is carrying on work on his own property. It is only fair that the rule should be so, for, as he purchases scaffolding and ropes, it is his duty

No. 79. either to get them from a dealer who will give him reliable materials, or to subject them to the usual tests for ascertaining their strength and sufficiency. But when it is a case of the liability of an employer for injury sustained by a workman arising from the insufficiency of appliances on the ground, whether part of the original structure existing there, or the work of an independent contractor engaged on contract work, the responsibility must be defined by some working test or rule which will not break down when we come to apply it to the business of life. In the absence of any special rule suggested by experience or by the peculiarities of the work, it seems to me that we should apply the general criterion as to responsibility for fault which is to be found in the Roman law, and in the works of our institutional writers, viz., whether the employer has exercised that measure of skill and care which a prudent man would shew in the management of his own affairs. I cannot think that if in a case of this kind the defender had probable grounds for believing in the sufficiency of the staircase for his own purposes when going about the premises at which he was at work, he would be compelled to use greater precautions for the safety of his employees. The defender, when examined on this point, stated explicitly that as the step in question was part of the permanent stair erected for giving access to the upper storeys, he naturally supposed that it would support the burdens put upon it. That being the defender's explanation, the question is, has he discharged the responsibility which the law has laid upon him? Was he entitled, as a prudent man, to trust to the sufficiency of the stair? In my judgment he was, and to make him responsible it must be shewn that something brought prominently before him the question of the sufficiency of the stair,—that he had grounds for believing that it was or might be unsafe,—and that he had allowed his workmen to take the risk without warning them. I agree with the Lord President that this case is the same in all respects as if the work were being done on finished premises, and accordingly I see no grounds for holding the defender responsible.

LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Find in fact in terms of the findings in fact in the interlocutor of the Sheriff, dated 9th September 1896, and in law find the defender is not liable in damages: Dismiss the appeal: Affirm the said interlocutor, and decern."

JOHN BAIRD, Solicitor—WALTER C. B. CHRISTIE, W.S.—Agents.

No. 80. JOHN AND JAMES WHITE, Petitioners.—*Jameson—Clyde.*
 WILLIAM DIXON'S TRUSTEES AND OTHERS, Petitioners.—*Ure—C. K. Mackenzie.*
 JAMES MENZIES & COMPANY, Petitioners.—*D.-F. Asher—King.*
 COUNTY COUNCIL OF LANARKSHIRE, Petitioners.—*Cullen.*
 LANDWARD COMMITTEE OF THE PARISH COUNCIL OF RUTHERGLEN, Petitioners.—*R. S. Horne.*
 MAGISTRATES AND TOWN-COUNCIL OF RUTHERGLEN, Respondents.—*Balfour—Salvesen.*
Burgh—Extension of boundaries—Confirmation of resolution to extend—Expenses—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55),

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secs. 11, 12, and 13.—The Burgh Police Act, section 11, enacts that upon the application of the Commissioners or council of any burgh it shall be lawful for the Sheriff, after hearing all parties interested, “from time to time, to revise, alter, extend, or contract the boundaries of such burgh for the purposes of this Act,” and further enacts that the Sheriff “in revising boundaries of a burgh shall take into account the number of dwelling-houses within the area proposed to be included, the density of the population, and all the circumstances of the case.”

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Section 12 enacts that in the case of a burgh whose police boundary is within its municipal boundary or royalty, or within its parliamentary boundary, it shall be lawful for the council or the commissioners of the burgh “to resolve to extend such police boundary to the municipal boundary, or the royalty, or the parliamentary boundary respectively, for police purposes. . . . Upon any such resolution being adopted, the council or the commissioners of the burgh may present a petition to the Sheriff praying him to confirm the same, and the Sheriff, after such intimation and service as he thinks proper, and after hearing all parties interested, shall dispose of the application, and upon any final judgment confirming the resolution being pronounced, it shall be recorded in the Sheriff Court Books, and said resolution shall come into force from the date of such recording or such later date or dates as may be specified in the resolution.”

Section 13 gives a right to present a petition to the Court of Session against deliverances under section 11 or section 12.

Held that under section 12 the Sheriff, or the Court of Session, must either confirm the resolution of magistrates to extend the boundaries of the burgh *simpliciter* or refuse confirmation, and that therefore it is not competent to confirm the resolution as regards part of the area resolved to be added, and to refuse confirmation as regards the rest of the area.

Held further that in an application for confirmation of a resolution of magistrates under section 12, it is the duty of the Sheriff, or the Court, to consider all reasonable grounds of objection to the confirmation, including objections based on the number of dwelling-houses in the area proposed to be added and the amount of its population.

Circumstances in which the Court in a petition under section 13 of the Burgh Police Act, 1892, for recall of a deliverance of the Sheriff confirming a resolution of magistrates to extend the boundaries of a burgh, *recalled* the deliverance of the Sheriff, and refused to confirm the resolution.

The Court *refused* a motion by the petitioners for expenses, Lord Young observing that the proceedings were not a litigation.

UNDER the Reform Act of 1832 the parliamentary burgh of Rutherglen included a portion of the ancient royalty of the burgh, and also certain portions of the county of Lanark not within the ancient royalty. In 1863 the Magistrates and Town-Council of Rutherglen adopted the General Police and Improvement Act, 1862, as applicable to the whole of the ancient royalty, and the Sheriff pronounced an interlocutor finding and declaring that that Act applied to the whole royalty accordingly; but as the Act did not authorise its application to any part of the royalty which was outside the parliamentary burgh, the effect of these proceedings was to limit the application to that portion of the royalty which was within the parliamentary burgh.

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Lanarkshire.

In this way, when the Burgh Police Act, 1892, was passed the police burgh of Rutherglen was coextensive neither with the ancient royalty nor with the parliamentary burgh, for it did not include that portion of the ancient royalty which was outside the parliamentary burgh, nor did it include those portions (designated area 1 and area 2 in the proceedings after narrated) of the parliamentary burgh which were outside the ancient royalty.

No. 80. On 22d January 1896 the Magistrates and Councillors of Rutherglen as such and as Commissioners under the Burgh Police Act, 1892, at a meeting duly called for the purpose, passed the following resolution under section 12 of the Burgh Police Act, 1892* :—"Resolved that the police boundary of the burgh be extended to the parliamentary boundary thereof for police purposes, including the right to vote for Commissioners, under the Burgh Police (Scotland) Act, 1892."

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* The Burgh Police Act, 1892 (55 and 56 Vict. c. 55), enacts :—

Sec. 11.—"Upon the application of the Commissioners or of the council of any burgh, and after publication in the *Edinburgh Gazette*, and in any newspaper published in such burgh, and if no newspaper be published therein, then in a newspaper circulating in such burgh, and such other notice and inquiry as he may deem necessary, it shall be lawful for the Sheriff, after hearing all parties interested, from time to time to revise, alter, extend, or contract the boundaries of such burgh for the purposes of this Act, but so as not to encroach on the boundaries of any other burgh, and where not divided into wards to divide the same into wards, and where divided into wards to revise the boundaries of such wards; and where in any burgh wards exist at present, the Sheriff may increase their number or lessen their number by combination or rearrangement, and the Sheriff shall define, in a written deliverance on such application, the new boundaries of such burgh and wards, for the purposes of this Act; and such deliverance, unless appealed against, in manner hereinafter provided, shall be final; and when recorded along with the application on which it proceeds in the Sheriff Court books of the county, shall fix and determine the boundaries of such burgh and wards for the purposes of this Act. Where the burgh and the lands proposed to be included in any application for an extension of boundary lie in more than one county, the application shall be made to and disposed of by the Sheriffs of all the counties concerned. The Sheriff or Sheriffs in revising the boundaries of a burgh shall take into account the number of dwelling-houses within the area proposed to be included, the density of the population, and all the circumstances of the case, whether it properly belongs to and ought to form part of the burgh, and should in their judgment be included therein. In the event of the Sheriffs not being unanimous in opinion, the application shall not be granted, subject to an appeal as hereinafter provided."

Sec. 12.—"Where in any burgh the municipal boundary is either wholly or partly within the boundary for police purposes, it shall be lawful for the council at a meeting specially called for the purpose, of which a month's notice shall be given, to resolve that the boundary for municipal purposes, including the right to vote for town-councillors, shall be extended up to the boundary for police purposes, and to fix the boundary for municipal purposes accordingly, and where in any burgh the police boundary is wholly or partly within the municipal boundary or royalty or within the parliamentary boundary, it shall be lawful for the Commissioners at a meeting specially called for the purpose, of which a month's previous notice shall be given, to resolve to extend such police boundary to the municipal boundary or the royalty or the parliamentary boundary respectively for police purposes, including the right to vote for Commissioners, but so as not to encroach on the boundaries of any other burgh, and to fix the date, not being less than fourteen days from the date of the said resolution, when such resolution shall come into operation. Upon any such resolution being adopted, the council or the Commissioners of the burgh may present a petition to the Sheriff praying him to confirm the same; and the Sheriff after such intimation and service as he thinks proper, and after hearing all parties interested, shall dispose of the application, and upon any final judgment confirming the resolution being pronounced it shall be recorded in the Sheriff Court Books,

The effect of this resolution, if confirmed, would be to include area No. 80. 1 and area 2 within the police burgh.

Area 1, which extended to about 126 acres, lay at the north-west corner of the parliamentary burgh, and was entirely shut in by the existing police burgh of Rutherglen and by the city of Glasgow. Jan. 28, 1897.
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Area 2, extending to about 36 acres, lay at the north-east corner of the parliamentary burgh, and was shut in on three sides by the existing police burgh and by the city of Glasgow.

The magistrates and town-council having presented a petition to the Sheriff for confirmation of the foregoing resolution, objections were lodged (a) by Messrs John & James White, chemical manufacturers, Glasgow, and proprietors of works and other subjects in area 1; the trustees of William Dixon, ironmaster, also proprietors in area 1, and other similar proprietors or tenants; (b) by Messrs James Menzies & Company, iron tube manufacturers, and other proprietors or tenants in area 2; (c) by the County Council of Lanark; and (d) by the Landward Committee of Parish Council of Rutherglen.

The following statement (taken from the petition subsequently presented by the County Council to the Second Division for recall of the deliverance of the Sheriff) sufficiently shews the general nature of these objections:—"The areas Nos. 1 and 2 proposed to be included within the extended boundary are not adapted for such extension. They consist of fields or open ground, brickfields, and to a large extent of coalfields still unwrought, or in course of excavation, which render them unsuitable for building purposes. There are no large tenements, and such dwelling-houses as there are consist of a few rows of colliers' houses and one or two old mansion-houses (with ground attached) now either unoccupied or divided and let to several families. The population is small and not increasing, and neither of said areas is in

and such resolution shall come into force from the date of such recording or such later date or dates as may be specified in the resolution; and any Act of Parliament conferring police jurisdiction or any other authority within such extended boundary shall, in so far as it is inconsistent with the provisions of this section, be repealed."

Sec. 13.—"In any proceeding for fixing, altering, extending, contracting, or revising the boundaries of a burgh or populous place, or of the wards of a burgh, it shall be lawful for any owner or occupier within the boundaries as fixed by the Sheriff or Sheriffs who considers himself aggrieved by the deliverance of the Sheriff or Sheriffs, or the resolutions of the council or Commissioners, as the case may be, or for the county council or the standing joint committee of any county into which the said boundaries extend beyond the existing boundaries, within fourteen days from the date thereof, to present a petition against the deliverance of the Sheriff or Sheriffs to the Court of Session, setting forth the grounds on which they object to such deliverance; and the Court of Session may thereupon order answers, and, after answers have been lodged, may either pronounce a final order, or remit to a Lord Ordinary to direct inquiry into the circumstances of the case, and to issue such order thereupon as he may deem requisite to determine the boundaries of such burgh; and such order shall in either case be final, and when recorded in the Sheriff Court books of such county, shall fix and determine the boundaries of such burgh for the purposes of this Act. Where it is the duty of two or more Sheriffs to fix the boundary, and they cannot come to a unanimous decision, they shall state a case for the Court of Session, and the same procedure shall, with the necessary variations, be followed as hereinbefore prescribed in the case of the petition against the deliverance of the Sheriff."

No. 80. character a populous place within the meaning of the Burgh Police (Scotland) Act, 1892. Thus in area No. 2 (apart from the tenements after mentioned, through which the proposed extended boundary will pass) there is only one house to each five acres. The total rental or annual value of the said two areas as at the date of the petition to the Sheriff is £11,430.

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"Area No. 1 is occupied by the Shawfield Chemical Works, four old mansion-houses, the mineral field of William Dixon, Limited, and some brickworks. The total rental or annual value of said area as at the date of the petition to the Sheriff is £6526.

"Area No. 2 extends to thirty-four acres, with a rental or annual value as at the date of the petition to the Sheriff of £4904. Three-fourths of the area are occupied by the Phoenix Tube Works of Messrs James Menzies & Company, with a rental or annual value of £1855, the Clydesdale Tube Works of Messrs James Eadie & Sons, with a rental or annual value of £1080, and the Clydesdale Dye Works of Messrs David Miller & Company, with a rental or annual value of £500. The total area occupied by said three works is twenty-four acres, and the total yearly rent or value thereof is £3435, or five-sevenths of the whole annual value of the area. On the said area No. 2 there are at present 154 small dwelling-houses, which, with the exception of six houses at the above-mentioned works, are all in tenements known as Farme Road, New Farme Place, Union Place, Smith Terrace, and Miller Terrace, and one-half of each of these three last-named tenements lies outside the proposed extended boundary, which would pass through the tenements near the middle thereof. The said tenements, so far as within said boundary, occupy three acres of ground. The remaining seven acres of area No. 2 are destitute of buildings, but upon them is constructed the Farme Railway, which is a single line worked by the Caledonian Railway Company, and running from their Dalmarnock branch railway to certain collieries.

"In 1878 the Magistrates of the burgh of Rutherglen, proceeding under the General Police Act, 1862, presented a petition to the Sheriff of Lanarkshire, craving that the police boundaries of the burgh should be extended so as to include the area now proposed to be annexed, but after objections had been lodged and parties heard, the magistrates abandoned the petition. Since 1878 the area proposed to be annexed has not altered in character, and, if anything, there has been a decrease in the number of dwelling-houses.

"The said areas Nos. 1 and 2 will derive no benefit from inclusion within the burgh police boundary. They are at present policed by the county, in common with the burgh, which maintains no police force. They require no additional police force, and are unsuitable for police patrol, owing to the large area occupied by the before-mentioned works, within which there are a sufficient number of private watchmen. The said areas have at present a sufficient system of drainage and road management under the County Council administration, and an adequate supply of gas and water from the Corporation of the city of Glasgow; and the respondents cannot confer any benefit or make any improvement in regard to these matters. The respondents' only apparent motive in promoting the present extension is to acquire an additional area of taxation, irrespective of the suitability of the annexed area for inclusion in the police burgh."

The following special objection was also stated on behalf of Messrs White:—“The Messrs White, moreover, have at very considerable expenditure of time and money invented many methods in the way of the construction of furnaces, liquor-tanks, vitriol chambers, &c., and in the way of leading and utilising heat, which are secrets of the trade, and which they have expressly avoided patenting with the view of preserving such secrecy. If on these and similar occasions the warrant of the Dean of Guild Court had to be obtained, and plans and sections submitted before proceeding with the works involved, it would be impossible for the Messrs White to carry on their works, or at least a considerable number of the processes and operations now carried on in said works, within the area in question, thereby necessitating their removal to a locality free from such restrictions and interference.”

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On 23d October 1896 the Sheriff (Berry) pronounced the following deliverance:—“Having heard counsel for the parties, visited the district in question, and considered the whole process and productions, confirms the resolution of the Magistrates and Councillors of the Royal Burgh of Rutherglen, of date 22d January 1894, to the following effect:—‘That the police boundary of the burgh be extended to the parliamentary boundary thereof for police purposes, including the right to vote for commissioners under the Burgh Police (Scotland) Act, 1892.’” *

* “NOTE.— . . . No provision is contained in this section (sec. 12) to indicate the considerations which should weigh with the Sheriff in acting under it, and no reference is made to the particular considerations, viz., the number of dwelling-houses, and the density of the population, to which he is required to have regard in revising the boundaries of a burgh under the 11th section. The functions of the Sheriff in the two cases are different. In dealing with an application under the 11th section, it is open to him to grant it in part, and to refuse it in part. He is called upon himself to fix the proper boundaries, and has to exercise a discretion as to the limits to which the boundary should be extended, or it may be restricted. Under section 12 he has no such discretion, where, for example, as here, application is made by the commissioners of a burgh for confirmation of a resolution passed by them that the police boundary be extended to the parliamentary boundary, he must either grant or refuse the application altogether. He has no discretion in the way of adjusting a boundary as under section 11. In the present case there are two separate areas to which the resolution applies, referred to as areas 1 and 2 respectively, and it may be that the grounds for including one of these are stronger than those for including the other, but the two cannot be separated in disposing of the case. Both are required to bring the extension up to the parliamentary boundary, and confirmation must be granted as to both, if it is to be granted at all.

“It seems to me that the Act places the proceedings under the 11th and 12th sections on different footings, and it would have materially assisted the Sheriff in acting under section 12 if some indication had been given as to the considerations which should weigh with him in acting under it. It is contended for the objectors that he must, equally under section 12 as under section 11, take into account the particular considerations specified in the 11th section to which I have referred.

“If, however, that had been the intention of the Legislature, it might have been expected that, if not repeated in section 12, they would at all events have been referred to as set forth in section 11. We find that the language of section 11 on this subject is carefully repeated verbatim from

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The objectors then presented petitions under section 13 of the Burgh Police Act, 1892, to the Second Division for recall of the Sheriff's deliverance.

Argued for the petitioners ;—The Sheriff was in error in supposing that he ought not to take into consideration, in applications under section 12, such elements as the density of the population and the number of the houses. He was bound to take into account all matters which might affect his judgment as to the propriety of the proposed extension. Had he done so, it was clear from his note that he would have been of opinion that area 1 at all events ought not to be included, and if he was right in holding that the resolution must be confirmed *in toto* or not at all, it followed that area 2 must be rejected also.

The parties then respectively interested in the two areas proceeded to argue the merits of the case as applicable to their particular area, on the assumption that the Sheriff was wrong in holding that the resolution could not competently be in part confirmed and in part rejected.

The arguments for the respondents sufficiently appear from the note of the Sheriff.

section 9, where it is used for the guidance of the Sheriff in proceedings for the original formation of a burgh. Why, if it had been intended that the same considerations should govern an application under section 12, should a similar repetition of the language, or at least a reference to it, have been omitted? Further, if the same considerations were to apply equally to a confirmation by the Sheriff of a resolution of the magistrates under section 12 as to an application for a revision of the boundaries under section 11, it is difficult to see any necessity for such an enactment as we find in section 12. Without any such enactment, it would be competent for the commissioners of a burgh to apply, under section 11, for an extension to the parliamentary boundary, and in dealing with such an application the Sheriff, while he would be vested with all the discretion given to him by that section as to the proper limits of extension, would, on the other hand, be bound to have careful regard to the particular considerations specified in the section. I am induced to think that in regard to the question whether or not effect should be given to a resolution of the commissioners of a burgh under section 12, such special considerations as the number of dwelling-houses, and the density of the population are not to be treated as of the same importance as they would be were the proceedings under section 11. On the other hand, I am not prepared to accept the argument of the burgh authorities, that in acting under section 12 the functions of the Sheriff are purely ministerial. The language of the statute is not consistent with such a view. It seems to me that the case must be governed by considerations of general expediency, regard being had to the manifest intention of the Legislature, that an extension of the police to the parliamentary boundary should be dealt with in a different way, and treated on a distinct footing from a revision of the boundaries under section 11.

"In dealing with the present case, I think some weight may fairly be given to the fact that we have a unanimous resolution on the part of the magistrates and council, that the police boundary should be extended to the parliamentary boundary. Apart, however, from such weight as may be due to that consideration, I am of opinion that the extension on which the burgh authorities have resolved has reasonable grounds to support it. With regard to area No. 1, it is averred by the objectors on record, and it is not denied, that 'it consists to a large extent of coalfields still unwrought, or in course of excavation, which renders it unsuitable for building purposes.' To what extent the minerals may be still unwrought I am not aware. No inquiry was asked under this head, and on the part of Messrs

At the hearing it was mooted on the bench whether, in the event of it being held that the Sheriff had not taken into consideration all the circumstances which under the Act he ought to have considered, the case ought not to be remitted to the Sheriff on the ground that he had not exercised his jurisdiction under the Act, but a majority of the Court doubted the propriety of that course, looking to the terms of section 13 of the Act.

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At advising on 11th December 1896,—

LORD TRAYNER.—I agree with the Sheriff in thinking that in the present case he was precluded by the terms of the 12th section of the Burgh Police Act, 1892, from confirming the resolution of the magistrates in part, or from confirming it under conditions. I think the clause of the statute referred to gives the Sheriff the alternative of confirming the resolution or refusing to confirm it, but gives him no power to adopt another or a middle course. It is only upon a final judgment “confirming the resolution,”—that is, the resolution of the magistrates as presented to the Sheriff for confirmation,—

Dixon and other objectors, on whose behalf the averment is made, it was stated, when I asked if inquiry was wished, that the admission on record was considered sufficient. But however unsuitable for building purposes a portion of area No. 1 may be at present, we have on that area large and important industrial works, and in particular those of Messrs White, chemical manufacturers, who are among the opponents of the petition. These works, although not at present within the police boundary, are within the parliamentary boundary, and in close proximity to the burgh, which has a large and increasing residential population. It appears from the statements of these objectors, that ‘changes and renewals of buildings within chemical works are frequently necessary,’ although they say that these ‘in no way affect the public, and need no Dean of Guild supervision.’ The petitioners, on the other hand, rely on the importance of a power of supervision on the part of a Dean of Guild Court under the Act in support of their case; and I think that in that view they are right. There may also be other advantages in the possession by burgh authorities of a certain right of interference with large industrial works in their immediate vicinity, with the view, for example, of preventing or lessening possible nuisances to the inhabitants. It is suggested that the action of the Burgh Commissioners is prompted solely by a desire to profit by the inclusion within their area of valuable rateable subjects. That is denied by them, and, although no doubt the proprietors of the subjects in question would prefer to remain free from liability to the burgh rates, it must be kept in view that by section 373 (3) of the Act, the Commissioners are empowered to grant exemption or restriction of assessment in favour of any portion of the burgh where sufficient reason exists for such a course. It may be expected that the Commissioners will exercise the power so given to them in a spirit of equity.

“What I have said as to the importance of a certain power of control over buildings and works situated on the outskirts of the present police burgh has a bearing on the case in relation not only to area No. 1, but also to area No. 2. On that area there are various industrial works, and at the date of my visit to the locality additional works were in course of being erected. Besides works, there are on area No. 2 a considerable number of dwelling-houses; and in my judgment this area (to borrow the language of section 11) properly belongs to, and ought to form part of, the burgh, and should be included therein. It is unfortunate that the parliamentary boundary intersects certain tenements of houses on this area, and is not therefore such a boundary as one would have fixed had the boundary been open for adjustment. But such an awkwardness of boundary does not affect

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being recorded in the Sheriff Court books that "such resolution" comes into force. To confirm it in part or under conditions would not be confirming the resolution agreed to and made by the magistrates; it would be confirmation of something other than had been resolved upon. The Sheriff was therefore right, in my opinion, in saying that the two areas in question comprehended and dealt with in the one resolution must be kept together so far as his judgment was concerned—that he could not, as the case was presented to him under section 12, confirm the resolution *quoad* the one, and refuse to confirm the resolution *quoad* the other.

But dealing with the resolution as a whole, the Sheriff is directed to hear the parties interested, and thereupon to dispose of the case. Now, to hear all parties interested involves that the parties interested shall be entitled to state every consideration which they think has a bearing upon the matter to be decided, and that every such consideration shall be duly weighed by the Sheriff. The effect to be given to such consideration lies with him, at all events in the first place, but there are no considerations of the nature I have alluded to which he may not take into account and give such effect to as he may think them entitled to. On the contrary, I think the Sheriff, in the discharge of his duty, not only may, but must, consider all reasonable grounds of objection to the confirmation of the magistrates' resolution stated for his consideration by parties interested. But I gather from what the Sheriff says in the note to his interlocutor that he has not done so. He thinks that the density of population and the number of dwelling-houses within the area which he is directed to take into account in any proceeding under section 11 are not to be taken into account in dealing with a magistrates' resolution under section 12; at all events, that they are "not to be treated as of the same importance as they would be were the proceedings under section 11." I cannot judge of their exact importance, but I think they should certainly be taken into account if in the Sheriff's judgment they have any bearing upon the application before him. So far as I can judge, these considerations are very far from being irrelevant, and should be taken account of. The Sheriff evidently thinks that the case presented to him was stronger for the confirmation of the resolution in reference to area No. 2 than in reference to area No. 1. He says the circumstances of area No. 1, if considered apart from area No. 2, might

the question whether the area within it ought to be included in the burgh, as in my opinion it ought to be. If this area No. 2 is included, it is impossible to leave out area No. 1, the circumstances of which, if considered by itself, might give rise to greater question.

"The fortunes of the two areas are indissolubly bound up together.

"I have been pressed with the argument that the bulk of the residents in the district proposed to be annexed are opposed to the application. Their objections are founded mainly in apprehensions of increased rating; but these are not, in my opinion, sufficient to overcome other considerations of expediency and convenience of administration. I have already referred to the power of granting exemption or a restriction of assessment possessed by the Commissioners under the Act. The special provision contained in section 12 points to the conclusion that an assimilation of the police to the parliamentary boundary is regarded by the Legislature as in itself generally expedient, and after consideration, I think that in the present case the circumstances are sufficient to justify it. . . ."

“give rise to greater question,” but that their fortunes are “indissolubly bound up together.” But there is no reason why the one case should give place to the other. If the case for confirmation is made out as regards area No. 2, but not as regards area No. 1, the result will be that the resolution will not be confirmed; the two being bound together, if confirmation cannot be given of all, then the part that would be confirmed, if standing alone, must follow the fortune of that part confirmation of which cannot be given.

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The interests involved in this case are represented by the respondents as being very momentous. I can believe that this is no exaggeration, and being of opinion that the Sheriff has not given full weight to all the considerations that were presented to him—being of opinion that to some extent these were not open for his consideration—I think the interests of all concerned require that we should hear the case further, and give the parties an opportunity of stating to us any grounds upon which they think the resolutions of the magistrates should not be confirmed.

LORD YOUNG.—I do not think that it is clear that the Sheriff in arriving at his decision has taken into consideration all the facts necessary in connection with this petition. I therefore concur in the Court hearing further statement and argument with reference to the interests here involved, and which very properly require to be taken into consideration. Thus there are here manufacturers upon a large scale who have set down works outside the municipal area, and we can understand manufacturers of this description and on this scale objecting, because it might be very serious to them, and possibly detrimental to their interests, to bring these localities within the municipality. Then, again, it might be shewn that municipal expenses were considerably increased by the very fact that these manufactories were in the immediate vicinity of the burgh. I take it to be clear enough that the real desire on the part of the municipal authorities was to bring these areas within the bounds of the municipality in order that the municipal taxes might be extended thereto. These were all matters upon which, in the legitimate interests of all concerned, we might hear further argument and any statements in fact which might bear on these questions.

LORD MONCREIFF.—But for one consideration I should not have been disposed to interfere with the deliverance of the Sheriff. I think that he has, with one possible exception, taken a correct view of his duties in a proceeding under the 12th section of the Burgh Police Act, 1892. He is the most suitable person to make the necessary inquiry, and decide as to the extension of the police boundaries of the burgh to the parliamentary boundaries thereof for police purposes, and his decision on the merits is not to be lightly set aside.

But in a proceeding under the 12th section I think it is the duty of the Sheriff to take into consideration all the circumstances of the case. Amongst these I think he is bound to consider the number of dwelling-houses and the density of the population in the area between the police boundaries and the parliamentary boundaries to which it is sought to extend them, not because these matters are mentioned in the 11th section and imported by implication into the 12th section, but because they are material matters to be considered in any question as to the extension of boundaries.

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What weight and effect is to be given to the density of the population and the number of the dwelling-houses is another matter. As at present advised, I am disposed to think that in deciding as to extension of boundaries under the 12th section, less weight may be given to the number or paucity of dwelling-houses and population than in deciding as to a revision of the boundaries under the 11th section. The object of the 12th section is to square the burgh boundaries, *e.g.*, to make the municipal boundary coincide with the police boundary, or the police boundaries with the parliamentary boundaries, and the extension of boundaries under that section is only competent if they are extended as a whole to the outer boundaries which have already been fixed for certain purposes connected with the burgh. It may often happen that part of the intermediate area is so sparsely populated that had the question been one of revision of boundaries under the 11th section the Sheriff might not have been entitled or bound to include that part in the extension. But it would greatly hinder the operation of the 12th section if the same considerations applied with equal force to proceedings under the two sections. While they would merely limit extension in the one case, they might wholly prevent it in the other.

But in the present case the Sheriff's note leaves some doubt as to whether he has taken into consideration at all the number of dwelling-houses and the density of population in the area in question. I think that probably he did; there are passages in his opinion which indicate as much, but the matter is left in doubt. Personally I should have preferred, had that course been considered open to us, to have remitted to the Sheriff, not for the purpose of holding any fresh inquiry, but simply to ascertain whether he did or did not consider those matters. But as there may be objections to adopting this course, I agree that parties should be further heard before ourselves.

The LORD JUSTICE-CLERK concurred.

The case was then restored to the roll, and was thereafter put out for further hearing, and the parties were further heard.

There was no proof.

At advising,—

LORD JUSTICE-CLERK.—I agree with the Sheriff in thinking that the resolution must be confirmed as a whole, or must be set aside altogether. But I am of opinion, taking into consideration the circumstances stated in connection with the two areas in question, that this resolution to annex them cannot be confirmed.

There is a great deal to be said for annexation of certain parts of one of the areas, or even the whole of one of the areas, but the whole resolution cannot be confirmed, as there are large parts of the districts as to which there is no prospect of conversion into burghal subjects. There are mineral districts which would make building hazardous, and in point of fact, buildings had been decreasing and the rental had been diminishing for a considerable time. I therefore see no sufficient ground for including the whole of the areas, and I am therefore of opinion that the resolution should not be confirmed.

LORD YOUNG.—The duty which the Court has to discharge is one which, No. 80.
I think fortunately, rarely presents itself. I agree with your Lordship
that the reasons given for preserving things as they have been hitherto
should prevail. In that view I do not think it expedient to enter into
details.

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LORD TRAYNER.—On careful consideration of the arguments presented to us for the several parties, I have come to be of opinion that there is no sufficient ground for confirming the resolution complained of, while very strong and sufficient reasons to the contrary have been stated. I think the interlocutor of the Sheriff petitioned against should be recalled, and confirmation of the resolution refused.

LORD MONCREIFF.—I agree that the considerations in favour of the extension of the boundaries of the burgh of Rutherglen are not sufficient to counterbalance those against the extension.

The application is made under the 12th section of the Burgh Police Act of 1892. Under that section the boundaries must be extended as a whole, or not at all. I think it is quite a fair observation that unless that power of extension is to remain a dead letter we cannot apply such a strict test as to density of population and number of dwelling-houses as is required under the 11th section of the statute, when it is proposed to make a partial extension of the municipal boundaries. In an application under the 12th section some of the areas which it is proposed to include may be more sparsely populated than others, and taken by themselves might not justify an extension. But if the other areas proposed to be included were suitable for that purpose, the character of the sparsely populated areas might be disregarded.

In each case, therefore, it is necessary to balance the considerations which affect the different areas which it is proposed to include, and in particular the proportions in extent which those which are suitable bear to those which are not.

In the present case if area No. 2, which contains 36 acres, were alone to be considered, there might perhaps be sufficient grounds for including it within the municipal boundaries; and if it is hereafter thought desirable to do so, this may still be done under the 11th section of the statute. But No. 1 contains 126 acres, and is thus nearly four times the size of No. 2. It is not urban in character; the residences and population are few; and a great part of the ground is, at present at least, unfitted for building owing to mineral workings. I do not attach much weight, taken by themselves, to the objections made by the manufacturers whose works stand on No. 1, on the ground that the proposed extension will interfere with them in the management of their works. But, taken as a whole, I think that that area is not suitable for inclusion, and that the considerations arising from its size and character so much counterbalance the reasons for extension afforded by No. 2, that the application made to us under the 12th section of the statute should be refused.

LORD YOUNG.—I wish to avoid saying anything that would give any encouragement to the Town-Council to make another resolution applicable to one of the areas. I desire to express no opinion upon that point.

No. 80. The petitioners moved for expenses.

Jan. 28, 1897. LORD TRAYNER.—I think not. The Magistrates were quite entitled to White v. pass this resolution.
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LORD YOUNG.—I think so too. This is not a litigation.

THE COURT pronounced the following interlocutor :—" Recall the deliverance of the Sheriff of Lanark, dated 23d October 1896 : Refuse to confirm the resolution of the said Magistrates and Councillors dated 22d January 1894, to the following effect :— ' That the police boundary of the burgh be extended to the parliamentary boundary thereof for police purposes, including the right to vote for Commissioners under the Burgh Police (Scotland) Act, and decern.' "

F. J. MARTIN, W.S.—MELVILLE & LINDSAY, W.S.—STURROCK & STURROCK, S.S.C.—BRUCE, KERR, & BURNS, W.S.—H. B. & F. J. DEWAR, W.S.—J. & A. HASTIE, Solicitors—Agents.

No. 81.

ASTON EDWARD M'MURDO AND ANOTHER (M'Murdo's Marriage-Contract Trustees), First Parties.—*Burnet.*

Jan. 28, 1897. CHARLES EDWARD M'MURDO, Second Party.—*C. J. Guthrie.*
M'Murdo's Trustees v. CHARLES DOUGLAS M'MURDO AND OTHERS, Third Parties.—*C. J. Guthrie.*
M'Murdo.

DOUGLAS HALL M'MURDO AND OTHERS, Fourth Parties.—*Burnet.*

Marriage-Contract—Construction—Whether grandchildren could claim as "issue" of the marriage—Renunciation of liferent—Alimentary Provision.—An antenuptial marriage-contract directed the trustees on the death of the wife to pay to the husband the free income of the residue of her estates, during his life, "for his own use and for the maintenance and education of the issue (if such there be) of the intended marriage," and to hold the capital "for behoof of the whole children of the said intended marriage, in such proportions and under such conditions as" the spouses or the survivor might appoint; and failing such appointment, "for behoof of her whole lawful children and the survivors and survivor of them, share and share alike, the issue of any of them predeceasing her succeeding to their parent's share in equal proportions.

The wife died without making any appointment, survived by four children and her husband, who subsequently executed a deed by which the estate was divided equally among the children. In accordance with this deed, the husband, who was willing to renounce his liferent, and the children who were all major, and three of whom were married with issue, required the trustees to distribute the estate, but they refused to do so on the ground that the husband's liferent might be alimentary, and that the grandchildren might have an interest in the estate.

In a special case, *held* (1) that the words "issue of the marriage," as used in the clause in question, applied exclusively to the children, and did not include grandchildren; (2) that the husband was entitled to renounce his liferent; and (3) that the trustees were bound on production of a discharge by the children, and a renunciation of his liferent by the husband, to divide the trust-estate among the children in the proportions specified in the deed of appointment.

2D DIVISION. CHARLES EDWARD M'MURDO, lieutenant, and afterwards captain, in the 79th Regiment of Highlanders, and Miss Madeline Susan Baxter, entered into an antenuptial contract of marriage in 1861, by which Miss Baxter conveyed her whole estate to trustees.

The fifth purpose was in the following terms :—" In the event of her predeceasing her said intended husband, they shall pay to him the

free interest or income for the time being of the residue of her estates foresaid during all the days of his life, for his own use and for the maintenance and education of the issue (if such there be) of the said intended marriage; and the said trustees shall hold and apply the fee or capital of the residue of the said estates and income arising therefrom after his death, for behoof of the whole children of the said intended marriage, in such proportions and under such conditions as the said Madeline Susan Baxter and Charles Edward M'Murdo may appoint in any writing to be executed by them during their joint lives, or if no such writing be executed by them jointly, then by any writing to be executed by the survivor of them; and failing such writings, for behoof of her whole lawful children and the survivors and survivor of them, share and share alike, the issue of any of them predeceasing her succeeding to their parent's share in equal proportions." No. 81.
Jan. 28, 1897.
M'Murdo's Trustees v. M'Murdo.

Mrs M'Murdo died in 1869, survived by her husband and by four children, and leaving estate to the amount of £10,827, 8s. 1d., without having executed the power of appointment. In 1883 Captain M'Murdo, by deed directed the trust-estate to be divided equally among the children, and "in case of the death of any of my said children before receiving payment of the sum apportioned to each as aforesaid without issue, then and in that case I direct and appoint the said trustees to make payment of the share or shares destined to the child or children so dying without issue to the survivors of my said children equally among such survivors."

In 1896 Captain M'Murdo and the four children of the marriage requested the trustees to divide the estate in terms of the deed of appointment. Captain M'Murdo agreed to renounce his liferent and join in the discharge to the trustees. Three of the children were married, and had children who were all in pupilarity.

The trustees contended that they could not competently divide the estate during the life of Captain M'Murdo.

Accordingly a special case was presented by (1) the marriage-contract trustees; (2) Captain M'Murdo; (3) the children of the marriage; and (4) the issue of the children, for the opinion of the Court on the following question of law:—"Whether the first parties are bound, on receiving a renunciation from the second party of his liferent and a discharge by the third parties, to wind up the trust-estate under their charge, and divide the funds in their hands among the said third parties in the proportions specified in the said deed of appointment?"

The first and fourth parties argued;—(1) The marriage-contract directed the income to be applied to maintenance of the "issue." "Issue" included grandchildren.¹ The contract plainly used it in this sense. The word occurred twice. The second occasion applied to grandchildren, and it was natural to suppose that the first occasion was as comprehensive in its application. The fourth parties had thus an indefeasible interest in the estate. (2) Captain M'Murdo had the use of the income "during all the days of his life," and thus the provision for him was alimentary in character, and must be retained.²

The second and third parties argued;—"Issue" meant children of the marriage, and grandchildren were only conditionally instituted on the predecease of Mrs M'Murdo by her children. Captain M'Murdo

¹ Macdonald v. Hall, July 24, 1893, 20 R. (H. L.) 88.

² Muirhead v. Muirhead, May 12, 1890, 17 R. (H. L.) 45.

No. 81. was entitled to renounce his provision, as it was not alimentary, and he and his children could demand distribution and discharge the trustees.¹
 Jan. 28, 1897. At advising,—
 M'Murdo's
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LORD JUSTICE-CLERK.—The late Mrs M'Murdo, by antenuptial contract, disposed her estate, present and prospective, to trustees, and appointed that in the event of her predeceasing her husband they were to pay to him the interest or income during his life, "for his own use and for the maintenance and education of the issue" of the marriage, and to hold the fee and income after his death for the children, in such proportions and under such conditions as the spouses or the survivor of them might appoint in writing, and failing such writing, for all the children and the survivors, the issue of any predeceasing child taking the parent's share.

Mrs M'Murdo is now dead, being survived by her husband and all her children, and her husband has executed a deed of appointment, by which the estate is to be divided equally among the children, the share of any child dying without issue before division to be divided equally among the survivors.

The question now before the Court is, whether the trustees may now divide the fund among the children of the marriage. All the children are major, and desire that this should be done, and the father, who is also desirous to the same effect, has agreed to renounce all rights he may have to the liferent or income settled upon him.

When the purposes of the trust are looked at, it is seen that there is here a provision for the support of the other spouse and the upbringing of the family. There is no express declaration of an alimentary character attaching to the provision, and there is nothing from which such an intention is to be implied. The purpose is stated as one "for his own use and the maintenance and education of the issue." This latter part of the purpose has been fulfilled so far as upbringing and education are concerned, as the family are all grown up. There therefore remains only as regards the purposes that which applies to the payment of interest to the survivor of the spouses. There is really no question as regards issue of children, for there is in the deed no destination over. It is only the issue of any child "predeceasing her" that are to take the parent's share, and she was survived by all her children.

In this case the children of the marriage have a right of fee, and it is only the father's right to a liferent interest which stands in the way of their shares being made over to them. I think that he can discharge his claim, and that if he does so the trustees are entitled to wind up the trust and to hand over their shares to the beneficiaries.

LORD YOUNG.—I assume from the manner in which the trustees express their views that the request of the beneficiaries for the immediate distribution of the estate appears to them to be quite reasonable, and that in their opinion the purpose of the deceased will not be defeated by such distribution. I therefore concur in answering the question as suggested.

¹ Pretty v. Newbigging, March 2, 1854, 16 D. 667, 26 Scot. Jur. 338; Muirhead v. Muirhead, 17 R. (II. L.) 45, *per* Lord Watson, p. 48.

I think it proper to add that in my opinion questions as to whether a No. 81.
 liferent or annuity is alimentary or not ought to be avoided, as they easily Jan. 28, 1897.
 might, by conveyancers bringing the matter under the notice of the granter M'Murdo's
 of such deeds, and seeing that the words of the deed clearly express the Trustees v.
 granter's intention. M'Murdo.

LORD TRAYNER.—By the antenuptial contract now under consideration it was provided that on the death of Mrs M'Murdo (which has happened) the marriage-contract trustees should pay the free interest or income of the residue of her estates to her surviving husband "during all the days of his life" for his own use, and for the maintenance and education of "the issue of the marriage," and should hold the fee or capital of such estates for behoof of "the whole children of the said intended marriage," in such proportion as the spouses or the survivor of them should appoint. Failing such appointment, the estates were to be held "for behoof of her whole lawful children" and the survivors, share and share alike. It was suggested, if not maintained, on behalf of the first and fourth parties to this case, that some right was conferred (after the death of Mrs M'Murdo) on the fourth parties (her grandchildren) in the interest or income of the estates by the words "issue of the marriage." I do not doubt that in many cases the terms "issue of the marriage" would include grandchildren. But I do not think they do so here. The expression "issue of the marriage" occurs in the same clauses with the expression "children of the said intended marriage" and "whole lawful children," and I think it impossible to read the whole clause without coming to the conclusion that its provisions were intended to apply, and only to apply, to the immediate issue of the marriage,—that is, to the children of Mr and Mrs M'Murdo.

Mrs M'Murdo having died, the only persons interested in the estate in question are Mr M'Murdo, who has right to the liferent, and the children of the marriage, who take the fee, subject to their father's right of appointment. The children are all of full age, and their rights are vested.

In these circumstances Mr M'Murdo offers to renounce and discharge his liferent in order that his children may at once receive their shares of the estate as he has apportioned them; but the question has been raised whether Mr M'Murdo can validly discharge his liferent. I am of opinion that he can, and the case of *Pretty v. Newbigging*¹ seems a direct authority in favour of that view. I may also refer to the opinion of Lord Watson in the case of *Muirhead*² as applicable to the present case, where the construction and continuance of the trust have apparently no other purpose or object (and none other was suggested at the bar) than the protection and security of the liferent right which Mr M'Murdo is ready to discharge.

I think therefore that the question put to us should be answered in the affirmative.

LORD MONCREIFF concurred.

THE COURT answered the question in the affirmative.

MURRAY, BEITH, & MURRAY, W.S., Agents.

No. 82.

JAMES EDWARD SCOTT, Pursuer (Reclaimers).—*Shaw—Cullen.*

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 Craig's Representatives.
 MRS MARY CRAIG OR HARVEY AND OTHERS (Mrs Mary Taylor or Craig's Representatives), Defenders (Respondents).—*W. Campbell—M'Clure.*

Executor—Settlement of action by majority of executors—Title of non-consenting executor to continue action.—Where an action on behalf of an executry estate had been raised by the executors, six in number, and the case had been settled by joint minute for five executors without the consent of the sixth, and decree of absolvitor pronounced, *held* that the executor who did not consent to the settlement had no title to continue the action, no unfairness on the part of the other executors being alleged.

Judicial Factor—Curator Bonis—Power to compromise conflicting claims on ward's estate.—*Opinion* by Lord Kincairney that a curator bonis has power at common law to compromise claims relating to the ward's moveable estate.

Trust—Trustee—Judicial Factor—Curator Bonis—Power of curator bonis to compromise claims on ward's estate—Statute—Retrospective operation—Trusts (Scotland) Act, 1867 (30 and 31 Vict. c. 97), sec. 2—Trusts (Scotland) Amendment Act, 1884 (47 and 48 Vict. c. 63), sec. 2.—The Trusts Act, 1867, sec. 2, enacted that trustees should have the power, where it is not at variance with the trust purposes, "5 to compromise . . . all claims connected with the trust-estate."

The Trusts Amendment Act, 1884, sec. 2, enacted,—"In the construction of the said recited Acts,"—one of these being the Trusts Act, 1867,—"'trustee' shall include tutor, curator, and judicial factor," and "judicial factor shall mean curator bonis."

Opinion (per Lord Kincairney) that this latter provision was declaratory, and therefore retrospective in its effects.

2D DIVISION.
 Lord Kin-
 cairney.

ON 28th June 1872 James Wink, accountant, Glasgow, was appointed curator bonis to Alexander Taylor junior, shipmaster, who had become insane, and was then in Gartnavel Asylum. The ward's property had been managed for many years by his mother, Mrs Janet Fraser or Taylor, who died in July 1872. The curator bonis then called upon her executors, Mrs Mary Taylor or Craig and others, to account for her intromissions with the rents of her son's property. The executors made a large claim for meliorations executed by Mrs Taylor, and Mrs Craig, as an individual, claimed repayment of a loan of £600 which she had made to the ward.

In July 1873 an agreement was executed by Mrs Elizabeth Taylor, the ward's wife, on the one part, Mrs Craig and Mrs Scott, the ward's sisters, and Ebenezer, the ward's only surviving brother, on the other part, whereby, on the narrative that the curator had agreed, on receiving discharges of the claims against him, to renounce all claims against the executors of the ward's mother, and that the parties to the agreement were the only parties interested at present or prospectively in the ward's estate, they agreed to a certain arrangement.

By an agreement, dated 25th September and 4th October 1873, between the curator bonis and Mrs Craig, Mrs Craig gave up her claim for £600, and the curator gave up all claims against Mrs Janet Fraser or Taylor's representatives, and Mrs Craig, as taking burden on herself for these representatives, gave up all claims against the ward's estate.

Mrs Scott died in May 1888, Ebenezer Taylor died in 1892, and the ward died insane on 14th November 1893.

It was then discovered that he had left a will dated 15th November 1866 leaving his whole property to Mrs Scott, and a codicil dated 17th November 1880 to the same effect, but adding a conveyance in favour of Mrs Scott's children *nominatim*, to take effect in the event of Mrs Scott predeceasing him, and nominating them his executors.

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On 14th February 1894 James Edward Scott, shipowner, London, and his five brothers and sisters, as executors-nominate of Alexander Taylor, their uncle, and as individuals, raised an action against Mrs Craig and her daughter Mrs Harvey, the surviving executors of Mrs Janet Fraser or Taylor, mother of the ward, and against James Wink, the curator bonis of the lunatic.

The conclusions of the summons were (1) for reduction of the agreement dated 25th September and 4th October 1873 between the defender Wink, as curator bonis of the lunatic, Alexander Taylor, and Mrs Craig, as representing Mrs Taylor, then deceased; (2) for an account of Mrs Taylor's intromissions with the estate of her son Alexander; and (3) for decree for £14,000 failing accounting.

The pursuers averred,—(Cond. 13) "At the time that said agreement (the agreement dated 25th September and 4th October 1873 under reduction) was entered into, it was apparently contemplated that the parties thereto were the only parties who would be interested in the succession of the ward on his death. Acting on this assumption, which was entirely erroneous, Mr Wink made no independent inquiry of any kind as to the nature or extent of the claims which he could enforce against Mrs Taylor's representatives, and he did not obtain the authority of the Court to the compromise in question. He acted upon the footing that whatever might be the sums due to his ward by the representatives of old Mrs Taylor, it was useless to inquire into same, if the whole parties who were interested in the ward's succession settled the question of accounting amongst themselves. This was entirely erroneous in fact,—neither the ward nor the parties interested in or entitled to his succession having come to any such agreement or settlement, or even considered the subject, or been consulted thereon. Prior to the date of the agreements in question, the ward had executed a will leaving his whole estate to Mrs Scott, whom failing, by predecease, to her children, the pursuers, and they accordingly are the only persons interested in his succession." (Cond. 14) "The agreement under reduction was executed in essential error, as above set forth, on the part of the whole parties thereto. It was of the nature of a compromise on the erroneous footing that all parties interested then or prospectively were agreed. It was not, and was not meant to be, binding upon the ward himself, or others deriving right through him. In point of fact, his and their rights and interests were entirely ignored, and the same have been prejudiced, and loss thereby caused to the extent of the sum sued for. It was *ultra vires* of the said James Wink or the other parties to said agreements to prejudice the rights of the pursuers by said deeds, and the same are not in any way binding on the pursuers."

The pursuers pleaded;—1. The said agreement falls to be reduced in respect (1) that it was granted under mutual and essential error; (2) that it was *ultra vires* of the curator bonis, James Wink; *et* (3) *separatim*, it is not binding on the pursuers and forms no bar to an accounting.

The defenders pleaded;—(1) No title to sue. (3) The averments of

No. 82. the pursuers being irrelevant, the action should be dismissed. 4. The pursuers are barred from suing the present action in respect that the curator bonis compromised the present claim.

Jan. 29, 1897. *Scott v. Craig's Representatives.* On 6th March 1894 the Lord Ordinary held the production satisfied, and the defences already lodged as defences on the merits, and on 20th March the record was closed.

On 17th January 1895 a joint minute was lodged, which bore that the "pursuers other than the said James Edward Scott" concurred with the defenders in stating that they had come to an extrajudicial arrangement regarding the matters set forth upon record, and in respect of it they craved "the Lord Ordinary, as between these parties, to assolzie the whole defenders from the conclusions of the summons."

On 19th January 1895 the Lord Ordinary pronounced this interlocutor:—"In respect and in terms of the joint minute for the pursuers other than the pursuer James Edward Scott, and for the defenders, assolzie the whole defenders from the conclusions of the summons."

On 21st February 1896 a minute of wakening and transference was lodged by James Edward Scott, which prayed for transference of the cause to the representatives of Mrs Craig, who in the interval had died.

This minute was objected to by Mrs Harvey and the other representatives of Mrs Craig, on the ground that it was incompetent unless with the concurrence of James Edward Scott's co-executors, and accordingly on 10th March by the interlocutor by which the process was wakened and transferred as craved, all questions as to the pursuer's title were expressly reserved.

On 1st December 1896 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds that the pursuer James Edward Scott has no title to sue this action: Sustains the defenders' plea to that effect: Dismisses the action."*

* "OPINION.— . . . Parties have been heard on title and the grounds of action, and the first question necessarily is whether the objection to title should be sustained.

"With very considerable hesitation I have come to the conclusion that it should. James Edward Scott, the sole pursuer, is one of several executors and one of several beneficiaries under the will of Alexander Taylor, and it is, I think, clear that he does not, either as executor (being only one of many, and none of them confirmed) or as beneficiary, represent Alexander Taylor. In the ordinary case a minority of executors cannot sue a debtor of the defunct—See *Morton v. The Duke*, 11th April 1557, M. 14,686; *Borthwick v. Douglas*, 1st February 1566, M. 14,685; *v. Lag*, 8th March 1634, M. 14,689; *Bryson v. Torrance*, 24th November 1841, 4 D. 71, 14 Scot. Jur. 30, per Lord Medwyn. It has also been settled, in a great variety of circumstances, that no creditor or legatee of a defunct can sue the debtor of the defunct—*Bryson v. Torrance*, *supra*; *Addison v. Whyte*, 25th June 1870, 8 Macph. 909, 42 Scot. Jur. 483; *Hinton v. Connell's Trustees*, 6th July 1883, 10 R. 1110; *Rae v. Meek*, 20th July 1888, 15 R. 1033; *Henderson v. Robb*, 18th January 1889, 16 R. 341.

"But exceptions have been admitted to both of these rules. In *Bryson v. Torrance*, the title of one out of three executors was sustained in an action against another of the executors as a debtor to the estate, in which the other executors had refused to concur; and in *Watt v. Roger's Trustees*, 18th July 1890, 17 R. 1201, an action by a beneficiary under a trust for recovery, for

James Edward Scott reclaimed, and argued ;—(1) The action was relevant. The ground of reduction was essential error, consisting in the fact that the curator bonis on the one hand and Mrs Taylor's representatives on the other entered into the agreement under the erroneous belief that the defenders were the sole prospective inheritors of the ward's estate. A judicial factor charged with the administration of an estate had a duty to consider the interests of the estate, and only to enter into transactions affecting it after full consideration. Here the averment was that he had failed in this duty and had never really applied his mind to the agreement. Confronted by those whom he imagined to be the sole representatives having any interest in his ward's estate, he had practically told them to arrange matters amongst themselves, and that he would endorse their settlement. He had totally ignored the possibility of the ward's recovering his sanity and making a new will. It was not necessary that such a case should be suggested by anything *in gremio* of the agreement. It was enough if the pursuer averred that by the transaction the curator bonis had surrendered through error a valuable asset of the estate to those

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the benefit of the trust-estate, of a debt by one of the trustees, where it was said that the other trustees were acting in concert with the defender, was sustained.

"The pursuer James Edward Scott, admitting the general rule, contended that this case falls under either or both of the exceptions so recognised, and that his executorial title is sufficient on the authority of *Bryson v. Torrance*, and his title as beneficiary sufficient under the authority of *Watt v. Roger's Trustees*; and, if there had been nothing against the pursuer's title, except that the pursuer was only one of several executors and beneficiaries, I think I should hardly have been able to sustain the objection to it. The lapse of time might create much difficulty, but still there is no plea of *mora* against the pursuer, the action having been brought without any delay; and it might have been possible for him, if he had good grounds for setting aside the contract, to have ascertained the balance, if any, which would in that case be due from the estate of Mrs Taylor to the estate of Alexander Taylor; and he might perhaps have restricted his demand to the share of the balance which he might be able to vindicate for himself.

"But then over and above all this, there has been a transaction by which decree of absolvitor in favour of the defenders has been pronounced against five of the executors. The action by them has not been dismissed. It has been decided against them, although no doubt by agreement. I think the case is the same as if these five executors had ratified the agreement, and that without fraud or any conduct which has been described as unfair. No doubt they did not intend to affect the pursuer's title; but the defenders did not agree that the pursuer's title should not be affected, and they are not barred from objecting to it. If then five out of six executors agree to ratify an agreement which has been challenged, has a single remaining executor a title to ignore that ratification and to set aside that agreement? I must admit that I cannot give a confident answer to that question, and I answer it with hesitation in the negative.

"The law as to the powers of a majority of executors is not very clearly settled, but latterly the view that executors act like trustees by a majority has, I think, been preferred. The earlier cases of *Grant and Gregory v. Campbell's Representatives*, 11th July 1764, M. 14,690, and *Rogerson v. Barker*, 9th March 1833, 11 S. and D. 563, 5 Scot. Jur. 273, and the more recent case of *Mackenzie v. Mackenzie*, 3d February 1886, 13 R. 507, favour that view, and I think it is supported by Lord M'Laren on Wills, 2d ed. vol. ii. 902. On these grounds I lean to the opinion that the pur-

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who had no title to it. The error was "of the substance of the matter,"¹ and the agreement was reducible. (2) The reclaimer had a good title to continue the pursuit of the action. The action was raised by the pursuers individually as well as *qua* executors, and the reclaimer was therefore entitled to pursue the action notwithstanding that his co-executors had retired from it. One executor could not discharge a debt wholly "seeing the other executors had equal share in all."² When the majority of the executors retired from the action they did not intend to prejudice the reclaimer's right to go on with it if he chose. It had never been held that a majority of executors was entitled to compromise an action begun by the entire body of executors, and none of the cases cited by the respondents were in point. In *Coulter v. Forrester*,³ the deed expressly directed that two trustees should be a quorum, and two of them settled the action with the debtor. In *Grant v. Campbell's Representatives*,⁴ of the three executors appointed in the deed two only had been confirmed, and they settled the action.

Argued for the defenders;—(1) The action was irrelevant. The

suer has no title to sue this action on this record. Whether he can frame a better action against the defenders, or whether he has any remedy against his co-executors, I do not venture to say.

"This ground of judgment necessarily disposes of the action, and precludes disposal by judgment of the plea of irrelevancy and of the grounds of reduction, and if I were more confident about it than I am, I might go no further. But, as the grounds of reduction pleaded were fully argued, I think it may be more satisfactory that I should proceed briefly to notice them. I do so as if the whole executors were still insisting.

"Now, the agreement bears to be of the nature of a compromise. It was not a mere discharge, it was a settlement of conflicting claims, and the first question seems to be whether it was *intra vires* of the curator bonis. I am disposed to think that it was, especially as it related only to personal estate, and did not affect the ward's heritable property. It must be admitted that the powers of a curator bonis at common law to effect a compromise without judicial authority are not well cleared by decisions. Such a power has, however, been recognised to a certain extent. Thus, in *Anderson*, 7th March 1855, 17 D. 596, 27 Scot. Jur. 258, the Court refused a petition by a judicial factor for special power to compromise, on the ground that such powers were unnecessary. In *Thomson's Trustees v. Muir*, 13th December 1867, 6 Macph. 145, a distinction was taken between the power of trustees to compromise and their power to enter into a submission; and while it was held that a submission into which trustees had entered was beyond their power, the judgment might have been different had the case regarded a compromise by the trustees. It appeared to be thought that a power in trustees to compromise would be more readily recognised than a power to refer, and the case of *Anderson* was referred to without disapproval. Yet in the case of *Corson*, 10th July 1835, 13 S. and D. 1093, 7 Scot. Jur. 501, a petition by a curator bonis for power to enter into a submission regarding the moveable effects of an imbecile party was refused as unnecessary, because within the discretion of the curator bonis. If a power to enter into a submission about moveable estate was held to be within the power of a curator bonis, much more must a power to compromise about such an estate be so. Further, in the case of *Ross v. Devine*, 30th June 1878, 5 R. 1015,

¹ Stair, i. 17, 2.

² Stair, iii. 8, 59.

³ Coulter v. Forrester, June 11, 1823, 2 S. 343.

⁴ Grant v. Campbell's Representatives, July 11, 1764, M. 14,690.

deed embodied a compromise entered into with a view to avoid a litigation, and the Court would not readily set it aside now that all the representatives who had transacted with the curator bonis were dead. When the curator bonis found himself vested in 1872 with the rights of his ward, he was face to face with a situation in which, while the estate was entitled to a sum of money from Mrs Taylor's representatives, they had large counter claims against the estate, and he thought the matter a fair subject for such a compromise as he was entitled to make both at common law¹ and under the statute.² The question as to who at the time had the interest in the estate was irrelevant, for had the lunatic recovered his sanity he might have made another will. All the parties then interested were represented. If the curator had failed to make proper inquiry *sibi imputet*, the defenders had not induced him to enter into the transaction.³ He gave up one claim and they another. If he acted improperly he would have to answer to his ward or his ward's representatives. That was no reason for setting aside a transaction with the defenders, who had acted honestly, and were entitled to rely upon the contract. More-

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the power of a curator bonis to adjust differences between his ward and her sister seems to have been recognised. The 17th section of the Pupils Protection Act, 12 and 13 Vict. cap. 51, which provides for the Court granting power to factors to perform exceptional acts of factorial management, does not apply to this case.

"Further, I am disposed to think that the power of a curator bonis to compromise was statutory at the date of the contract under reduction, *i.e.* 1873. That question stands thus: Power to compromise is one of the general powers conferred on trustees by the 2d section of the Trusts Act, 1867 (30 and 31 Vict. cap. 97); but that section is not made applicable to curators bonis. It is, however, provided by the 2d section of the Trusts (Scotland) Amendment Act, 1884 (47 and 48 Vict. cap. 63), that in the construction of the recited Acts—one of these being the Trusts Act, 1867—trustee shall include tutor, curator, and judicial factor, and judicial factor shall mean curator bonis. It appears to me that from the manner in which this provision is expressed it must be held to be declaratory, and retrospective, and therefore to make it possible to affirm that, in 1873, the Trusts Act of 1867 conferred the power of compromise on curators bonis, or, otherwise, recognised the existence of that power. If so, the contract was *intra vires* of the curator bonis.

"I do not know whether this question has come up for determination, and I was not referred to any decision on the point. But I may refer to the *Attorney-General v. Theobald*, 1890, L. R., 24 Q. B. D. 557, in which a similar point was decided. It was there held that a provision in the Customs and Inland Revenue Act, 1889, enacting that a prior Act should be construed so as to embrace a certain class of property passing under a settlement, was retrospective so as to subject to the provisions of that Act property of the class in question although payable before the date of the later Act.

"It is further pleaded by the pursuer that the contract is reducible because it was granted under mutual and essential error. It is said that parties acted under the belief that all parties interested were represented,

¹ *Ross v. Devine*, June 30, 1878, 5 R. 1015.

² Trusts Act, 1867 (30 and 31 Vict. c. 97), sec. 2; Trusts (Scotland) Amendment Act, 1884 (47 and 48 Vict. c. 63), sec. 2.

³ *Stewart v. Kennedy*, March 10, 1890, 17 R. (H. L.) 25, *per* Lord Herschell, p. 27.

No. 82. over, the alleged error was not within the deed under reduction. The error was non-essential. Nothing short of fraud would avail to set aside a solemn contract. (2) The pursuer had no title to sue. It mattered not that the action was brought by the pursuers as executors and individuals. The pursuers were suing in the interests of the executry estate as a whole, and not for the enforcement of any individual interest. The reclaimer was therefore excluded from claiming under the action as an individual for his own interest. The question then came to be, whether one out of six executors could persist in an action from which the other five had departed? That question had been answered negatively as far as concerned trustees,¹ and it fell to receive the same answer in the case of executors.² Executors, like trustees, were entitled to act by a majority. Here five of them saw the chance of a large part of the estate being carried off, and they compromised the action. The reclaimer had no right to interfere with a good arrangement made by the majority.

At advising,—

LORD YOUNG.—The Lord Ordinary has stated the facts of the case fully, and, I think, accurately, but a briefer statement will suffice to enable me to

and that this was an erroneous belief, because the pursuers were not represented, and it has now turned out that they are entitled to the whole of the ward's estate. I understood that this is the error referred to in the pursuer's plea, and it was maintained that it was a mutual error which vitiated the contract. I consider that argument entirely fallacious, and that there was no error of the kind. All the parties who had any right or interest were represented, and the pursuers had then no interest whatever, and, of course, could have none so long as Alexander Taylor lived. It may be also noticed that, as it now appears, at the date of the contract, Mrs Scott, and not the pursuers, was Alexander Taylor's executor-nominate. I do not find any other error averred. It is, as I think, not averred that Mr Wink was under any error in regard to the extent of his ward's claims on Mrs Taylor's estate, and certainly it is not averred that Mrs Craig or those whom she represented misled the curator bonis to any extent. What is said or suggested is that the curator bonis was ignorant of the extent of these claims because he was careless; and no doubt it is intended to be alleged that his carelessness arose from the fact that he thought he was acting with the consent of all who could ever succeed to Alexander Taylor, and that he overlooked or disregarded the contingencies that Alexander Taylor might leave a will or might recover his sanity. But I am not aware of any authority for setting aside a contract on such grounds against the will of the other parties to it, who did nothing to induce the error or ignorance of the former party, and who were, in my opinion, entitled to rely on the contract. I think that Alexander Taylor could not have reduced this deed had he recovered his reason, although he might possibly have had an action against the curator bonis and his cautioner. The mere fact that a contracting party is ill informed about the subject-matter of a contract has never, so far as I am aware, been held to be a reason for reducing it.

"None of the cases quoted by the pursuer appear to me to be authorities which warrant reduction of this deed on the grounds pleaded; and I am unable to see that the conclusions of accounting can be reached if the deed be not reduced. Even if I had sustained the pursuer's title, I must therefore have decided against him on the relevancy."

¹ Coulter v. Forrester, June 11, 1823, 2 S. 343.

² Grant v. Campbell's Representatives, July 11, 1764, M. 14,690; Mackenzies v. Mackenzie, Feb. 3, 1886, 13 R. 507.

explain my opinion on the only question—one of law and not of fact—decided by the interlocutor reclaimed against, and which does not involve any disputed matter of fact. That question is, whether the reclamer James Edward Scott has a title to pursue this action, or, as I should prefer to put it, to continue the pursuit of it after and notwithstanding of the minute and the interlocutor of 19th January 1895 following upon it.

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By that minute and interlocutor this action was settled and taken out of Court, the defenders being assoilzied. It appears on the face of the minute that the reclamer did not assent to the settlement, and we must take the fact to be so. If this fact invalidates the settlement and absolvitor, any person having legitimate interest may challenge the proceeding and have it set aside. But while it stands I am of opinion that we must regard the action as out of Court by legitimate settlement and decree of absolvitor. It follows that the reclamer has no title to pursue it.

It is right, however, that I should express the opinion which I entertain that the reclamer's dissent, or rather declinature to assent to the settlement which his five co-executors deemed prudent and proper in the performance of their executorial duty, and therefore resolved to make, was not necessarily an obstacle to their making it, or a ground for impeaching it when made. There may unquestionably be grounds on which one of six executors may interfere to hinder the settlement of a pending action (or anything else) proposed to be made by the other five, or take proceedings to set it aside when made, but I cannot countenance the proposition that the mere fact of his dissent or refusal to assent is sufficient. The reclamer has really no ground on which to ask the Court to disregard the minute and interlocutor in question and allow him to proceed with the action as an action at his instance, except this, that his assent was not given but refused, and that his co-executors could not validly act without it.

I am disposed to agree with the Lord Ordinary in the opinion which he has expressed, to the effect that this action, which the majority of the executors pursuing it compromised and settled as they did, was irrelevant. There are certainly plausible and probable grounds for that opinion, and if it was held by the advisers of the executors and by all but one of their own number, it would be unfortunate if the law enabled that one to veto a compromise on reasonable terms by merely declining to assent to it. I allude to this matter of relevancy only to make this illustrative observation on the question of title.

LORD JUSTICE-CLERK.—I am of the same opinion.

LORD TRAYNER.—I concur in the judgment of the Lord Ordinary. The present action was raised by the executors-nominate of the deceased Alexander Taylor for reduction of an agreement, the terms of which were said to be prejudicial to the interests of the executry estate, and for recovery of a large debt said to be due to that estate. The action was brought in the interest of the executry estate as a whole, and not for the enforcement of any individual beneficial interest. The pursuers are no doubt described in the instance of the summons as executors "and as individuals." But there are neither averments nor conclusions applicable to any individual claim. Such an action could have been brought by a majority of the executors, and I

No. 82. think it was within the competency of a majority of them to abandon or compromise such an action. If they did so to the prejudice of any beneficiary they must of course answer for it. But the discharge, by a majority of the executors of the action, just like the discharge of a debt, would be quite a sufficient discharge to the defender in the one case, and the debtor in the other, to whom the discharge was granted. I think, therefore, the pursuer Mr James Edward Scott cannot now insist in that action, which his co-executors have discharged. As an executor he cannot do so, because the demands of the executry estate, made by the executors as a body, have been satisfied. The case of *Bryson v. Torrance*¹ does not decide anything to the contrary. It was a special case, where the title to sue an action brought by one out of three executors was sustained, in respect that one of the executors was the debtor who was being sued, and the remaining executors declined to concur in the action. To have refused to sustain the title in such a case would have been to prevent the executry estate recovering its debt. But the case here is not that no other executor will concur with Mr Scott, but that having concurred with him their claim, so far as they think they have right or interest to enforce it, has been satisfied. As an individual Mr Scott cannot, in my opinion, insist in this action (whatever other remedy may be open to him), because the form of the action excludes him from claiming under it as an individual for his own interest. The case of *Watt v. Roger's Trustees*² (referred to by the Lord Ordinary as relied upon by Mr Scott), certainly gives some countenance to the view that a beneficiary under a trust may be allowed to sue the debtor of a trust-estate for payment of a debt due to the trust. I am not, as at present advised, prepared to follow that case, in which there was a serious division of opinion, as a conclusive authority.

On the question of relevancy I agree with the Lord Ordinary, and have nothing to add.

LORD MONCREIFF.—Looking to the whole scope of the summons, I think the pursuers sue as executors for an alleged debt due to the executry, and as a majority of the executors might have raised the action, so, in the absence of exceptional reasons to the contrary, may they compromise it or decide in the interests of the executry not to proceed with it. I do not doubt that in some circumstances the Court may sustain the title of a minority of executors to raise or proceed with an action. But all that we see of this case leads to the conclusion that the five executors who have compromised their claim and withdrawn from the action exercised a very sound discretion in deciding not to proceed, because, in my opinion, the pursuers' averments are utterly insufficient to infer reduction of the agreement sought to be reduced. I therefore think that the Lord Ordinary's judgment should be affirmed.

THE COURT adhered.

WM. B. RAINNIE, S.S.C.—R. ADDISON SMITH, S.S.C.—Agents.

¹ 4 D. 71.

² 17 R. 1201.

REVEREND THOMAS ANGUS MORRISON, Pursuer (Respondent).—*Ure*— No. 83.

M'Lennan.

J. T. SMITH & COMPANY, Defendants (Reclaimers).—*D.-F. Asher*—
W. Campbell.

Jan. 30, 1897.
Morrison v.
Smith & Co.

Reparation—Slander—Newspaper—Anonymous letter—Diligence for recovery of original letter.—In an action of damages for slander against the proprietors of a newspaper founded on statements contained in an anonymous letter published in the newspaper, the pursuer, a parish clergyman, averred that the letter “was written or procured to be written by the defenders for publication in their newspaper in pursuance of a malicious design to injure the pursuer,” and “to destroy his reputation” as a clergyman. The defenders refused to disclose the name of the writer of the letter, and the pursuer moved for a diligence for the recovery of the original letter.

The Court (*rev. judgment of Lord Kincairney*) *refused* the diligence.

Cunningham v. Duncan & Jameson, Feb. 2, 1889, 16 R. 383, *distinguished*.

Opinion reserved (per Lord Young) as to the right of a person who alleges that he has been slandered by an anonymous letter in a newspaper, to discover the name of the writer with a view to proceedings against him.

Observed (per Lord Moncreiff) that as the defenders refused to disclose the name of the writer of the letter, they would not be entitled to prove an averment made by them that they had received the letter in the ordinary course of business, and in good faith.

ON 16th May 1896 the Rev. Thomas Angus Morrison brought an action against J. T. Smith & Company, publishers of the *Kirkintilloch and Lenzie Mercury* and *East Dumbartonshire and Campsie Advertiser*, concluding for £2500 as damages. 2D DIVISION.
Lord Kin-
cairney.

The pursuer averred that (cond. 3) the annual report of the Kirkintilloch Parish Church for the year ending 31st December 1895 was issued to the congregation in March 1896. “In the issue of their said newspaper, dated Saturday, 28th March 1896, the defenders falsely, calumniously, maliciously, and without probable cause, printed and published the following statement in the form of a letter to the editor from an anonymous correspondent:—

‘Kirkintilloch Parish Church Annual Report.

‘Sir,—The parish church congregation has at *last* been supplied with a copy of this interesting report. The parish church is like no other church in this respect, that there is no congregational meeting at which the report can be presented, discussed, and adopted, and for this reason perhaps you will allow me space in your paper to draw attention to one or two points.

‘The report as a whole, I think, is the weakest production of the kind I have ever perused, and comparing it with the reports of 1891 and 1892, or with those of any other church, it is mere rubbish, and certainly not worth the expense of the printing.

‘To begin with, there is no pastoral address from the minister to the people. What can be the reason of this? Is it because that he cannot say, as in 1891, that “he visited every member of the church at least once during the year”; that he is ashamed to say that there are members of the church and families that he has not visited since he became minister of the church? or is it that he would not like to say that he has neglected the sick and the dying, and the aged and infirm of the congregation, who are unable to attend the church? I certainly would like to know the reason why there is no address, and I would have liked as much to have read the address, if there had been one.

No. 83. 'We have a report from the kirk-session which is the essence of brevity. From it I observe the membership has fallen from 966 to 961. Why is it not increasing by fifties and hundreds? The reason is not far to seek. The parish is secured; there is no need of swelling the communion-roll with the names of people who never go to a church. Their vote is all that was wanted, and they are not now required.

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'We come to the treasurer's report, and it is an interesting document.' The letter quoted then proceeded to criticise the treasurer's report, and was signed "Auld Kirk."

"A print of the said newspaper containing the said statement is produced and referred to. The statements in answer are denied."

The defenders answered;—(Ans. 3) "The annual report for the year 1895, which was published in or about March 1896, and the letter to the defenders' newspaper are referred to. *Quoad ultra* denied. The said letter was received by the defenders and was printed by them in the ordinary course of business, and in good faith, and without any intention of injuring the pursuer, towards whom the defenders entertained no malice whatsoever. The said letter bore to be, and was, a criticism of the annual report of the parish church, which was a public document in which a large portion of the community was interested. It was accompanied, according to the usual practice, with the name and address of the writer—not for publication—but as a guarantee of good faith."

The pursuer then set forth (cond. 4) the innuendoes appearing from the issues allowed *infra*. The defenders denied that the letter bore the meaning attributed to it by the pursuer, and averred that it was a fair comment on the facts stated in the report, and that its statements were true in point of fact, as shewn by a number of details specified.

The pursuer further averred;—" . . . The said letter was written or procured to be written by the defenders for publication in their newspaper in pursuance of a malicious design to injure the pursuer, and with the calumnious and injurious object of destroying his reputation, respectability, character, and usefulness as a clergyman, and of holding him up to public hatred, contempt, and ridicule. The defenders have identified themselves with and have made their newspaper the mouthpiece of a small number of persons in the parish, who, mainly from motives of personal hostility to the pursuer, desired to form themselves into a separate congregation in connection with the Church of Scotland, and petitioned the Presbytery for this purpose. There being no *bona fide* occasion for a separate church in the village of Kirkintilloch, where the petitioners proposed that the new church should be situated, the pursuer and the kirk-session of Kirkintilloch in discharge of their duty opposed the petition of said persons before the Church Courts, and it was ultimately refused by the General Assembly in May 1896. The said letter has had the effect of lowering and degrading the pursuer in the eyes of the public." (Ans. 5) "Denied."

The pursuer then averred, and the defenders admitted, that the defenders had declined to give the name of the writer of the letter.

The following issues and counter issue were adjusted for the trial of the cause:—Issues.—(1) Whether, in the issue of *The Kirkintilloch and Lenzie Mercury* and *East Dumbartonshire and Campsie Advertiser*, dated on or about 28th March 1896, the defenders printed and

published the letter printed in the schedule hereto appended? No. 83. Whether the said letter is in whole or in part of and concerning the pursuer, and falsely and calumniously represents that the pursuer, in pursuance of his candidature for the appointment of parish minister of Kirkintilloch, had procured persons to be enrolled on the communion-roll of said parish who were to his knowledge unfit to be communicants, with the motive of securing their votes in his favour, or makes similar false and calumnious representations of and concerning the pursuer—to his loss, injury, and damage? (2) Whether the said letter is in whole or in part of and concerning the pursuer, and falsely and calumniously represents that the pursuer, after being ordained as parish minister of Kirkintilloch, had, in breach of his duty as such minister, neglected the sick and dying, and the aged and infirm of the congregation, or makes similar false and calumnious representations of and concerning the pursuer—to his loss, injury, and damage? Damages laid at £2500? Counter issue.—“Whether the pursuer in breach of his duty as parish minister of Kirkintilloch neglected the sick and dying, and aged and infirm of the congregation?”

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The pursuer then moved for a diligence for the recovery of, *inter alia*, the following:—“(3) The original manuscript or manuscripts of the said letter. (4) All letters received by the defenders, or any of them, or any one on their behalf, between 1st March and 7th April 1896, relating to the letter in question, or to the authorship or publication thereof.”

On 2d December the Lord Ordinary (Kincairney) granted the diligence.

The defenders reclaimed, and argued;—The general rule was settled that a newspaper which undertook the responsibility of a letter published in its columns could not be compelled to disclose the name of the writer in an action for damages on account of slander alleged to be contained in the letter.¹ *Cunningham*² was exceptional, and was recognised by the Judges who decided it to be so. The averment there was that the newspaper had inserted a number of letters bearing to proceed from different persons, which would give readers of the paper the impression that there was a general *fama* against the pursuer, whereas the truth was (as the pursuer averred) that all the letters proceeded from a single source, viz., the paper itself. Nothing of that sort was averred here. There was only one letter.

Argued for the pursuer;—This case was within the principle of *Cunningham's* case, which was, that a pursuer complaining of a letter regarding him in a newspaper was entitled to discover whether the letter was the genuine production of a third party, seeing that, if it was not, the pretence by the paper that it was amounted to an aggravation of the injury to the pursuer. The fact that there was only one letter did not affect the pursuer's right to test its genuineness, although it might affect the amount of the damages.

At advising,—

LORD JUSTICE-CLERK.—It has been the practice for a very long time, and laid down as the right course to pursue, that where a newspaper which is responsible and able to meet the case of a pursuer alleging slander in the

¹ *Lowe v. Taylor*, June 24, 1843, 5 D. 1261, 15 Scot. Jur. 601; *Brims v. Reid*, May 28, 1885, 12 R. 1016.

² *Cunningham v. Duncan & Jameson*, Feb. 2, 1889, 16 R. 383.

No. 83. columns of the newspaper undertakes responsibility, the proprietor is not called on to give the name of the correspondent.

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It is quite true that the rule is not absolute. Notwithstanding the fact that the newspaper is prepared to take all responsibility, there may be circumstances in which the Court may allow such inquiries by recovery of documents as may shew who is the writer of the letter.

It was so decided in the case of *Cunningham*,¹ which was a case of a very peculiar description. It was alleged by the pursuer on record that the letters were not genuine letters at all, received by the editor of the newspaper and inserted by him, but were the result of a deliberate plot to injure the pursuer by putting in fictitious letters, which had not been received from correspondents.

It was argued in that case that, if recoveries were allowed, they might reveal who the writers were, if it was not the fact that the letters were fictitious, but, as the Lord President pointed out, persons who write such letters are not entitled to great consideration; and in the particular case his Lordship was for disregarding that argument, although he recognised that it applied as a general rule.

I am, therefore, of opinion that we should refuse the diligence.

LORD YOUNG.—I am of the same opinion. I desire to give no opinion as to the right of a person, who says he is slandered by a letter in a newspaper, to discover who has slandered him, with the view to proceedings against the writer. This is not an application of that sort. It is an action in which issues have been adjusted against a newspaper, and it is as good as it can be made irrespective of the question who was the author of the letter, if other than the paper itself. As to the proceedings for ascertaining who was the author of letters—slanderous letters—sent to a newspaper which might not be able to meet the responsibility at all, I am giving no opinion now. But in such a case it would appear to me to be very strange if the law afforded no means of enabling a person to ascertain who it was that had slandered him. It appears to me to be just the same as if the slanderer instead of getting a newspaper to publish his slander, had got a billsticker to stick it up. In that case I should think that there must be some means of ascertaining who was guilty of such conduct.

Reserving, however, my opinion on that question, I agree that this diligence should be refused, and with expenses.

LORD TRAYNER.—If I had thought that this case was indistinguishable from the case of *Cunningham*,¹ I would have agreed with the Lord Ordinary. But I think the cases very different. They are materially different in so far as the *species facti* are concerned, and give rise to the application of a different rule. In *Cunningham's*¹ case, the pursuer's averment was that the defender had written or procured to be written several letters which he published in his newspaper under different signatures, intending to represent them (as he did in a subsequent editorial article) as the spontaneous expressions of the opinion of divers members of the public anent the pursuer's alleged misconduct; and that this was part of a systematic plan to destroy

or injure the pursuer's reputation. These averments presented a very special case, and it was in respect of its specialty, as I read the opinions of the Judges there delivered, that the Court adopted the course, which was recognised as exceptional, of giving the pursuer a diligence to recover the original manuscripts of the libellous letters—although the defenders took the whole responsibility of their publication. No. 83. Jan. 30, 1897. Morrison v. Smith & Co.

Here there is only one letter published, which the pursuer avers was written or procured to be written by the defenders. Now, whether it was written by the defenders or by somebody else at their request or instigation, does not seem to me of very much importance, if indeed of any, for the defenders adopt the letter and responsibility in connection with it. They virtually take the position of the writer, whoever he may be; and at the trial the defenders should be dealt with exactly as if they were the avowed authors of the letter. In this view of the case, the inquiry which the diligence asked for is intended to aid is irrelevant to the issue, and I think should not be granted.

LORD MONCREIFF.—As a general rule the publisher of a newspaper is not compelled to disclose the name of the writer of a letter published anonymously in his paper—*Lowe v. Taylor*,¹ *Cunningham v. Duncan & Jameson*.² This exemption can only be justified on the footing that the publisher accepts full responsibility for the contents of the letter, and that thus the disclosure of the name of the writer would not materially benefit the person who complains of the slander.

Accordingly the Court will not in ordinary circumstances assist a pursuer, in an action for damages against a publisher, to ascertain the name of the writer by granting such a diligence as is here asked. In the case of *Cunningham v. Duncan & Jameson*,² the application for a diligence was treated as unusual, and it was granted only on account of the exceptional averments made by the pursuers, which were to the effect that the defenders, the printers and publishers of certain newspapers, had themselves written not one but eight letters which were published in their papers, and which bore to be written by different persons, thus falsely representing that there was a *concursus* of independent public opinion on the matter, upon which they commented in leading articles. It was clear that if this fraudulent conduct on the part of the defenders were established the damages might be materially increased.

In the present case, however, the pursuer complains of only one letter, and the only purpose which such a diligence would serve would be to discover the true author. Whether the writer were discovered to be the defender or a third party, I do not think that the amount of damages to be awarded against the defenders would be appreciably affected by the disclosure. There is this further objection to granting the application, that the pursuer's averments are far from specific. If diligence were granted in the present case, I do not see why it should not be granted in every case where the pursuer avers that he believes that the publisher wrote the letter complained of himself. At the same time, I must say that in my opinion

¹ 5 D. 1261.

² 16 R. 383.

No. 83.

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the defenders can derive no benefit from the averments which they make in answer 3, to the effect that the letter was received and printed in the ordinary course of business and in good faith. The reason why the publisher of a newspaper is absolved from disclosing the name of his correspondent is, as I have said, because the name is not material to the pursuer's case, because the publisher takes the writer's place to all effects, and is deprived of all privilege. But if a publisher, while refusing to disclose the name of his correspondent, were to attempt to take benefit and obtain mitigation of damages by proving that he received the letter in good faith and in the ordinary course of business, it would at once become material to the pursuer to have the means of testing this by ascertaining the author's name. Therefore in my opinion the defender should not be allowed to lead evidence to that effect.

There are passages in the opinions of some of the Judges in *Cunningham's* case which, taken apart from the circumstances, would seem to support the pursuer's application. But taken as a whole, I read that decision as proceeding upon the exceptional circumstances of the case.

In the result, while I think it will be open to the pursuer at the trial to object to the defender leading evidence of the averments contained in the third answer, I think that the diligence now asked should not be granted.

THE COURT recalled the Lord Ordinary's interlocutor, refused the diligence, and remitted to the Lord Ordinary to proceed.

FORRESTER & DAVIDSON, W.S.—CARMICHAEL & MILLER, W.S.—Agents.

No. 84.

THE BANKNOCK COAL COMPANY, LIMITED, Petitioners.—
Lorimer.

Jan. 30, 1897.
Banknock
Coal Co.,
Limited.

Company—Reduction of capital—“Capital lost or unrepresented by available assets”—Companies Act, 1867 (30 and 31 Vict. c. 131), secs. 9 to 19.—Companies Act, 1877 (40 and 41 Vict. c. 26), secs. 3 and 4.—A company registered as a company limited by shares under the Companies Acts, and which under its articles of association had power to reduce its capital and to accept the surrender of its shares, passed a special resolution to reduce its capital by permanently cancelling certain fully paid-up shares belonging to two shareholders who had agreed to the cancellation in order to recoup the company against a loss resulting from the misappropriation of the funds of the company by one of its officials.

The company having presented a petition praying the Court to confirm the resolution and the proposed reduction of capital and to dispense with the addition of the words “and reduced” to the company's name, the Court, after a remit for inquiry and a report, *granted* the prayer of the petition.

1ST DIVISION. ON 6th November 1896 the Banknock Coal Company, Limited, presented a petition praying the Court to pronounce an order (1) confirming the reduction of the company's capital, as resolved upon by a special resolution of the company passed on 18th September, and confirmed by the company on 9th October 1896; (2) to approve of a minute to be registered (under section 15 of the Companies Act, 1867) along with the order by the Registrar of Joint Stock Companies, and (3) to dispense altogether with the addition of the words “and reduced” to its name.

The Court remitted to Mr Charles B. Logan, W.S., "to inquire and report as to the regularity of the proceedings, and the reasons for the proposed reduction of capital." No. 84.

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Mr Logan reported that the proceedings were regular, and that there were sufficient reasons to warrant the proposed reduction of capital.*

* "REPORT.— . . . By the memorandum of association the capital of the company was declared to be £25,000, divided into 2000 ordinary shares of £10 each, and 500 preference shares of £10 each. Of this capital 1602 ordinary shares have been issued, 1054 of which are fully paid up, and on the remaining 548 the sum of £6 each has been paid; 492 preference shares have also been issued, and are fully paid up. The remaining 398 ordinary and 8 preference shares are still unissued. By its articles of association (No. 58), the company has power from time to time, by special resolution, to reduce its capital.

"It is explained in the petition that funds of the company, amounting to £2300, have been misappropriated by an official of the company, and in order to recoup the company against loss, two of the shareholders of the company have, by minutes of agreement, agreed to the cancellation of, in all, 230 ordinary paid-up shares of the company belonging to them, provided that the capital of the company is reduced from £25,000 to £22,700.

"Accordingly, at extraordinary meetings of the shareholders held at Glasgow on the 18th of September, and 9th of October, both in the year 1896, the following special resolution was passed and confirmed, viz:— 'That the capital of the company be reduced from £25,000, divided into 2000 ordinary shares of £10 each, and 500 preference shares of £10 each, to £22,700, divided into 1770 ordinary shares of £10 each, and 500 preference shares of £10 each; and that such reduction be effected—(a) by cancelling the 180 paid-up ordinary shares numbered . . . 'and (b) by cancelling the 50 paid-up ordinary shares numbered . . . ' " as provided for in two provisional agreements between the company and the two holders of these shares respectively.

"By article 18 of its memorandum of association the company has power to accept surrenders of its shares. The surrender proposed in the present case is not in consideration of a payment in money or money's worth by the company, and it appears not to be *ultra vires*, and is a transaction which may be competently carried out without the sanction of the Court. The company, however, desires to treat the surrendered shares as permanently extinguished, and unless the capital of the company is formally reduced, the surrendered shares might be again issued, and they would still be part of the company's nominal capital and would affect the nominal rate of dividend. It is this reduction of capital which your Lordships are asked to confirm.

"So far as I am aware, the only reported case at all similar to the present that has come before the Scottish Courts, is that of *The West End Café Company, Limited (and Reduced)*, Jan. 16, 1894, 21 R. 381, in which the Court confirmed a reduction of capital where certain shares had been purchased by the company and cancelled. Several petitions of a like nature, however, have come before the English Courts, and in the petition of *In re Gatling Gun, Limited*, 1890, L. R., 43 Chan. Div. 628, in circumstances somewhat similar to those of the present case, Justice North sanctioned a reduction of capital following upon the surrender of shares to the company.

"In the present instance, the shares which have been surrendered are fully paid up, and as no further liability attaches to them their cancellation will not affect the rights and liabilities of the shareholders of the company *inter se*. By the 3d section of the Companies Act, 1877, it is declared that the word 'capital,' as used in the Companies Act, 1867, shall include paid-up capital, and that the power to reduce capital conferred by that Act shall include a power 'to cancel any lost capital or any capital unrepresented by

No. 84. The petition was unopposed.

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The petitioner cited the cases referred to by the Reporter, and referred to Lord Herschell's opinion in *British and American Trustee and Finance Corporation*, L. R. [1894], A. C. 399, at p. 405.

THE COURT (the LORD PRESIDENT, LORD ADAM, LORD M'LAREN, and LORD KINNEAR) granted the prayer of the petition.

R. AINSLIE BROWN, S.S.C., Agent.

No. 85. JOHN PRATT AND OTHERS (John Marshall's Trustees), Petitioners.—
R. E. M. Smith.

Jan. 30, 1897.
Marshall's
Trustees.

Trust—General power of sale—Prohibition in codicil against selling a particular subject—Petition for power to sell—Trusts (Scotland) Act, 1867 (30 and 31 Vict. cap. 97), sec. 3.—A truster in his settlement gave his trustees a general power of sale. In a codicil he directed,—“As I consider that the value of property in B will improve, I direct and appoint my trustees to hold and retain the property known as K . . . and not to sell or dispose of the same before the youngest of my sons attains twenty-one years of age.”

In a petition brought by the trustees before the youngest child had attained majority, under the 3d section of the Trusts Act, 1867, for power to sell the property dealt with in the codicil in the interests of the trust-estate, the Court (*dub.* Lord M'Laren) *refused* the petition on the ground that, assuming that a sale was “expedient for the execution of the trust,” it was “inconsistent with the intention thereof.”

1ST DIVISION. JOHN MARSHALL, corn merchant in Leith, executed a trust-disposition and settlement in which he disposed to trustees his whole estate, heritable and moveable, for the purposes of the trust.

The trustees were requested and authorised to carry on, for the benefit of the family, the business of John Marshall & Company at Borrowstounness, with power to them to wind up the business, or sell

available assets.' The reduction of capital which the petitioners ask your Lordships to confirm appears to fall under this description, and the loss sustained by the company above referred to, and the subsequent surrender and cancellation of the shares, appear to me to warrant the reduction. . . .

“It is provided by the 4th section of the Companies Act, 1877, that where the reduction of capital does not involve ‘the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital,’ the creditors of the company shall not, unless the Court otherwise direct, be entitled to object or required to consent to the reduction, and that in that case the Court may dispense with the addition of the words ‘and reduced’ to the name of the company. In the present case, the cancelled shares are fully paid up, and no repayment to the shareholders of paid-up capital is involved, and, therefore, under the section above referred to, no objection on the part of creditors of the company is competent, and no consent by them is required. By your Lordships’ interlocutor of 7th November 1896, the addition of the words ‘and reduced’ to the name of the company was dispensed with from that date, and until disposal of the petition; and I submit that it is a case for also dispensing with the words ‘and reduced’ after the disposal of the petition. . . .

“I have to report that the whole proceedings prior to and since the date of the presentation of the petition have been regular, and that there are sufficient reasons to warrant the proposed reduction of capital, and that accordingly the prayer of the petition may be granted.”

the trustees' interest therein, as they might see expedient; and he also conferred upon his trustees power to continue to hold his investments as at his death, or reinvest the same—to lease, sell, or dispose of all or any part of the trust-estate, all as therein specified.

By a codicil, dated 18th June 1877, Mr Marshall provided as follows:—"As I consider that the value of property in Borrowstounness will improve, I direct and appoint my trustees to hold and retain the property known as Kinglass Brewery, belonging to me, and not to sell or dispose of the same before the youngest of my sons by my present marriage attains twenty-one years of age."

Mr Marshall died on 1st January 1879, survived by nine children, and the trust was thereafter managed by the trustees.

On 28th December 1896 this petition was presented to the Court by the trustees under section 3 of the Trusts (Scotland) Act, 1867 (30 and 31 Vict. cap. 97),* for authority to sell and dispose of the property known as the Kinglass Brewery.

The petitioners averred that all of the children of the deceased Mr Marshall had attained majority, excepting Andrew Pratt Marshall, who would not attain that age till February 1898.

They further stated that the trust-estate, consisting of heritable property, feu-duties, furniture, the trustees' interest in the estate of John Marshall & Company, and certain shares in the company, at present unsaleable but of hopeful value, amounted to £4000, and that there were bonds over the estate amounting to £2500, and other debts amounting to £2000. They further stated that they had discharged some of the most urgent claims in order to protect the estate from embarrassment.

"In order to protect the estate and pay off the debts, it is necessary to realise the heritable property, including the property known as Kinglass Brewery. It is considered there is no chance of its improving in value, and the present would be a good time to sell. Had the said Andrew Pratt Marshall been of age, the petitioners would, under their powers in the trust-deed, have at once disposed of it, but owing to the terms of the codicil referred to, special powers are required to enable them to do so."

The petition was unopposed.

On 20th January 1897 the Lord Ordinary (Stormonth-Darling) reported the petition to the First Division.†

* The Trusts Act, 1867 (30 and 31 Vict. cap. 97), sec. 3, enacted,—“It shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees . . . on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof . . . (1) to sell the trust-estate or any part of it.”

† “NOTE.—My difficulty in granting the prayer of this petition arises from the express terms of the prohibition against selling. In several of the reported cases under section 3 of the Trusts Act, a distinction has been drawn between a positive direction not to sell (as in *Hay's Trustees v. Hay Milne*, June 13, 1873, 11 Macph. 694) and a destination from which it could be inferred that sale was not in the testator's mind (as in *Weir's Trustees*, June 13, 1877, 4 R. 876). Cases of the former class have been held not to fall within the statute, because, however great the expediency of selling might be, it was impossible to affirm that the power asked was ‘not inconsistent with the intention’ of the trust.

“In *Whyte's Factor v. Whyte*, Jan. 10, 1891, 18 R. 376, this view pre-

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Marshall's
Trustees.

The petitioners, in addition to their contention as appearing in the Lord Ordinary's note, further argued that the codicil did not indicate the main purposes of the trust, but was only an administrative direction, and therefore a prohibition in it was not of the same force as if it had been contained in the trust-deed itself.

LORD PRESIDENT.—The truster has in so many words directed and appointed his trustees to "hold and retain" this property, and "not to sell or dispose of the same" before a certain date.

I am quite unable to get over this direction, and think on that ground we should refuse the petition.

LORD ADAM.—I am of the same opinion. We have statutory authority for granting such a petition if a sale is not inconsistent with the purposes of the trust. There is in this deed a direct prohibition against a sale before a certain date, and I do not see how it can be said that a sale before that date could be consistent with that direction.

LORD M'LAREN.—I understand that this petition is maintained on the ground that the direction contained in the codicil is not one of the main purposes of the trust, but is only an administrative direction.

That appears from the preamble to the clause, where the truster states that he considers the value of property in Bo'ness will improve, and for that reason he gives the direction to defer selling his property there until his youngest child should be of age.

Now, it must be admitted that there may be directions in a trust which in some measure conflict with the notion of a power of sale, and which will not exclude the action of the Court under the Trusts Acts. The mere omission of a power of sale may indicate that the truster did not intend that there should be a sale, or there may be cases where it is shewn by implication that the truster did not contemplate a sale; yet, if the necessity arises, the Court may be legitimately moved to grant the statutory power of sale which the truster, not foreseeing the circumstances, did not himself grant. The question is one of degree, and unless this administrative direction is to

vailed, because certain lands were excepted from the general power of sale. In *Sutherland's Trustees*, however, July 20, 1892, 29 S. L. R. 903, where there was a somewhat similar exception, the Court granted power of sale in order to preserve the trust-estate against the diligence of creditors.

"The circumstances of the present case as stated in the petition have a strong resemblance to those in *Sutherland's case*, and much may depend on the precise extent to which the trustees are being pressed by creditors. I have thought it better not, at my own hand, to incur the expense of a remit to a man of business, but I have asked the petitioners to be prepared with exact information on this head.

"It is to be observed that the prohibition here expires in February 1898, so that, unless creditors are very urgent, the trustees could accomplish their purpose in little more than a year without any authority from the Court. This circumstance was founded on by counsel as diminishing the force of the prohibition, but it may be replied that the prohibition, while it lasts, is couched in as strong terms as could well be used. It is not merely that this particular property is excepted from a general power of sale (as in *Whyte and Sutherland*), but that the trustees are directed 'not to sell or dispose of the same' before the majority of the testator's youngest son."

be treated as having that positive character which would exclude the statutory jurisdiction, I should be disposed to think that the power might be granted on the ground that this is a direction intended only to secure as large a price as possible, and is not one of those conditions to which the statute refers as "the purposes of the trust," or, as the Lord President in a previous case¹ has called them, the "main purposes" of the trust.

But as your Lordships think that the case is one where an order of sale would be inconsistent with the purposes of the trust, I am content that the petition should be dismissed, because powers of sale should only be granted where the question of competency is free from doubt.

LORD KINNEAR.—I agree. The statute requires, in order to the exercise of the power which it gives the Court to enable trustees to sell where the trust-deed contains no such power, that two conditions shall be satisfied—first, that the sale shall be expedient for the execution of the main purposes of the trust, and second (and equally imperative with the first), that it shall not be inconsistent with the intention of the truster.

Now, a sale may or may not be expedient for the execution of the general purposes of the trust. I assume that it will be so, although there has been no inquiry for the purpose of ascertaining the facts. Mr Smith tells us that it will be, and I therefore take it for granted for the purpose of the argument. But, assuming that it will be expedient, the further question arises, whether it is consistent with what the truster intended? On this matter I can have no doubt whatever, because he says in so many words that the trustees are not to sell before 1898.

THE COURT refused the petition.

J. & A. PEDDIE & IVORY, W.S., Agents.

MRS SUSANNAH CRAMB OR MACGOWN AND ANOTHER, Pursuers.—
Christie. No. 86.

MISS SUSANNAH CRAMB (Cramb's Executrix), Defender.—*Clyde.* Feb. 2, 1897.
MacGown v. Cramb.

Process—Interlocutor allowing proof—Motion for recall on ground of res noviter—Nobile officium—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 28.—After an interlocutor allowing proof in an action has become final in terms of section 28 of the Court of Session Act, 1868, the Court cannot, in the exercise of its *nobile officium*, order its recall on the application of one of the parties to the cause.

THIS was an action at the instance of Mrs Susannah Cramb or MacGown, with consent of her husband, against Miss Susannah Cramb, general disponent and sole executrix of John Cramb, for declarator that the pursuer, as one of the heirs-portioners of James Cramb, her uncle, who had died in 1876, had acquired by survivorship of him, under section 9 of the Conveyancing and Land Transfer Act, 1874 (37 and 38 Vict. cap. 94), a personal right to one-half *pro indiviso* of the said James Cramb's one-half *pro indiviso* interest in certain heritable properties.

The defender averred that James Cramb had left a holograph

¹ Weir's Trustees, June 13, 1877, *per* Lord President (Inglist), 4 R. p. 880.

No. 86. settlement conveying his whole property to John Cramb, whose executrix and general disponent she was.
 Feb. 2, 1897. She pleaded, *inter alia*;—(1) No title to sue.
 MacGown v. On 3d November 1896 the Lord Ordinary (Kincairney) closed the
 Cramb. record, and allowed parties a proof of their respective averments.

On 20th November the Lord Ordinary granted a diligence at the instance of the defender for the recovery of certain documents.

One of the documents recovered by the defender under this diligence was an antenuptial contract of marriage between the pursuer and her husband.

On 5th January 1897 the defender moved the Lord Ordinary for leave to add to the record a statement in regard to this marriage-contract. She further moved the Lord Ordinary to recall the interlocutor allowing a proof, and to send the case to the Procedure-roll to discuss the question of the pursuers' title to sue, on the ground that the newly discovered marriage-contract had an important bearing thereon.

The Lord Ordinary allowed the defender to amend the record as craved, and thereafter of new closed the record and reported the cause to the First Division.*

The defender moved the Court to authorise the Lord Ordinary to recall the interlocutor allowing a proof, and to send the case to the Procedure-roll. She submitted that once the case was brought before the Court, the Court could deal with it, and that in the circumstances the course she suggested was clearly appropriate, as she intended to maintain, on a construction of the marriage-contract, that the pursuer had no title to sue.

The pursuer opposed the motion. She stated that she maintained that she had a title to sue, and was willing to proceed with the proof, and argued that under the Court of Session Act,¹ an interlocutor allowing proof was absolutely binding unless reclaimed against within six days.

LORD PRESIDENT.—The section of the Act of Parliament which Mr Christie has referred to makes this a final interlocutor unless it is reclaimed against, and therefore it seems to me we can do nothing.

LORD ADAM.—I never understood that the *nobile officium* could supersede an Act of Parliament.

LORD M'LAREN and **LORD KINNEAR** concurred.

THE COURT remitted to the Lord Ordinary to proceed.

STURROCK & STURROCK, S.S.C.—**R. AINSLIE BROWN, S.S.C.**—Agents.

* "NOTE.—At the closing of the record on 3d November last, the Lord Ordinary, on the motion of the parties, allowed to them a proof of their averments. On 5th January current the defender moved for leave to add to the record certain statements of the nature of *res noviter*. It appeared to me that these statements should be considered, and accordingly the record has been amended by the addition of these statements, with the pursuers' answers thereto.

"The defender has contended that the effect of these statements is to destroy the pursuers' title to sue, and that therefore the interlocutor allowing proof should be recalled. As I do not seem to have power to recall that interlocutor, the defender's counsel moved that I should report the cause."

¹ Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 28.

MRS ELIZABETH MELROSE, Pursuer (Reclaiming).—*Cook—D. Anderson.* No. 87.
 ROBERT ADAM AND OTHERS (Trustees of the Edinburgh Savings Bank),
 Defenders (Respondents).—*Shaw—W. Campbell—J. G. Stewart.*

Feb. 2, 1897.
 Melrose v.
 Trustees for
 Edinburgh
 Savings Bank.

*Bank—Savings Bank—Depositor—Action by depositor—Arbitration—Savings Banks Acts Amendment Act, 1863 (26 and 27 Vict. c. 87), sec. 48.—*Section 48 of the Act 26 and 27 Vict. c. 87, enacts, that any dispute which may arise “between the trustees . . . of any savings bank and any individual depositor therein” shall be referred to a specified arbiter.

M brought an action against the trustees of a savings bank for payment of £50 which had been deposited in her name, and which she alleged the officials of the bank had paid away upon a forged order to another person. The defenders denied that the order was forged, or that they were responsible even if it was. They pleaded that the action was excluded by the arbitration clause in the statute. At the date when the action was brought M had no funds at her credit in the books of the bank.

Held (aff. judgment of Lord Kincairney) that the action being founded upon the contract of deposit involved a question between the bank and a depositor in the sense of the statute, which fell to be decided by arbitration.

THIS was an action at the instance of Mrs Elizabeth Melrose against Robert Adam and others, as trustees for the Edinburgh Savings Bank, for payment of £50. 1ST DIVISION.
Lord Kincairney.

The pursuer averred that on 28th January 1895 the bank had negligently paid away £50, which was then standing at her credit in the books, to her sister, who had stolen the pursuer's deposit-book, and forged the pursuer's name to an order for the withdrawal of the money.

The defenders admitted that the officials of the bank had paid the £50 to the pursuer's sister, but denied that the order on which it was paid had been forged. They further founded upon the Regulations of the Treasury for Trustee Savings Banks and the rules of the bank as protecting them, even if the order was forged.

The defenders also founded upon section 48 of the Act 26 and 27 Vict. cap. 87, as amended by section 2, subsection 1, of the Savings Bank (Barrister) Act, 1876 (39 and 40 Vict. cap. 52), and section 4 of the Friendly Societies Act, 1875 (38 and 39 Vict. cap. 60),* and

* By 26 and 27 Vict. cap. 87, sec. 48, it is enacted that,—“If any dispute arise between the trustees and managers of any savings bank and any individual depositor therein, or any executor, administrator, next of kin, or creditor or assignee of any depositor who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor or assignee, or to be entitled to any money deposited in such savings bank, then, and in every such case, the matter in dispute shall be referred in writing to the barrister-at-law appointed under the said hereby repealed Acts, or this Act, who shall have power to proceed *ex parte* on notice in writing to the said trustees or managers left or sent through the post-office by the said barrister to the office of the said savings bank, and whatever award, order, or determination shall be made by the said barrister shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal.” Subsection 1 of section 2 of the Savings Bank (Barrister) Act, 1876, enacts that “the powers and duties relating to any dispute arising between the trustees and managers of any savings bank . . . on the one hand, and any depositor or person claiming through or under a depositor on the other hand, shall be transferred to

No. 87. pleaded;—(1) The action is incompetent, *et separatim*, is barred by the arbitration clauses in the Acts of Parliament founded on.
 Feb. 2, 1897. It appeared from documents produced that after the £50 in dispute
 Melrose v. had been paid away a balance of £14, 9s. 4d. remained at the pur-
 Trustees for suer's credit, but that she withdrew this on 24th June 1896, a few
 Edinburgh days before the summons was signeted, but after her intention to
 Savings Bank. bring an action had been intimated to the defenders.

On 3d December 1896 the Lord Ordinary (Kincairney) pronounced the following interlocutor:—"Finds that the question at issue involves a dispute between the defenders, as trustees of the Edinburgh Savings Bank, and a depositor therein, who claims to be entitled to the sum sued for as money deposited in said bank, and that the said dispute falls to be decided by reference, as provided by the 48th section of the Act 26 and 27 Vict. c. 87, and other statutes libelled: Therefore dismisses the action, and decerns," &c.*

and vested in the Registrar, as defined by the Friendly Societies Act, 1875." Section 4 of the Friendly Societies Act, 1875, enacts,—“The Registrar means . . . for Scotland or Ireland, the Assistant Registrar for either country respectively.”

* “OPINION.—This is an interesting and important case. It is an action against the trustees for the Edinburgh Savings Bank for payment of £50. The pursuer avers that on 28th January 1895 the bank paid that sum, which was standing at her credit in their books, to her sister. She avers that her sister obtained payment by stealing her pass-book, and by forging an order or requisition for withdrawal of the money, and by presenting the pass-book and forged order to the bank. The defenders admit that the £50 was paid to the pursuer's sister. They do not admit that the order on which it was paid was forged, but they contend that they are not responsible even if it was. The question between the parties, therefore, is whether the payment by the defenders to the pursuer's sister relieves them in the circumstances of their obligation to pay to the pursuer the money which she had deposited; or, supposing the case clear of specialties in fact, the question expressed with its greatest generality is, whether a depositor in a savings bank or the bank loses by a forgery.

“The pursuer appeals to the common law, the defenders to regulations of the Treasury and rules of the bank, which are, they say, authoritative, and to which, they say, the pursuer has assented, and by which they are—as they maintain—protected. That is the very important and general question raised in this case.

“But there is a preliminary question stated in the defenders' first plea that the action is barred by the arbitration clauses in the Acts of Parliament.

“The primary provision on which the defenders found is section 48 of the Act 26 and 27 Vict. c. 87, which provides,—‘If any dispute arises between the trustees and the managers of any savings bank, and any individual depositor therein, or any executor, administrator, next of kin, or creditor or assignee of any depositor who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money deposited in such savings bank, then, and in every such case, the matter in dispute shall be referred in writing to the barrister-at-law appointed under the said hereby repealed Acts, or this Act . . . whose determination shall be binding . . . on all parties, and shall be final to all intents and purposes, without any appeal.’

“This enactment still continues to be law, except that by the operation of the Acts 39 and 40 Vict. c. 52, section 2, subsection 1, and the Friendly Societies Act, 1875, 38 and 39 Vict. c. 60, section 4, the referee in ques-

The pursuer reclaimed, and argued ;—The defenders were precluded from pleading the arbitration clause of the Act in answer to the pursuer's claim, in respect that they denied that she was a depositor. The character of her claim was to be judged of as at the date of the action, and at that date they denied that she had any deposit in the bank. The question turned upon the construction of such statutes as 50 and 51 Vict. cap. 40, which dealt with the approval of regulations made for trustee savings banks, and was therefore for the Court, and not the arbiter, to decide.²

Counsel for the defenders were not called on.

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tions arising in Scotland is now, instead of the 'barrister-at-law,' the Assistant Registrar of Friendly Societies for Scotland, who must be 'an Advocate, Writer to the Signet, or Solicitor, of not less than seven years' standing' (section 10, subsection 3).

"The language of this enactment appears to be very distinct, and I have not been able to see how its application can be avoided, or how it can be denied that the question raised by this action is a dispute between the trustees and an individual depositor in the bank, who claims to be entitled to 'money deposited in the bank.' The words seem to apply exactly.

"I do not understand that the application of the statute, and of the above section of it, to the defenders' bank is disputed, but the pursuer has pleaded that the question is not a dispute within the meaning of the statutes. This plea was supported mainly by reference to the case of *Symington's Executor v. Galashiels Co-operative Store Company, Limited*, 13th January 1894, 21 R. 371, but I think the case inapplicable.

"The question in that case arose under the Industrial and Provident Societies Act, 1876 (39 and 40 Vict. c. 45). The action was by the executor-dative of a deceased member for recovery of a sum claimed as due to the deceased, and the defence was that the sum claimed had been paid to certain of the next of kin of the deceased. It was considered that the defence imported a denial that the pursuer had the rights of a member, and it was held that a clause providing that disputes between members—or those suing in right of members—and the society should be referred to a committee of the society, was inapplicable, because, while the statute provided a domestic tribunal for ascertaining what the rights of members were, it did not empower the committee to determine whether a party was or was not a member. That was held to be a proper question for the Court. It might perhaps be said that the Court, after deciding that the pursuer was entitled to the rights of a member, went on to determine what these rights were, but upon that point there was truly no dispute.

"The pursuer sought to assimilate that case to this by representing that, as in that case, the defence imported a denial that the pursuer had the rights of a member, so here the defence imported a denial that the pursuer was a depositor. But I think the cases are altogether different. The relations of a member of an industrial and provident society to the society are wholly different from those of a depositor to a savings bank. The latter is not a member of the bank, but only an ordinary creditor, subject to certain conditions. There is nothing of the nature of a domestic tribunal provided, but only a comprehensive clause of reference; and I think it is a mere play upon words to say that when a savings bank, in an action brought by a party as a depositor, pleads that the money in question has been paid, that is to be held as a denial that the party is a depositor. In this case the pur-

¹ *Symington's Executor v. Galashiels Co-operative Store Company, Limited*, Jan. 13, 1894, 21 R. 371; *Prentice v. London*, 1875, L. R., 10 C. P. 679; *Willis v. Wells*, L. R. [1892], 2 Q. B. 225.

² *Per* Lord Adam in *Symington's Executor*, 21 R., at p. 377.

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LORD PRESIDENT.—I think this is a very clear case. The Act of Parliament says that if any dispute shall arise between the trustees and managers of any savings bank, that dispute (I summarise the provision) shall be settled by arbitration. This is a dispute between the trustees on the one hand, and on the other, a person who had a deposit of between £60 and £70 in this savings bank, and the matter in dispute is whether £50 of that deposit was rightly or wrongly paid to someone else.

If the matter had stood on that footing, there would have been no room for the very slender answer to the plea of the arbitration clause now given. That answer is this :—The pursuer says, “*De facto*, I am not now a depositor, because I have now no money in the bank.” First of all, let us see how the facts stand. I take the pursuer’s own record, and I find that an action had been intimated prior to the withdrawal by the pursuer of the £14 odds which remained on the deposit-account after the £50 now in dispute had been paid away. And therefore this dispute, which had arisen on the 24th June, was a dispute not as to whether the pursuer was or was not a depositor, but simply whether an item of £50 was a good debit entry in her account as a depositor, or not. Therefore it is not the fact that this dispute when it arose was a dispute between the trustees and a person who was not a depositor.

suer does not aver that the withdrawal of the £50 took from her the position of a depositor, and, in point of fact, it did not, for her pass-book shews that £14, 19s. 4d. was left deposited to her credit in the bank.

“It was maintained that the question here raised was not the sort of question referred to in the arbitration clauses; and here again reference was made to the case of *Symington*, in which an opinion to that effect was expressed on the bench in relation to the question there raised. There the tribunal was so constituted as not to be, in the opinion of the Court, adapted to the trial of a question which was thought to involve the construction of the statute, and also so constituted as apparently to make the society judge in its own cause. But in this case the arbiter—the Assistant Registrar—is presumably, in the strictest sense, impartial; and it would be absurd to represent that an official, whose statutory qualifications involve legal training and practice, is to be presumed unqualified to construe the statute which he is appointed to administer.

“If a dispute as to whether money deposited was paid or not be not a dispute with a depositor comprehended in the clause about arbitration, it is difficult to understand what sort of dispute with a depositor would be comprehended.

“It may seem a little startling that so general a question as this, whether a savings bank or its depositor should suffer from a forgery, should be withdrawn from the cognisance of the ordinary Courts, so that apparently it is a question which can never be authoritatively determined; still, that appears to be the effect of the statute, the terms of which are too plain to admit of question; and, in my opinion, they necessitate the conclusion that the question here raised must be submitted to the Assistant Registrar.

“I think the policy of the Act was to protect savings banks and their depositors from the cost of ordinary litigation, and to provide that disputes between them should not come into Court at all; and it seems to me that that policy would be best carried out by dismissing this action. Still, if the parties think it better that it should remain in Court to abide the issue of a reference to the Registrar, I do not object to sist it.

“Seeing that I am thus debarred from deciding the question raised, and that question falls to be decided by the Assistant Registrar, it would be obviously improper to indicate any opinion on the merits.”

But I go further, and I say that even supposing that this payment of £50 would have exhausted her account, still this would be a question between the trustees and a depositor. Consider the arguments on each side. The pursuer's case would then be:—"I deposited my £50. You have paid it away wrongly, and I hold that in your books I am a depositor for that amount." The answer for the trustees is, not that they dispute that this lady is entitled to the rights of a depositor, but that these rights have been satisfied; for they say that their payment to another person is as good as their payment to her. That is a totally different kind of question from those which arose in the cases of *Symington*,¹ *Prentice*,² and *Willis*.³ To take specimen passages from *Prentice*,—"If the matter in controversy is whether the party is a member or not, that clearly is not a matter of internal arrangement" (*per* Lindley, J.). Lord Coleridge said substantially the same, and Lord Esher, then Mr Justice Brett, said,—“A dispute as to whether a party is a member or not is clearly not a dispute between the society and the plaintiff as a member.” The present case is on a totally different footing. It seems to me that it is a mere accident in the case that from supervening events this pursuer has no money in the bank on her account. The question must be determined as at the time at which the dispute arose, but, further, if the payment in question had exhausted her account, the question is still one between depositor and trustees or managers.

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LORD ADAM.—I am of the same opinion. It is impossible to read the summons without seeing that it is a claim by a depositor for repayment of a sum wrongly paid away by the bank. The only question is whether the sum was properly paid away or not. I agree with the Lord Ordinary that, if a dispute as to whether money deposited has been paid or not be not a dispute with a depositor comprehended in the clause about arbitration, it is difficult to understand what sort of a dispute with a depositor would be comprehended.

I quite agree with your Lordship and the Lord Ordinary, and think it a clear case.

LORD M'LAREN.—I agree. I think there is no doubt that the question in dispute is referred to arbitration.

LORD KINNAR.—I entirely agree. The pursuer avers that she deposited certain sums in the defenders' bank. She is suing on the contract of deposit, and the only defence is founded on what the defenders allege to be the terms of the contract. The dispute is as to what are the rights of the parties to the contract of deposit *inter se*. I agree in an observation of the Lord Ordinary that the pursuer's argument that she is not a depositor in the defenders' bank, because, as they say, the money deposited has been paid, resolves itself into a mere play upon words.

I have no doubt whatever that the Lord Ordinary's judgment is right.

THE COURT adhered.

DAVID MURRAY, Solicitor—CURROB, COWPER, & CURROB, W.S.—Agents.

¹ 21 R. 371. ² 1875, L. R., 10 C. P. 679. ³ L. R. [1892], 2 Q. B. 225.

No. 88.

Feb. 3, 1897.
Smyth v.
Caledonian
Railway Co.

PETER SMYTH AND OTHERS, Pursuers (Appellants).—*Baxter—Guy.*
THE CALEDONIAN RAILWAY COMPANY, Defenders (Respondents).—

C. J. Guthrie—Blackburn.

THE GLASGOW IRON AND STEEL COMPANY, LIMITED, Defenders
(Respondents).—*Balfour—Salvesen.*

Reparation—Master and Servant—Railway—Injury to servant from defective plant of third party.—The children of a labourer, in the employment of the Glasgow Iron and Steel Company, who was killed while working as a platelayer on a railway siding situated within the steel company's premises, brought an action of damages against the steel company and the Caledonian Railway Company. They averred that the accident had been caused by a defect in the points, which had thrown several waggons off the line during a shunting operation; that the lines, and the engine and waggons which were using them at the time of the accident, belonged to the railway company; that the lines had been kept up by the steel company for at least ten years, and that both the defenders were responsible for their upkeep; that it was the duty of the steel company to have seen that the points could shut, and that the rails, &c., were in good condition, before putting the deceased to work at or near them.

Held (1) that there was a relevant case against the railway company, but (2) that no relevant case was stated against the steel company, there being nothing in the pursuers' averments to shew that any duty to see to the maintenance of the line attached to these defenders.

1st DIVISION.
Sheriff of
Lanarkshire.

THIS was an action of damages brought in the Sheriff Court at Hamilton by Peter Smyth and others, the children of the deceased Andrew Smyth, against the Caledonian Railway Company and the Glasgow Iron and Steel Company. The action against the steel company was laid both at common law and under the Employers Liability Act.

The pursuers averred;—On 5th September 1896 Andrew Smyth was killed by accident on the line of the defenders the Caledonian Railway Company, while in the employment of the other defenders, the Glasgow Iron and Steel Company. On said date Andrew Smyth was working as a platelayer under the orders of one of the Glasgow Iron and Steel Company's foremen, on a railway siding situated within the gateway which formed the entrance to the Steel Company's works, his duty being to keep the lines in order within the works of the Steel Company. (Cond. 4) At the time of the accident a row of waggons was being shunted on the siding within the Steel Company's works. "Said engine, waggons, and lines were the property of the defenders the Caledonian Railway Company, but both of said defenders are responsible for the upkeep and proper conduct of said lines and the traffic thereon." (Cond. 5) During the shunting operations several waggons left the line, with the result that the pursuers' father was crushed between one of them and a stationary waggon on another line. (Cond. 6) "The said accident was caused through the fault of the defenders the Caledonian Railway Company, or those for whom they are responsible, in respect that the switch-points and switch-boxes were defective, and of old material and pattern, and worn out, the switch-points being so loose that they could not be shut, and the switch-boxes broken and useless, and worked with a piece of scrap iron, and the rails bent and pieces broken off them. The sleepers also were very badly ballasted. It was their duty to have had said points so that they could shut, and said switch-boxes, rails, and sleepers of good material and in good condition, and periodically overhauled, and to have had said switch-boxes worked with a lever. This they culpably

failed to do. By an examination the defects would easily have been seen. It is usual, necessary, and safe to have such points so that they can shut, and said boxes, rails, and sleepers of good material and in good condition, and periodically overhauled, and also said boxes worked with a lever. . . ." (Cond. 7) "The said accident was also caused through the fault of the defenders the Glasgow Iron and Steel Company, or of their superintendent, for whom they are responsible, in culpably failing to see that the said points and switch-boxes were defective, the switch-points being so loose that they could not be shut, and the switch-boxes broken and useless, and worked with a piece of scrap iron, and the rails bent and pieces broken off them. The sleepers were also very badly ballasted. *The defenders the Glasgow Iron and Steel Company have kept up these lines for ten years at least.*" It was their duty to have seen that said points could shut, and that said boxes, rails, and sleepers were in good condition, before putting deceased to work at or near them, [and] to have had said switch-boxes worked with a lever. . . . It is usual, necessary, and safe to have such points so that they can shut, and said boxes, rails, and sleepers periodically overhauled and in good condition, [and] to have said switch-boxes worked with a lever."

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The defenders the Railway Company admitted that the shunting operations which resulted in the accident were being carried on by their servants.

Both defenders pleaded that the pursuers' averments were irrelevant.

On 23d December 1896 the Sheriff-substitute (Davidson) conjoined the action with three other cases arising out of the same accident, and allowed a proof before answer.

The pursuers having appealed for jury trial, the defenders objected to the relevancy.

Argued for the defenders the Caledonian Railway Company;—The ground of action was the defective condition of the points on a line which was alleged to be the property of these defenders. But the mere averment that they owned the line was not enough. To make the case against them relevant, it was necessary also to aver that they were in occupation of the line. There was no relevant averment to this effect. On the contrary, it was averred that the line had been maintained for ten years by the Steel Company, and the record read as a whole implied that the other defenders were in occupation of it. If so, the liability must rest with them, and not with the Railway Company.¹

Argued for the defenders the Glasgow Iron and Steel Company;—There was no relevant case against these defenders. The accident was averred to have taken place on the Railway Company's line, and there was no averment that the Steel Company were in occupation of that line as tenants. On the contrary, it was averred that at the time of the accident the line was occupied by a train belonging to the Railway Company and controlled by their servants. The gate was to exclude the public, and its existence could not justify the inference that the line was given over to the occupation of the Steel Company. It was said, no doubt, that the Steel Company had kept up the line for a number of

* The words in italics were added in the Sheriff Court by way of amendment of the record as closed.

¹ Smith v. Bailey, L. R. [1891], 2 Q. B. 403; Caledonian Railway Co. v. Greenock Sacking Co., May 13, 1875, 2 R. 671.

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years, but it was not averred that they were under any contract to the other defenders to do so. The duty of maintenance therefore remained with the owners of the line.¹ Even if there had been a relevant averment of a contract whereby the Steel Company undertook to keep up the line, that would not have made the action relevant against these defenders, although such a contract might have given the Railway Company a right of relief against them.

Argued for the pursuers;—It was clear that one or other of the defenders was responsible for the defective condition of the line. The pursuers could not be expected to know their exact relations to one another in regard to the line, but in the circumstances they had made averments sufficient to constitute a relevant case against each. They were entitled therefore to have the case against both defenders sent to trial. The cases of *Robinson*² and the *Greenock Sacking Company*³ had been sent to trial, and decided after proof, and a similar course had been followed in other cases of the kind.³

LORD PRESIDENT.—We have to consider this case purely upon the pursuers' record, and that being so, I am of opinion that there is a well-laid case against the Caledonian Railway Company, but not against the Glasgow Steel Company.

The pursuers, having called into Court both these parties, proceed to narrate the duties incumbent on either of them, and the fault attached to either. They do so necessarily in a continuous narrative, because their claim is that both are liable.

An examination of the record has satisfied me that *prima facie* their case lies against the Caledonian Railway. In the first place, the accident occurred in this way—there was a failure on the part of the switch apparatus to operate effectively. Now, the railway and the switch apparatus are, according to the pursuers, the property of the Caledonian Railway. Further, the operations which miscarried were operations with the plant of the Caledonian Railway, and conducted by the servants of the Caledonian Railway. All that goes far to shew *prima facie* a case against the Caledonian Railway, and in order to dismiss from consideration this, the less difficult part of the case, I may say that I consider the averments good against the Caledonian Railway. They may be more reserved and less explicit than they would have been had the draftsman not been influenced by an *arrière pensée* arising from the other claim; but still they are sufficient.

When I turn to the case against the Glasgow Steel Company, I enter upon an entirely different character of statement. The key-note there is, that while the Caledonian Railway are the proprietors of this railway, and the using company, the duty assigned to the Steel Company in condescendence 7 is merely this,—that, in as much as this railway passes through

¹ *Robinson v. John Watson, Limited*, Nov. 30, 1892, 20 R. 144; *Simpson v. Burrell & Son*, March 12, 1896, 23 R. 590; *M'Lauchlan v. ss. "Peveril" Co., Limited*, May 27, 1896, 23 R. 573.

² *Robinson v. John Watson, Limited*, Nov. 30, 1892, 20 R. 144; *Caledonian Railway Co. v. Greenock Sacking Co.*, May 13, 1875, 2 R. 671.

³ *North British Railway Co. v. Leadburn, &c., Railway Co.*, Jan. 12, 1865, 3 Macph. 340, 37 Scot. Jur. 163; *Miller v. Renton*, Dec. 8, 1885, 13 R. 309.

their works, and it may be said is used for the transit of their traffic, there is a resulting duty on them to supervise and examine the proceedings of the Caledonian Railway and their plant and apparatus. That is the essential part of condescendence 7, and by way of criticism upon the article it is instructive to note that the isolated sentence which introduced another element was in point of fact inserted, not at the original composition of this indictment against the company, but because the exigencies of debate suggested that it might be as well at least to adumbrate another view of the subject.

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Now, the importance of that statement must be judged by its relation to the context, and it seems to me to have no more importance than belongs to an anecdote or illustration of the text. I could quite have understood its being said,—“I, the pursuer, was a plate-layer engaged in the maintenance of these lines, and the keeping up of the apparatus, and the footing on which I was employed was this, that the company, my employers, were the maintainers and as such specially charged with responsibility.” But nothing is said to connect this statement of practice with the essential charge against the company, which is, not that they were bound to do the thing, but to see that it was well done. Now, can it be held that it results from the averred facts, which are these,—that this railway was the property of the Caledonian Railway, passing doubtless through the works of the other company, but still run and managed by the Caledonian Railway—can it be held that there results from these facts an obligation on the Glasgow Steel Company, in a question with their employees, to see that the Caledonian Railway do their work properly? The argument would be equally applicable to the case where there was a mere local proximity of the works to the railway. Suppose a manufacturer had his establishment close to the railway, so close that an accident with great impulse might drive waggons on to his land, would he be liable if there were an accident due to the fault of the railway company’s servants merely because he did not go into their premises to see if they were doing their duty? I cannot distinguish that case from the present, and the conclusion I have come to is, that the case against the Glasgow Steel Company is irrelevant, and that the action must be dismissed against them.

One feels the difficulty in which a pursuer is placed who is not certain as to which of two parties is liable to him, but I am afraid that he must by inquiry and investigation outside the Courts make up his mind before he comes into Court, or at all events that his difficulties will not entitle the Court to consider the record on any other footing than that of giving due weight to the statements made throughout it, and of considering whether there is a distinct and relevant statement made against each defender. On this ground I think that the Glasgow Steel Company are entitled to have the action dismissed.

LORD ADAM concurred.

LORD M'LAREN.—The case against the Caledonian Railway Company does not appear to me to present any difficulty, for this action arose from certain waggons in a train leaving the rails and causing the death of the person whose representatives are now before us. The accident is attributed

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by the pursuers to defects in the permanent way. *Prima facie*, the duty of maintaining the permanent way is one cast upon the owners of the line, the Caledonian Railway Company, who, being a company incorporated by statute for the purpose of managing a line with a view to profit, are bound to keep it in good order, whether they use it themselves or employ others to work it for them. It appears to me, therefore, that a statement that the accident was due to defects in the way is *prima facie* a relevant statement of liability against the Caledonian Railway Company. Now, in the fourth article of the condescendence it is stated that the engine, waggons, and line were the property of the defenders the Caledonian Railway Company, and that is admitted. There is no defence by the Railway Company that the permanent way belongs in property to any other person.

When we come to the case against the Glasgow Steel Company I agree that there is no relevant case against them, for it would be necessary to such a case to shew in what manner they were in fault with reference to the condition of the way. It would be necessary to aver that, as a matter of contract or otherwise, the Steel Company had undertaken the upkeep of the points, and had failed in their duty, but I cannot find such a statement in the record. The bare statement that they had maintained the line for ten years is not sufficient to raise such a liability, for it is consistent with the theory that they maintained it as agents of the Caledonian Railway Company. It follows, in my opinion, that the action against the Steel Company ought to be dismissed.

LORD KINNEAR concurred.

THE COURT pronounced the following interlocutor:—"Find that the actions as laid against the defenders the Glasgow Iron and Steel Company, Limited, are irrelevant, and dismiss the same as laid against the said Glasgow Iron and Steel Company, Limited: Find the four sets of pursuers liable to the Glasgow Iron and Steel Company, Limited, in expenses both in this and in the Sheriff Court, and remit the account thereof to the Auditor to tax, and to report: *Quoad ultra* approve of the issues No. 18 of process as adjusted at the bar: Appoint the same to be the issues for the trial of the cause, and decern."

HENRY ROBERTSON, S.S.C.—HOPE, TODD, & KIRK, W.S.—
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THE GENERAL TRUSTEES OF THE FREE CHURCH OF SCOTLAND,
 Appellants.—*Balfour—C. J. Guthrie—Macphail.*
 ALEXANDER BAIN (Surveyor of Taxes), Respondent.—
Sol.-Gen. Dickson—A. J. Young.

Revenue—Inhabited house duty—Hall—College—The House-Tax Act, 1851 (14 and 15 Vict. cap. 36), Act 48 Geo. III. cap. 55, Schedule B, Rule V.—The Customs and Inland Revenue Act, 1878 (41 and 42 Vict. cap. 15), sec. 13, subsec. 2.—Held (1) that the Free Church Assembly Hall and Free Church College were "halls or offices" within the meaning of rule V. of schedule B of the Act 48 Geo. III. cap. 55, and, being charged for poor and school rates, were liable to inhabited house duty under the House-Tax Act, 1851; and (2) that the hall and college were not entitled to the exemption conferred by the Customs and Inland Revenue Act, 1878, in respect that

they were not occupied for the purposes of a business or calling, by which the occupier—the General Trustees of the Free Church—sought “a livelihood or profit.”

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1st DIVISION.

THE General Trustees of the Free Church of Scotland appealed to the Commissioners of Income-tax against an assessment for inhabited house duty on £1105, made on them for the year ending 24th May 1896, as occupiers of the Free Church Assembly Hall and of the Free Church College Buildings, Edinburgh, and claimed exemption on the ground that the premises “are not inhabited houses, and not within the provisions of the Acts, or if they are, that they are within the exemptions expressed in the Acts.”*

In support of the assessment the Surveyor of Taxes contended that the buildings consisted of “halls and offices” in the sense of rule V. of schedule B of the Act 48 Geo. III. cap. 55, and that subsection 2 of section 13 of the Customs and Inland Revenue Act, 1878, did not apply, in respect that the occupiers did not carry on in the premises any trade or business by which they sought a livelihood or profit.

The Commissioners refused the appeal, and the appellants craved a case.

The case stated, *inter alia*;—“1. The appellants are owners and occupiers of the buildings which form the subject of the appeal. 2. The buildings in question enclose three sides of a quadrangle on Mound Place, Edinburgh. On the north and west sides of the quadrangle stands what is known as the Free Church College, a building of four storeys, containing on the sunk floor cellarage and accommodation for the heating apparatus; on the ground floor a janitor's dwelling-house, two class-rooms or halls, with professors' retiring-rooms attached, and a hall in which the Senatus and the College Committee of the General Assembly meet; on the first floor four

* The duties on inhabited houses are assessable in virtue of the House-Tax Act, 1851 (14 and 15 Vict. cap. 36), and of the schedule annexed thereto, which grants to the Crown a duty on “every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of twenty pounds or upwards by the year.”

Section 2 of the Act enacts that all powers, provisions, rules, and regulations contained in or enacted by former Acts with reference to the duties on inhabited dwelling-houses according to the value thereof, as set forth in the schedule marked B annexed to the Act 48 Geo. III. cap. 55, shall apply in the assessing, raising, levying, and collecting the duties granted by the said House-Tax Act, 1851.

Rule V. of the said schedule marked B enacts that “every hall or office whatever belonging to any person or persons, or to any body or bodies politic or corporate, or to any company, that are or may be lawfully charged with the payment of any other taxes or parish rates, shall be subject to the duties hereby made payable as inhabited houses; and the person or persons, bodies politic or corporate, or company to whom the same shall belong, shall be charged as the occupier or occupiers thereof.”

Subsection 2 of section 13 of the Customs and Inland Revenue Act, 1878 (41 and 42 Vict. cap. 15), enacts,—“Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said Commissioners, upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof.”

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class-rooms and four retiring-rooms, a common hall for the use of students, where newspapers, books, &c., are placed, and where, since the institution of dinners for the students some years ago, the dinners are served, a large library hall and other library accommodation; and on the second floor other two class-rooms, with two retiring-rooms, a gymnasium, and a museum. 3. The buildings known as the Assembly Hall, which stand on the south side of the enclosed quadrangle, contain a large hall, a smaller hall, which during the meetings of a General Assembly is used as a refreshment-room, and several retiring-rooms and lavatories. 4. A gateway from Mound Place leads through the northern side of the college buildings to the quadrangle, whence access is had by separate doors to the Assembly Hall and the college buildings. The janitor's dwelling-house on the ground floor, which is entered by a door within the gateway, and forms an integral part of the main building, now communicates internally with the sunk floor, which contains the furnaces, heating apparatus, and cellarage, and thence with the whole premises assessed. As the buildings were originally erected, there was no internal communication between the janitor's house and the remainder of the buildings charged. . . . The communication was opened for the convenience of the janitor in attending to the furnaces, and to prevent the necessity of his going from the house through the quadrangle and then into the cellar. The heating apparatus is for the college only. The gateway leading to the janitor's dwelling-house and to the quadrangle is furnished with an iron gate, which is locked at night, and thus shuts in the whole buildings, and establishes internal communication throughout the whole premises charged to duty. 5. The Assembly Hall was built expressly as a place of meeting for the General Assembly of the Free Church of Scotland, which meets annually in the month of May, and sits about ten days, and for the meetings of the Commission of the General Assembly, which are held about three times a year. The hall is occasionally let for meetings of a religious, semi-religious, or charitable character, or for temperance meetings, when a charge of from £2, 2s. to £3, 3s. a day is made for its use, but the fees charged for admission to the meetings of the Assembly and the charges for the occasional use of the hall do not more than cover expenses. 6. The Free Church College is what is known in Scotland as a divinity hall, and it is in this sense that the word "college" is used in this case, and is intended primarily for the training of candidates for the ministry of the Free Church of Scotland, when they have completed their undergraduate course at one or other of the national universities. Other students who desire to make themselves proficient in the subjects taught therein may be and are admitted. . . . 8. Fees were paid by the students, but the revenue from fees did not nearly cover the working expenses. . . . 12. The College and Assembly Hall are both charged to poor and school rates for the year to which the assessment to inhabited house duty applies. These rates were paid under protest."

Argued for the appellants;—(1) To render buildings assessable to inhabited house duty under the Act of 1851, they must not only be "inhabited," but must be "dwelling-houses,"—that is, they must be houses in which people lived not only by day but by night. It had been so held in England in the case of *Riley*,¹ and the later English

¹ *Riley v. Reid*, 1879, L. R., 4 Exch. Div. 100.

decision¹ founded on by the Inland Revenue really supported that case. This view of the statute was supported by a consideration of rule V. of schedule B of the Act 48 Geo. III. c. 55, for the inference from the special enactment there made in regard to halls and offices was, that without such special enactment they would not have been subject to the tax. The Scots decisions² were to the contrary, but the point seems never to have been directly raised in argument. (2) Nor did the buildings fall within the description of "halls or offices" in the sense of rule V. of schedule B of the Act 48 Geo. III. cap. 55. That rule contemplated business premises, and premises *ejusdem generis*. Even if the Assembly Hall were a "hall" in the sense of the rule, the college, which consisted of a series of classrooms, was evidently not. (3) Though the buildings were not primarily occupied for profit, profits were taken, and this was enough to entitle the appellants to the exemption conferred by subsection 2 of section 13 of the Customs and Inland Revenue Act, 1878.

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Argued for the Surveyor of Taxes;—(1) The duty imposed by the Act of 1851 applied to houses occupied in different ways, and not only to those in which people lived. The point was foreclosed by decisions of the Scots Court, in which it had been raised and decided.³ The only case contrary to these decisions was the English case of *Riley*,⁴ but the judgment of Baron Kelly in that case had not been supported or approved in any later case.⁵ The Act 57 Geo. III. cap. 25, which exempted houses occupied solely for purposes of trade from inhabited house duty, interpreted the Act 48 Geo. III. cap. 55, as referring to all inhabited houses, whatever the nature of the inhabitation.⁶ (2) The buildings here in question were clearly "halls or offices" in the sense of rule V. of schedule B of the Act 48 Geo. III. cap. 55. (3) The exempting clause of the Customs and Inland Revenue Act did not apply, the buildings not being occupied for the purposes of a business or calling by which the occupiers sought a livelihood or profit.

At advising,—

LORD PRESIDENT.—In my opinion the Commissioners are right, but my judgment is rested solely on the 5th rule of schedule B of the Act 48 Geo. III. cap. 55. I think that these buildings consist of "halls" in the sense of that rule, and they are in fact (and without challenge) charged with the payment of poor and school rates (the requirement of the rule being thus satisfied). The argument that they are not halls in the sense of the rule

¹ London Library v. Carter, 1890, 2 Tax Cas. 594, 62 L. T. (N. S.) 466.

² Glasgow Coal Exchange Co. v. Solicitor of Inland Revenue, March 18, 1879, 6 R. 850; Corporation of Glasgow v. Inland Revenue, Oct. 19, 1880, 8 R. 17; Edinburgh Life Assurance Co. v. Solicitor of Inland Revenue, Feb. 2, 1875, 2 R. 394; Cowan & Strachan v. Solicitor of Inland Revenue, Jan. 22, 1880, 7 R. 491; Muat v. Shaw Stewart, Jan. 27, 1890, 17 R. 371.

³ Glasgow Coal Exchange Co. v. Solicitor of Inland Revenue, March 18, 1879, 6 R. 850, *per* Lord President Inglis, at p. 852; Corporation of Glasgow v. Inland Revenue, Oct. 19, 1880, 8 R. 17; Cowan & Strachan v. Solicitor of Inland Revenue, Jan. 22, 1880, 7 R. 491.

⁴ Riley v. Reid, L. R., 4 Exch. Div. 100.

⁵ London Library v. Carter, May 24, 1890, 2 Tax Cas. 594, 62 L. T. (N. S.) 466.

No. 89. was very weak, and consisted merely of a suggestion that the word "hall" was used as synonymous with office, or at least was meant to apply only to the premises of the trade companies in London. So far as the statute shews, this theory is fanciful.

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The appellants' claim for exemption under subsection 2 of section 13 of the Customs and Inland Revenue Act, 1878, is untenable, for this plain reason, that the exemption is conferred on premises occupied for the purpose of any trade or business, or a profession or calling by which the occupiers seek a livelihood or profit. Now, it is set out in the case that the occupiers here are the General Trustees of the Free Church; they do not occupy the premises for any trade or business, or calling, or profession by which they seek a livelihood or profit.

LORD ADAM.—I am of the same opinion. I have never been able to see how the appellants got out of the clear enactment of rule 5 of schedule B of the Act of 48 Geo. III. The description given of the premises is halls and offices connected therewith, which is just the description of premises specified in rule 5; and then it is admitted in this case that the Assembly Hall and the halls in question are subject to the payment of rates, and that being so, I do not think it necessary to say more about the other grounds on which it is sought to assess these buildings.

LORD M'LAREN and LORD KINNAR concurred.

THE COURT affirmed the determination of the Commissioners.

COWAN & DALMAHOY, W.S.—THE SOLICITOR OF INLAND REVENUE—Agents.

No. 90. ALEXANDER BAIN (Surveyor of Taxes), Appellant.—*Sol.-Gen. Dickson*
—*Young*.

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THE GENERAL TRUSTEES OF THE FREE CHURCH OF SCOTLAND,
Respondents.—*Balfour—C. J. Guthrie—Macphail*.

Revenue—Income-Tax—Exemption—Theological College—"Public School"
—*Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 61, Schedule A, Rule 6.*—*Held* that a theological college which was intended primarily for the training of candidates for the ministry of the Free Church of Scotland and the regular students of which required either to be graduates or to have passed through a University course of Arts before they were admitted to the college, was not a "public school" in the sense of the Income-tax Act, 1842, sec. 61, schedule A, rule 6.

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Cause.
1st Division.

THE General Trustees of the Free Church of Scotland appealed to the Commissioners of Income-Tax for the district of the City of Edinburgh against an assessment, under schedule A of the Property and Income-Tax Acts, on £665, duty £22, 3s. 4d., made on them for the year ended 5th April 1896, as occupiers of the Free Church or New College buildings, Edinburgh, and claimed exemption from the tax on the ground that the College, being a public school, was exempt under the Act, and referred to the Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 61, schedule A, rule 6.*

* Rule 6 is in the following terms:—"Allowances to be made in respect of the said duties in schedule A.

"For the duties charged on any college or hall in any of the Universities

The Commissioners allowed the appeal, and relieved the assessment. **No. 90.**

The Surveyor of Taxes obtained a case for the opinion of the Court of Exchequer.

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The following facts were set forth in the case:—"The College referred to is what is known in Scotland as a divinity hall—and it is in this sense that the word 'college' is used in this case—and is intended for the training of candidates for the ministry after they have completed their undergraduate course at one or other of the national universities, although other students who may be desirous to make themselves proficient in any of the subjects taught therein may be, and are, admitted. The ordinary theological curriculum consists of four years' regular attendance.

"The number of students who attended the said College in session 1895-96 was 131. Of these 86 were regular or ordinary students of the Free Church of Scotland, who before admission had produced all the certificates set forth in pages 9 and 10 of the College calendar of the Free Church of Scotland for session 1895-96, and who intended to follow the regular four years' course of study. The remaining 45, of whom 10 were Scotch, 4 English, 9 from Ireland, and 22 from the United States, Canada, and other places abroad, were irregular students, who had either not passed the necessary examinations, or who were not provided with the certificates required from regular or ordinary students or aspirants to the ministry of the Free Church, who did not intend to follow the regular four years' course of study. On a separate page of the enrolment-book there is also kept a register of students who are not provided with all the statutory certificates; such students may be allowed to take part in all the ordinary work of the classes they attend with the exception of the discourses required by the laws of the Church, but the course of study followed at the New College and the examinations which follow are regulated to meet the requirements of the ordinary Free Church students, and not those of the irregular students. . . . All students who enter the College are understood to profess their faith in Christ and their obedience to Him.

"Candidates for admission to the College as ordinary or regular students must have completed that attendance at a university which is required for graduation. . . .

"The matriculation fee for ordinary students of theology is 10s. a year, and the common fee £4, 10s. annually. Students from other countries and churches, counting their attendance as part of their curriculum, pay the same fees. Other English-speaking students pay in all £2, 10s. annually; students speaking foreign languages pay the matriculation fee only. The revenue of the College from students' fees for tuition and for use of library does not nearly cover the working expenses, the deficiency being made up by the income of endowments and from church-door collections."

of Great Britain in respect of the public buildings and offices belonging to such college or hall

"Or on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse; . . . and for the repairs of such hospital, public school, or almshouse and offices belonging thereto, and of the gardens, walks, and grounds for the sustenance or recreation of the hospitallers, scholars, and almsmen, repaired and maintained by the funds of such hospital, public school, or almshouse. . . ."

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The Surveyor argued ;—In no reasonable sense of the words could the theological college of a particular Church be called a “public school.” The words were peculiarly unfitted to describe the institution in question. The great majority of the students—all the regular students—were either graduates or had at least received a university education before they were admitted to the Hall, and the object of the institution was of a particular or professional character, being the training of candidates for the ministry of the Free Church of Scotland.

The respondents argued ;—The Free Church College was a theological school. It was also a public school. To entitle it to that character it was not essential that it should be open to the whole public ; it was enough that its object was to benefit a large class of persons.¹ Though fees were exacted it was not self-supporting, but was of the nature of a charitable trust.² To entitle a charitable trust to an allowance under the Act it was not necessary that its object should be the relief of the poor. It was sufficient that it promoted religion and learning, and so conferred a public benefit.³

At advising,—

LORD PRESIDENT.—The question is whether, in the sense of this statute, the Free Church College is a “public school.”

What, then, in the first place, is the institution now in question ? It is a theological college. The training offered is theological study, primarily at least as qualifying for the ministry of the Free Church. It is, therefore, an institution for professional training. But an establishment of that kind is necessarily one for young men, and not for boys ; and the period of life is shewn by the fact that the students must either be graduates of a university, or at least must have passed through a university course of arts, or have some similar equipment in literature and philosophy.

Well, now, in ordinary language, I do not think that anyone would call a theological college a public school. Of course the word “school,” in a literary, and still more in a rhetorical sense, is applied somewhat widely. But the phrase we have to construe is “public school,” and we have to look to the context of this statute. Now, the Act, in the immediately preceding paragraph, has occasion to consider universities and colleges for the purpose of conferring an exemption on certain colleges. But, if the argument of the respondents be sound, this was entirely superfluous, for, on their construction of the words “public school,” the colleges so exempted are at least as much “public schools” as is the Free Church College. Accordingly, the statute contains within itself clear evidence that the words “public school” are used with no greater latitude than is accorded to them by popular use.

I am for reversing the determination of the Commissioners and sustaining the assessment.

LORD ADAM.—I quite agree. I think it may not be easy to define what

¹ Blake v. Mayor, &c., of City of London, 1887, L. R., 19 Q. B. D. 79 ; Hall v. Derby Sanitary Authority, 1885, L. R., 16 Q. B. D. 163.

² Cawse v. Committee of Nottingham Lunatic Asylum, L. R. [1891], 1 Q. B. 585.

³ Commissioners for Special Purposes of Income-Tax v. Pemsel, L. R. [1891], A. C. 531.

a public school is; it may not be difficult to say what is not a public school. In this particular case it appears to me, from the narrative given of the nature of this institution, that it is neither more nor less than an institution primarily for the purpose of educating or preparing persons for entering the Free Church as ministers. In my opinion that is not a public school in any sense, and I agree with your Lordship that there can be no doubt that this is not a public school in the sense of the Act.

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LORD M'LAREN.—This case raises only a question of construction of the exemptions in the taxing statute, and I agree with your Lordships that the Free Church College does not come within the exemptions relating to public schools. I do so on the ground that in the consideration of taxing statutes the true canon of construction is to take the primary sense of the words used, and that shade of meaning which is in ordinary use, avoiding all secondary meanings. The principle so applied is one which generally operates in favour of the tax-payer, because it avoids bringing in persons who might fall within the taxing words in a remote or analogical sense. But of course the principle must be applied consistently to clauses of exemption, as well as to taxing clauses; and in this case, confining the words "public school" to the meaning with which we are familiar in ordinary use, it leads to the failure of the plea of exemption which has been set forth.

LORD KINNAR concurred.

THE COURT reversed the determination of the Commissioners, and sustained the assessment.

SOLICITOR OF INLAND REVENUE—COWAN & DALMAHOY, W.S.—Agents.

DAVID GUTHRIE (Paterson's Judicial Factor), Pursuer (Reclamer).—*W. Campbell—Clyde.* No. 91.

JAMES PATERSON AND OTHERS (Paterson's Trustees), Defenders (Respondents).—*C. K. Mackenzie.*

DANIEL PATERSON, Defender (Respondent).—*Watt—Guy.*

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Paterson's Judicial Factor v. Paterson's Trustees.

Succession—Destination in moveable bond.—B invested money belonging partly to himself and partly to A in a moveable bond payable to A and B and the survivor. In a question between A's executor and B, held (aff. judgment of Lord Kyllachy), after proof, that A had authorised the investment in these terms, and that the destination operated as a bequest by A in favour of B.

Walker's Executor v. Walker, June 19, 1878, 5 R. 965; *Connell's Trustees v. Connell's Trustees*, July 16, 1886, 13 R. 1175, followed.

Succession—Destination—Effect of general settlement on prior special destination.—Held (aff. judgment of Lord Kyllachy) that a will revoking all deeds of settlement, and declaring the testator's wish that her estate should go to her heirs whomsoever, was not to be construed as revoking the special destination in a moveable bond taken by the testator, although its effect was testamentary.

Campbell v. Campbell, July 8, 1880, 7 R. (H. L.) 100, referred to.

Expenses—Judicial Factor—Personal Liability.—In an action brought by a judicial factor in which he was unsuccessful, the Court adhered to a judgment of the Lord Ordinary finding, in the circumstances of the case, the pursuer liable in expenses, without the qualifying words "as judicial factor."

Observed that a decree in these terms inferred personal liability on the part of the pursuer to the defender.

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1st Division.
 Ld. Kyllachy.

ROBERT PATERSON, innkeeper, Woodend Hotel, Holytown, died on 21st March 1882, survived by his widow, Mrs Jane Gray or Paterson, and by six children, three sons, James, Daniel, William, and three daughters, Mrs Mitchell, Mrs Burt, and Mrs Kilpatrick.

Mr Paterson left a trust-disposition and settlement and codicil, by which he conveyed his whole heritable and moveable estate to certain persons as trustees, among whom were his widow and his sons James and Daniel.

By the second purpose of his settlement Mr Paterson provided that his widow should enjoy the liferent of his whole trust-estate.

On the death of Mrs Paterson the trustees were directed (fourth purpose) to realise the moveable trust-estate, to make over certain heritable properties to his son James, and to pay certain legacies to his daughters, and (fifth purpose) to pay certain other legacies, including one of £1000 to his widow, and (sixth purpose) to hand over the residue of the estate to his son Daniel.

Power was given to the trustees to appoint one of their number to be factor on the trust-estate, and on 5th May 1882 they appointed Mr Daniel Paterson.

The truster's widow died on 19th July 1893, leaving a deed, dated 2d June 1893, in the following terms:—"I, . . . Do hereby revoke and cancel all deeds of settlement and codicils executed by me in their whole heads and clauses, and specially without prejudice to the said generality, a trust-disposition and settlement executed by me upon the 24th day of March 1884, and five codicils annexed thereto, dated respectively 8th May 1885, 7th January 1886, 22d September 1886, 19th December 1888, and 25th August 1892: And I declare it to be my wish that my estate shall at my death go to my nearest heirs whomsoever, the sums already advanced by me to any of the members of my family on loan or otherwise, namely, £530 to my son James Paterson, £400 to my son Daniel Paterson, and £400 to my daughter Mrs Jane Paterson or Kilpatrick, being treated as part of my estate, but without calculating interest thereon prior to the date of my death: And I appoint James Graham junior, writer in Glasgow, my sole executor, with power to him to charge the usual professional remuneration for his services."

Under the codicil of 22d September 1886 Daniel Paterson had been appointed residuary legatee.

Mr James Graham having declined to act as executor, Daniel Paterson and other children of Mrs Paterson were appointed executors-dative *qua* next of kin, but as they had conflicting interests, David Guthrie, C.A., Glasgow, was, on 7th November 1893, appointed judicial factor on Mrs Paterson's estate.

On 31st March 1894 Mr Guthrie raised an action of count and reckoning against James Paterson, Daniel Paterson, and others, the trustees under Mr Robert Paterson's settlement, as trustees and as individuals, and also against the Trustees of the Clyde Navigation.

The conclusions of the summons were (first) against Mr Paterson's trustees for an account "of their whole management and intromissions, and of the management and intromissions of the said Daniel Paterson as their factor, of and with the trust-estate of the said deceased Robert Paterson," and failing an account for payment of £13,000 to the pursuer as judicial factor; (second) against the defender Daniel Paterson for an account of his intromissions with the estate of Mrs Paterson, and failing an account for payment of £13,000;

"(third) it ought and should be found and declared, by decree foresaid, that the following bonds, bearing to be granted by the defenders the Trustees of the Clyde Navigation, in favour of the said Mrs Jane Gray or Paterson and the defender Daniel Paterson, and the survivor of them" (here followed an enumeration of five bonds), "and the whole moneys payable in respect of said bonds, were the property of the said Mrs Jane Gray or Paterson, and formed part of her estate at her death, on or about 19th July 1893, and now belong to the pursuer as judicial factor foresaid, and that the defender Daniel Paterson has no right or title to the said bonds or moneys payable in respect thereof, in virtue of the destination of the said bonds or otherwise, saving always the said defender's claim against the pursuer for an accounting for his share of the said bonds as one of the next of kin of the said deceased Mrs Jane Gray or Paterson"; (fourth) for delivery of the bonds to the pursuer; (fifth) failing delivery, for adjudication of the bonds; and (sixth) for decree for expenses against "the defender Daniel Paterson in any event, and the other defenders only in the event of their appearing and opposing the conclusions hereof."

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Defences were lodged for Mr Paterson's trustees and for Daniel Paterson.

The pursuer, after stating the facts before narrated, which were not disputed, averred that Mr Paterson left moveable estate amounting to £5920—the defenders admitted £3856—and various heritable properties, the rental of which was about £450—the defenders admitted £323—that after the appointment of Daniel Paterson as factor "the trustees negligently and wrongfully failed to exercise any supervision over the defender Daniel Paterson's actings as factor, or to obtain from him any accounts of his intromissions with the trust-estate. The said defender also did not account for his said intromissions to his mother Mrs Paterson."

The pursuer further averred;—"A part of Mrs Paterson's estate consists of the bonds by the Trustees of the Clyde Navigation mentioned in the summons. The consideration money for the said bonds belonged to Mrs Paterson, and the defender Daniel Paterson invested it, without any authority from Mrs Paterson, in bonds payable to her and to himself and to the survivor. In these circumstances the third, fourth, and fifth conclusions of the summons are rendered necessary."*

The defenders Mr Paterson's trustees stated, *inter alia*, that by arrangement with the trustees, and by the special desire of the life-rentrix, Daniel Paterson did not pay the sums collected by him from the trust properties to the trustees, but paid them direct to the life-rentrix, and that the net balance due by the trustees was £5, 19s. 1½d., which they offered to pay. They also produced a statement, with the relative vouchers and books containing receipts under Mrs Paterson's hands for payments made to her, of their intromissions with the trust-estate down to Whitsunday 1893.

* The bonds bore that "the Trustees of the Clyde Navigation, in consideration of the sum of ——— pounds sterling, paid to them by *Mrs Jane Gray or Paterson, widow, and Daniel Paterson, both residing at Woodend, Holytown Bridge*, do hereby bind themselves to pay to the said *Mrs Jane Gray or Paterson and Daniel Paterson, and the survivor of them, and their, her, or his executors, administrators, or assigns*, the principal sum of ——— pounds."

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The defender Daniel Paterson stated that he had kept regular accounts of his intromissions as factor; that he was never called upon to account to the trustees until January 1892, when Messrs J. & A. Graham, as acting for the trustees, asked him to produce his vouchers, and that he had at once done so.

He further stated that the sums contained in the Clyde Navigation bonds belonged to and were contributed in equal shares by his mother and himself, and that his mother was well aware of the terms of the destinations contained in the bonds.

The pursuer pleaded;—(1) In respect that the defenders the trustees of Robert Paterson have failed to account for their intromissions with the trust-estate either to Mrs Paterson or to the pursuer as judicial factor on her estate, the pursuer is entitled to decree of count, reckoning, and payment, in terms of the first conclusions of the summons; (2) the defender Daniel Paterson having failed to account to Mrs Paterson, or to the pursuer, for his intromissions with her estate, the pursuer is entitled to decree of count, reckoning, and payment, in terms of the second conclusions of the summons; (3) the said bonds being the property of the deceased Mrs Paterson, and the defender Daniel Paterson having had no authority to insert the said destination in his own favour, the pursuer is entitled to decree of declarator, delivery, and adjudication, as concluded for, with expenses.

The defenders the trustees pleaded that the action was unnecessary.

The defender Daniel Paterson pleaded, *inter alia*;—(5) On a sound construction of the terms of the five bonds mentioned in the summons, the pursuer is not entitled to declarator as concluded for, and the defender ought to be assoilzied *quoad* the third conclusion; (7) so long as the said bonds stand unreduced they are, on a sound construction of their terms, the property of this defender by virtue of the destinations therein.

After sundry procedure, in the course of which the trustees of consent lodged a further account of charge and discharge, and objections thereto and answers were also lodged, the Lord Ordinary allowed parties a proof before answer of their averments on record and in the objections and answers.

Proof was led. Evidence bearing upon the Clyde Navigation bonds shewed that Mrs Paterson had authorised the bonds to be taken in the terms which they bore. *Quoad ultra* the result of the proof sufficiently appears from the findings in the interlocutor of 30th April 1896 after mentioned, and the opinions of the Lord Ordinary and Lord McLaren.

On 30th April 1896 the Lord Ordinary (Kyllachy) pronounced an interlocutor containing, *inter alia*, the following findings:—"Finds that (subject to provision for the safety of certain legacies payable at the death of the widow and liferentrix, all of which have been duly paid), the administration of the estate was, at the request of the liferentrix, left in the hands of herself and her son, the individual defender—they being both of them trustees, and the individual defender being residuary legatee, and the arrangement being that the individual defender should be factor for the trust without remuneration, and should account to the liferentrix direct for such part of the income of the trust as was not drawn by the liferentrix herself: Finds that this arrangement was carried out, and that the liferentrix herself received possession of the deposit-receipts, and afterwards of the coupons of

the Glasgow and Clyde bonds, and also obtained possession of the stock in trade left by the deceased or the proceeds thereof, and that she made no complaint during her life that the defender, as factor foresaid, had not fully accounted to her for the rents, interests, and others which he collected on behalf of the trustees: Finds that in these circumstances the pursuer, as now representing the liferentrix, has no claim against the trustees for accounting, or at all events for further accounts and vouchers than those already produced: Finds further that, in so far as the pursuer has a claim of accounting against the individual defender as factor for the trustees, the accounts produced are correct and sufficiently vouched, except in so far as they take credit for payments made by the factor on account of the liferentrix as an individual, and not in connection with the trust-estate. . . . Finds further that, while the said defender assisted his mother in the management of her money matters, he did so not on the footing of any employment as factor or agent, or of any obligation to keep accounts and preserve vouchers, but as a son assisting his mother with whom he lived, and as his sister Mrs Kilpatrick had done prior to her marriage: Finds separately that the pursuer has failed to prove that the liferentrix was dissatisfied with the individual defender's actings in her affairs, or that she desired or expected any accounting from him beyond what she received: Therefore repels the objections stated by the pursuer to the defenders' accounts, whether the said accounts are regarded as the trustees' accounts, or accounts of the individual defender as factor to the trust, but excepting and reserving always any question which may be raised as to any items of discharge in the said accounts unconnected with the trust-estate, and consisting of disbursements made by the defender on account of his mother as an individual; with regard to said items, appoints parties to be further heard: And with respect to the Clyde Trust bonds for £1950 mentioned in the third conclusion of the summons, payable to the deceased Mrs Paterson (the liferentrix), and the individual defender and the survivor of them, finds it not proved that the said bonds were the sole property of the said Mrs Paterson: Finds further, that it is not proved that the destination therein contained was inserted without Mrs Paterson's authority: Finds that, in the circumstances disclosed in evidence, the presumption is that she knew and authorised the terms of said destination: Finds that said destination operated as a bequest of Mrs Paterson's share of said bonds to the individual defender, and that the same was not revoked by the general revocation contained in the deed executed by Mrs Paterson on 2d June 1893: Therefore assoilzies the individual defender from the third, fourth, and fifth conclusions of the summons, and decerns; appoints the case to be enrolled for further procedure in order to the determination of the matters above reserved, and meantime reserves all question of expenses.*

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* "OPINION.—The findings of the above interlocutor perhaps sufficiently explain themselves, but the Lord Ordinary may say in a word, with respect to the matters of fact to which the proof was mainly directed, that he prefers the evidence of the defenders to that of the pursuers. In particular, he is satisfied that the late Mrs Paterson was perfectly capable of understanding and looking closely after her pecuniary rights, and that she did so, and that if her son Daniel got more from her during her life than her other children, he did so because such was her wish. The Lord Ordinary does not

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On 9th July 1896 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that the sums taken credit for by the factor as disbursed on account of the liferentrix as an individual, and which fall in this accounting to be disallowed, amount to £139, 0s. 6½d.; . . . therefore decerns against the defenders Paterson's Trustees and the defender Daniel Paterson for payment of the said sum of £139, 0s. 6½d.; . . . *Quoad ultra* assolzies the whole defenders from the conclusions of the summons, so far as not already disposed of, and decerns; and having heard counsel on the question of expenses, finds the pursuer liable in expenses to the defenders Paterson's trustees; finds him also liable in expenses to the defender Daniel Paterson, subject to modification, reserving as to amount of modification until after the account is taxed. . . ."

believe that she was ill-used by Daniel. Neither does he believe that from fear or otherwise she allowed him to appropriate her means. That she placed confidence in him he does not doubt, but that he abused that confidence, and that she acquiesced in his doing so, looking forward to a reckoning at some future time or at her death, the Lord Ordinary does not believe.

"With respect to the separate matter of the Clyde bonds, the Lord Ordinary has had some difficulty. He finds nothing in the evidence to displace the presumption that the bonds belonged to the mother and son jointly,—the fact that the contributions were unequal being quite consistent with that conclusion. But he has had doubt whether there was sufficient evidence to prove or presume that the destination to the survivor was authorised by the deceased; and he has also had doubt whether the deed of revocation of June 1893 might not be held to strike at special bequests of the kind in question. On consideration, however, he has not seen his way to give effect to these doubts. There is some direct evidence that the old lady knew the terms of the bonds. Looking to the terms of her settlement as then existing, the destination therein expressed in Daniel's favour was not unnatural, and it is, the Lord Ordinary thinks, improbable that a person of Mrs Paterson's disposition would have remained or could well have been kept ignorant of the terms of the documents which represented so large a part of her capital. As to the deed of revocation, whatever may have been the intention, the language is, in the Lord Ordinary's opinion, too restricted to cover the bequest in effect constituted by the special destination in the bonds."

* "OPINION.—I have no doubt that the pursuer must be held liable, and personally liable, in the bulk of the expenses of this litigation. The only question is as to modification.

"As against the trustees, I see no ground for modifying the expenses. I think the litigation has proceeded on wrong lines from the first, and I also think that the pursuer, if he had exercised reasonable caution and had taken reasonable means of informing himself of the facts of the case, would have been less ready to launch into a litigation which has so far proved so unfortunate, the more especially as it involved the making of serious charges against respectable people—charges which I think ought not to have been made on slender grounds. Therefore I have no difficulty about the pursuer's liability for the expenses of the trustees. The trustees, so far as I can see, do not appear to have been at all in default. Two of their number, the widow (the pursuer's author) and her son Daniel, the individual defender, had (barring certain legacies which were well secured) the whole interest under the trust. The one was liferentrix, the other was residuary legatee, and the two lived together, and during the whole period of the trust the arrangement on which they and the trustees acted was that Daniel, who was at his mother's instance appointed factor to the trust, should manage everything and account to her direct. I cannot think that

The pursuer reclaimed, and argued;—The pursuer when appointed No. 91. judicial factor was in entire ignorance of the position of matters. He was entitled and bound to call the trustees to account. The appointment of Daniel Paterson had in no way relieved them of the duty Feb. 4, 1897. of closely supervising the administration of the trust-estate. It was Paterson's Judicial Factor v. Paterson's Trustees. their duty to require a regular audit from their factor.¹ It was really due to the conduct of the trustees that the action was necessary, and they should be found liable in expenses, or neither party should be found liable in expenses. In any view the pursuer should only be found liable *qua* judicial factor.² It was the factor's duty to Mrs Paterson's next of kin to have the matter cleared up. *A fortiori* the pursuer was entitled to his expenses against Daniel Paterson, who had failed to keep regular accounts. It might be that in the result no serious deficiency had been ascertained, but looking to the absence of vouchers and the difficulty connected with the Clyde Navigation bonds, proof was necessary. The Lord Ordinary was wrong on the question of the Clyde Navigation bonds. In point of fact the money lent was Mrs Paterson's, and the defender had failed to prove that she had

this was an unusual or unreasonable arrangement, and I think the pursuer, whether or not he had at first evidence that such an arrangement had been in fact made, had at least the statement to that effect of the trustees' agents, Messrs Graham, and ought at least to have considered whether the usage and practice of the trust, acquiesced in by his author, the liferentrix, during so long a period, admitted of any other interpretation. But the factor does not seem to have so thought. He seems to have considered that the trustees were nevertheless bound to produce accounts of charge and discharge formally vouched—such accounts as they would have had to produce at the call of a beneficiary who had left the whole administration in their hands, and to whom they had never accounted from first to last. That position was, in my judgment, entirely untenable, and the factor, in bringing this action against the trustees, did so at his own risk, and must take the consequences.

“The question whether there should be expenses awarded to Daniel Paterson is not quite in the same position. Daniel, as factor for the trust, was probably bound to render accounts to his mother, if his mother required them, or if the manner in which the trust was administered between him and his mother required accounts. But it did not follow that he was bound to preserve vouchers for all these years for every item of expenditure—he and his mother having, as I have said, the whole interest between them, and the mother being satisfied for all these years that all was in order. Daniel's position therefore was a position, I should imagine, common enough in such circumstances, and at all events a position which should have suggested caution on the pursuer's part before assuming that he was entitled, even from Daniel, to an account of charge and discharge with every item formally vouched. At the same time the case must, I suppose, be taken on the footing that Daniel was bound to keep and produce accounts of the income of the trust, and it is quite certain that until the action was raised, Daniel had not, although called upon to do so at the instance of the pursuer, produced to the trustees any account at all. A list of the investments of the estate seems to have been furnished. But

¹ M'Laren on Wills, ii. 1228; Edmond v. Blaikie & Anderson, June 29, 1866, 4 Macph. 1011, 38 Scot. Jur. 512; Carruthers v. Carruthers' Trustee, June 26, 1895, 22 R. 775, July 13, 1896, 23 R. (H. L.) 55, L. R. [1896], A. C. 659.

² Craig v. Hogg, Oct. 17, 1896, *supra*, p. 6.

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directed him to insert the destination in the terms he did. It was essential that he should do so.¹ It was admitted that moveable bonds similar in character to those in question had been allowed to receive testamentary effect, but that was contrary to principle, and they should be dealt with as ordinary deposit-receipts. But in any view the bequest was revoked by the deed of 2d June 1893.² The terms of that deed were unambiguous and absolute, and covered the destinations in the bonds. It was clearly the intention of Mrs Paterson that her estate should be equally divided among her next of kin, and that brought the bonds within the scope of the deed of revocation.³

Argued for the trustees;—The trustees were not concerned with the Clyde Navigation bonds. As regarded expenses, it was said that the conduct of the trustees made the action necessary. But the pursuer did not ask that any of the findings in the Lord Ordinary's interlocutor should be altered. One of these findings was that the late Mrs Paterson had made no complaints, and another was that in the

that was all, and it may be that, all things considered, he (Daniel) was somewhat dilatory in making up such accounts as he ultimately made up, and which accounts I have held sufficient. On the other hand, the action having been brought, there is no doubt that as soon as it was brought there was lodged with Daniel's defences or with the trustees' defences—it does not matter which—an account shewing the income of the trust-estate and its disposal during the period of the liferent, and there was also produced along with that account certain pass-books, &c., which I have held vouch sufficiently all Daniel's payments to his mother in so far as he was bound to vouch them. There may have been one or two further vouchers which were not produced at first, but practically Daniel's answer to the action was production of an account with sufficient vouchers.

"But then it is said that there was not produced along with the account any explanation by him or by the trustees as to the coupons of the trust investment having been from the first entrusted to the old lady, and as to her having cashed these coupons for herself. That is quite true. It was not until objections and answers were ordered that that fact came out. But still that was a fact which the factor might have ascertained on making inquiry, and which I daresay the Messrs Graham would have told him if he had asked them. At all events that explanation was tabled before the second discussion in the Procedure-roll, or before the incurring of any serious expense. And that being so, the only question is what amount of modification I am to make upon the award of expenses against the pursuer. I think, as I have said, that Daniel was a little slack in not at once realising his position, and in not at once tabling his accounts with the necessary explanation; but I hold that at all events before the second discussion in the Procedure-roll, Daniel had made, or the trustees for him had made, all the explanations which were necessary, and had also tabled all the necessary documents; and therefore what I propose to do is to allow Daniel's expenses, subject to modification, which will probably extend to the expenses up to the lodging of the third account—30th November—when all the necessary explanations were before the parties. I shall know when the account comes to be taxed what Daniel's expenses are up to that period. I shall also have in view in fixing the modification the fact that Daniel has to account for a sum of £144 brought out in the final account which he produced.

"As to the pursuer's responsibility, I see no ground for departing from

¹ M'Laren on Wills, i. 293.

² Campbell v. Campbell, July 8, 1880, 7 R. (H. L.) 100.

³ Buchan v. Porteous, Nov. 13, 1879, 7 R. 211.

circumstances the pursuer had no claim for an accounting against the trustees. The arrangement came to between Mrs Paterson and her son Daniel was a perfectly natural one. The whole circumstances were well known to the next of kin of Mrs Paterson, and the pursuer must be held to have the same knowledge as those for whom he was acting. So soon as the trustees lodged accounts and vouchers, the action against them should have been dropped.

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Argued for the defender Daniel Paterson;—The defender acquiesced in the Lord Ordinary's finding as to expenses, and the reasons stated for it. As regarded the bonds, it was proved that this defender had been authorised by his mother to take them in the terms he had. That being so, the law was firmly established that the destinations must receive effect.¹ The deed of revocation was so expressed as to exclude the bonds, being limited to deeds of settlement and codicils. A general conveyance had never been held to evacuate a special destination of a particular subject.

At advising,—

LORD M'LAREN.—The questions to be considered under this reclaiming note arise out of an accounting instituted by the judicial factor on the estate of the deceased Mrs Jane Gray or Paterson against her husband's testamentary trustees and her son Daniel Paterson, who managed her investments in her lifetime.

The greater part of the argument which we heard was directed to the question of the incidence of the expenses of the action of accounting, which are dealt with in the Lord Ordinary's interlocutor of 9th July 1896. But a question was also argued as to the right to sums amounting to £1950, which is considered under the interlocutor of 30th April 1896, and this question naturally falls to be first considered.

(1) By the third conclusion of the summons it is sought that it should be found and declared that the five bonds there enumerated, bearing to be granted by the Clyde Navigation Trustees in favour of the said Mrs Jane Gray or Paterson and the defender Daniel Paterson (her son), and the survivor of them, were the property of Mrs Paterson, and formed part of her estate at her death, and now belong to the pursuer as judicial factor on her estate, leaving always the defender's claim for an accounting for his share of the said bonds as one of the next of kin.

I understand that the five bonds are expressed in identical terms as regards the destination or obligation to pay. One of them is printed in the appendix to the proof, and under it the obligants bind themselves to pay

the rule that a judicial factor—like a trustee in bankruptcy—litigating, does so at his own risk. I do not consider the case here one specially favourable. I think the pursuer, to say the least, was unduly credulous. He accepted without due inquiry the statements of parties whom he ought as a man of the world to have distrusted. At all events he ought to have more fully informed himself of the facts of the case, and ought to have hesitated before making the charges against the defenders which he did make. On the whole, I see no reason for holding the pursuer otherwise than personally liable,—that is to say, unless the funds in his hands are sufficient, as I hope they are, for his relief."

¹ Connell's Trustees v. Connell's Trustees, July 16, 1886, 13 R. 1175; Walker's Executor v. Walker, June 19, 1878, 5 R. 965.

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to Mrs Jane Gray or Paterson and Daniel Paterson, and the survivor of them, and their, her, or his executors, administrators, or assignees, the principal sum of £1000.

The defender's statement is that the bonds were investments of the savings of his mother and himself, and that the destination was inserted by the authority of Mrs Paterson and himself, and with the intention that it should receive effect as a destination, and that the right to the sum secured by the bond should pass to the survivor. It will thus be seen that the defender's case involves a question of law and also a question of fact,—that the destination was inserted in the bonds at the desire of Mrs Paterson or with her authority.

If the question of law were open to consideration, there is much to be said in favour of the pursuer's contention, that a destination in a document of debt like a moveable bond ought not to have a testamentary operation. Destinations in the title-deeds of heritable estate stand in a different position. They operate as a devolution of the estate, because according to the common law a grant by the superior containing a destination was the proper mode of regulating the succession to land, and because there could be no reason or motive for the insertion of such a destination at the request of the grantee, except that it was the wish of the grantee that the persons named in the deed should take the estate in succession to himself. But as regards moveable estate, the proper mode of settling the succession is by a will or testamentary trust, and again it cannot be said that the regulation of the succession is the only motive that would account for the insertion of what is called a destination in a moveable bond or document of title, because there is another reason for inserting the name of two persons as payees, viz., the convenience of having a second person who is in a position to give a discharge of the debt or interest in the case of illness or death of the first.

These considerations, I may point out, have received effect in the rule now firmly established that no testamentary effect is to be given to destinations in bank deposit-receipts, and I think it is regrettable that a different rule should have been applied to the construction of moveable obligations. But in the later cases—and I may refer especially to *Walker*¹ and *Connell's Trustees*²—the rule which gives effect to such destinations in bonds was considered to be too firmly established to be disputed, and while it is not to be overlooked that the element of mandate may enter into the design of the creditor in taking the bond payable to himself and another person, this consideration can only have weight to the effect of casting on the second payee or survivor the *onus* of proving as conditions of the right which he claims, first, that the destination was inserted with the authority of the true creditor or investor; and secondly, that the bond was delivered to the person claiming under it as his proper writ.

In the present case we have the evidence of Mr Daniel Paterson that he made these investments for his mother, and that she gave authority for taking them payable to her and himself and the survivor. The Lord Ordinary states that he believes the evidence of Mr Paterson, and I need

¹ 5 R. 965.

² 13 R. 1175.

hardly say that in a matter depending on credibility this is a very important element. But I must also add that the evidence of a donee is insufficient to prove donation, or what is equivalent to donation, if uncorroborated, and I have therefore considered the proof to see whether it offers the necessary corroboration. Two witnesses speak to Mrs Paterson's knowledge and approval of the terms of these bonds. Mr Graham, the family solicitor, speaking of a bond which was expressed in similar terms to these in question, and which for some reason was transferred to a purchaser, says,—“I am perfectly satisfied that she (Mrs Paterson) knew the terms in which the bond had been taken, and that she was fully aware of the nature of the transaction.” Another witness, Mr Mather, who describes himself as an old friend of Mrs Paterson, says that in the course of conversation on business matters Mrs Paterson told him that she and her son Daniel had money invested jointly in the Clyde Trust. I think this is sufficient corroboration of the defender's evidence, and that we must take it that the destination is the act of Mrs Paterson. On the matter of delivery, I think that the defender had all the possession of the bonds which was possible in the nature of the case, but even if it be supposed that he held them as his mother's agent, this might prevent the destination taking immediate effect, but would not interfere with the testamentary effect of the destination.

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There remains the question of revocation under Mrs Paterson's will or codicil of 2d June 1893. Now, in the analogous case of heritable destination, upon which this chapter of the law is entirely founded, the case stands thus: If the owner of property holds it in virtue of the deed of another man who has left it to him and his heirs, a deed of revocation and new conveyance in general terms will take effect on the standing destination. But a general revocation or general conveyance will not necessarily or usually affect a previous settlement or destination of a special subject by the same testator, because the destination is like a special legacy, and is presumed to be excepted. This distinction is clearly explained in the Lord Chancellor's opinion in *Campbell v. Campbell*,¹ and runs through all the decisions. In the absence of anything to shew that Mrs Paterson had the bonds in view in executing the deed of 2d June, I am unable to hold that the deed operated as a revocation of the destination in the bonds. I am therefore for adhering to the interlocutor of 30th April 1896.

(2) I shall deal more briefly with the question of the expenses of the action. The Lord Ordinary has found the pursuer liable in expenses to the defenders Paterson's trustees, and has found him also liable in expenses to the defender Daniel Paterson subject to modification.

Now, it is to be observed that this is not an action of accounting or distribution in relation to the estate of Mrs Paterson's husband. Under the will of Mr Paterson Mrs Paterson had a general liferent of her husband's estate, and the action only calls for an accounting in relation to Mrs Paterson's estate, which of course includes her liferent. In fact, her estate consists entirely of the savings from her liferent. But if anything is proved in the case, it is proved beyond dispute that the trustees regularly paid over the income of her husband's estate to Mrs Paterson, or, which is the

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same in legal effect, to her son as her agent with her authority. It may have been quite right to call the trustees as defenders for their interest, but as soon as they produced evidence of the payment of income to Mrs Paterson's nominee, they ought to have been informed that the judicial factor was satisfied, and that there was no need for their further appearance in the case. Their appearance in the case throughout the course of the litigation is the consequence of the pursuer's original act in calling them as defenders, a position from which they have never been freed, and as they have successfully discharged themselves, I am of opinion that they are entitled to their expenses, and that this part of the interlocutor of 9th July is right.

As regards the question between the pursuer and Mr Daniel Paterson, I have felt this to be a question of much difficulty, and I am very unwilling to interfere with the discretion of the Lord Ordinary in dealing with this question. The pursuer cannot get expenses from Mr Paterson, because he has failed in all the important questions raised in the accounting. But he was placed in a position of some embarrassment from the circumstance that Mr Paterson had not kept regular accounts of his administration of his mother's affairs. This may be explained by the trust which his mother reposed in him, but his own statement that his mother trusted him is hardly an answer to a judicial factor who represents the interests of next of kin. When an account was given in, the judicial factor was not relieved from his obligation to call the defender to account, because many of the items were unvouched, and it appeared that some of the questions raised, and especially this question about the right to the Clyde Navigation bonds, depended on oral evidence. I do not think that the judicial factor was bound to accept the defender's statement that these bonds were taken in the terms which have been considered with Mrs Paterson's authority. The defender ought to have got a mandate from his mother instructing the preparation of the bonds in these terms, and it was the neglect of this proper precaution that necessitated the parole proof. In these circumstances I have come to be of opinion that as between the pursuer and the defender Daniel Paterson there ought to be no finding of expenses to either party.

I observe that the Lord Ordinary has found the pursuer liable to the trustees without the qualifying words "as judicial factor," and according to the views expressed by the majority of the Court of seven Judges in a recent case,¹ this imports a direct liability to Paterson's trustees irrespective of the existence of factory estate. We do not propose to alter this finding, and it will be for the pursuer to find the means of paying these expenses. Whether he has relief against the next of kin on the ground that he was protecting their interests is a question which, as I think, cannot be decided in this process, because the next of kin are not parties to the process, and we cannot make any finding which will prejudice their rights. I move your Lordships accordingly to adhere to the interlocutor of 30th April, and to vary the interlocutor of 9th July 1896 by leaving out the finding of expenses in favour of Daniel Paterson, and in place thereof to find no expenses due to or by the defender Daniel Paterson.

LORD ADAM concurred.

¹ Craig v. Hogg, *supra*, p. 6.

LORD KINNEAR.—I am also of the same opinion. I agree with Lord M'Laren that if the question had been still open it would require serious consideration whether terms of destination in such an instrument as a Clyde Trust bond ought to have the same legal effect as a proper destination in a conveyance of land. I think with his Lordship that that question is now settled by a series of decisions the authority of which is beyond dispute. I therefore agree in the conclusion to which Lord M'Laren has come.

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The LORD PRESIDENT concurred.

THE COURT pronounced this interlocutor:—"Adhere to the said interlocutors [dated 30th April 1896 and 9th July 1896]; vary the interlocutor of 9th July 1896 by leaving out the finding for expenses in favour of the defender Daniel Paterson, and in place thereof find no expenses due to or by the said Daniel Paterson, and decern: Find the pursuer liable to the trustees in expenses since 9th July 1896."

WEBSTER, WILL, & RITCHIE, S.S.C.—GRAHAM, JOHNSTON, & FLEMING, W.S.—
WALTER C. B. CHRISTIE, W.S.—Agents.

THE SOCIETY OF SOLICITORS IN ABERDEEN AND OTHERS, Petitioners.—
W. Brown.

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Society of
Solicitors in
Aberdeen.

Administration of Justice—Process—Law-Agent—Petition to have Law-Agent's name struck off roll—Proof—Law-Agents (Scotland) Act, 1873 (36 and 37 Vict. cap. 63).—A society of solicitors petitioned the Court to have the name of S., one of their number, struck off the roll of enrolled law-agents, on the ground that he had been guilty of fraud and embezzlement. It being alleged that S. had left the country, the order for service allowed a period of six weeks for the lodging of answers. The petition was served edictally. No answers were lodged.

Held that, as S. had been neither convicted of the offences charged against him nor fugitated, the petitioners must prove their averments before the prayer of the petition could be granted.

THIS was a petition and complaint under the Law-Agents Act, 1873 (36 and 37 Vict. cap. 63), at the instance of the Society of Solicitors in Aberdeen and their office-bearers, to have the name of William Sim struck off the roll of enrolled law-agents.

The petitioners averred that from 1884 to 1896 William Sim had practised as a solicitor and law-agent in Aberdeen, "but in or about 9th October 1896, his affairs having become embarrassed, he disappeared, having, it is believed, left the country."

"Since the disappearance of the said William Sim, it has transpired that while practising in Aberdeen he had been guilty of conduct unbecoming a solicitor, and in fact fraudulent. In the course of the years 1893-95 and 1896, when he was in financial difficulties, he borrowed money from clients, on the security of properties belonging to him, on representations that the properties were unencumbered, and that these loans would constitute first charges on the properties, whereas he well knew that the properties were heavily burdened and altogether inadequate as security for the loans. He also received money from clients upon the assurance that he would invest it upon first-class securities, which moneys he made no attempt to invest, but appropriated to his own uses."

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Particular instances of the misconduct with which Sim was charged were then set forth.

The petitioners further averred that Sim's estate, which had been sequestrated, was wholly insufficient to meet the claims upon it; that he had fled the country, and that a warrant for his apprehension had been issued at the instance of certain of his creditors.

The Court ordered service upon Sim, and appointed answers to be lodged by him, if so advised, within six weeks.

The petition was thereafter served edictally upon Sim, and a copy of the petition was also posted to his former residence, where his wife still resided. No answers having been lodged within the time appointed, the petitioners moved the Court to grant the prayer of the petition.

At advising,—

The LORD PRESIDENT delivered the following opinion as the judgment of the Court :—This is an application to have the name of William Sim struck off the roll of enrolled law-agents, on the ground that he has been guilty of fraud and embezzlement. The petitioners' motion is that the prayer be granted.

The Court consider the application premature. The accused person has neither been convicted nor fugitated. Unless the petitioners are prepared to prove their averments, it is for their consideration whether they should not in the meantime withdraw their petition.

ON the motion of the petitioners, the Court thereafter allowed them a proof of their averments.

HENRY & SCOTT, W.S., Agents.

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LOCAL GOVERNMENT BOARD FOR SCOTLAND, Petitioners.—

Sol.-Gen. Dickson—Pitman.

COUNTY COUNCIL OF THE COUNTY OF ELGIN, Respondents.—

Salvesen—Clyde.

Public Health—Local Authority—Special Water Supply District—Failure to introduce proper water supply—Complaint by Local Government Board—Assessment—Public Health (Scotland) Act, 1867 (30 and 31 Vict. cap. 101), secs. 89, 94, and 97—Public Health Act Amendment Act, 1871 (34 and 35 Vict. cap. 38), sec. 1.—The Public Health (Scotland) Act, 1867, sec. 89, authorises the Local Authority for a parish, if they think it expedient, to provide a water supply for the domestic use of the inhabitants, and to borrow money for the purpose on the security of the special water assessments and general assessments; sec. 94 enacts (1)—“Where any special water supply district has been formed . . . the expense incurred for water supply within the same, or for the purposes thereof, and the sums necessary for payment as before mentioned of any money borrowed for water supply purposes as hereinbefore provided, shall be paid out of a special assessment which the Local Authority shall raise or levy on or within such special district. . . .”

The maximum assessment for all purposes under the Public Health Act is, as fixed by the Public Health Act Amendment Act, 1871, sec. 1, 2s. 6d. per £1 of rental.

A Local Authority is not entitled to promote a scheme for the introduction of a water supply into a special water supply district the estimated cost of which will exceed the amount which they can recover under their assessing powers within the special district.

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The Local Government Board for Scotland presented a petition under section 97 of the Public Health Act, 1867, against the County Council of Elgin, as the Local Authority for the county, praying the Court to remit to a man of skill to inquire into the water supply of Hopeman district (which had been formed into a special water supply district under the Act), and thereafter to find that the Local Authority had refused or neglected to do what was required of them under the Act, by refusing or delaying to introduce into the district a supply of water sufficient and suitable for the domestic use of the inhabitants, and that their refusal or delay was an obstruction in the execution of the Act; and further, to ordain the respondents to execute the work necessary to provide such a supply. The petitioners averred that the present supply of water for Hopeman was inadequate and dangerous to public health; that the respondents had delayed for a long period to deal with the matter, and had no present intention of doing so, and that this failure was a refusal or neglect to do what was required of them, and an obstruction in the execution of the Act.

The petitioners did not set forth any scheme by which the respondents might have provided a water supply, but they founded on section 89 of the Public Health Act, 1867, as authorising them to borrow any sum required for the purpose on the security of the special water assessments, and of the general assessments.

The respondents lodged answers, in which they stated that they had obtained the report of an engineer as to the cost of introducing a supply of water by gravitation, but it shewed that the cost would greatly exceed any sum which could be raised within the special water district by the maximum assessment of 2s. 6d., and that knowing this they were not entitled to borrow a larger sum for the benefit of the special water district on the security of the general assessments payable by the whole county. They further stated that they were taking steps to improve the existing sources of supply.

The petitioners moved for a remit before answer.

The Court *refused* the petition, on the ground that it did not set forth any scheme for providing an improved supply of water which the respondents could have adopted within the 2s. 6d. limit, and that the petition was to be regarded as brought for the purpose of compelling the Local Authority to bring a supply of water by gravitation for the benefit of the special district at the cost of the whole county.

Tolmie v. Parochial Board of Urray, June 21, 1890, 17 R. 1027, *distinguished*.

In December 1876 that part of the county of Elgin which compre-^{1ST DIVISION.} hended the villages of Hopeman and Cummington, was constituted the Hopeman Special Water Supply District.

On 14th December 1896 the Local Government Board for Scotland, with the approval of the Lord Advocate, presented to the Court a petition* and complaint against the County Council of Elgin, as the Local Authority for the county, for the administration, *inter alia*, of the laws relating to public health in the county, and the prayer of the petition was "to order such inquiry (if any) as to your Lordships may seem fit in regard to the matters set forth in this petition, and

* The Public Health Act, 1867 (30 and 31 Vict. c. 101), sec. 97.—
"In case any Local Authority shall refuse or neglect to do what is herein or otherwise by law required of them, or in case any obstruction shall arise in the execution of this Act, it shall be lawful for the board, with the approval of the Lord Advocate, to apply by summary petition to either Division of the Court of Session, or during vacation or recess to the Lord Ordinary on the Bills, which Division or Lord Ordinary are hereby authorised and directed to do therein, and to dispose of the expenses of the proceedings, as to the said Division or Lord Ordinary shall appear to be just."

No. 93. in particular as to the water supply of the said Hopeman district, and that by remit to a man of skill or otherwise; and thereafter, on advising this petition and the procedure following thereon, to find that the said Local Authority have refused or neglected to do what is required of them in the said Public Health Act, 1867, or otherwise by law, by refusing or delaying to introduce into the said district a supply of water sufficient and suitable for the domestic use of the inhabitants and for the sanitary and other public purposes thereof, and that their said refusal or delay is an obstruction in the execution of the said Act; and further, to ordain the said Local Authority forthwith to take such steps and to execute such works as shall be necessary to procure a sufficient and suitable supply of water for the domestic use of the inhabitants of the said district, and that at the sight of, and to the satisfaction of, some person or persons to be named by your Lordships."

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The petitioners averred that the present supply of water for Hopeman was inadequate and dangerous to public health; that the respondents had delayed for a long period to deal with the matter, and had no present intention of doing so, and that this failure was a refusal or neglect to do what was required of them, and an obstruction in the execution of the Act. "That in the circumstances above set forth, the failure of the Local Authority to introduce a proper supply of water for domestic and sanitary purposes is a refusal or neglect to do what is required of them by the Public Health (Scotland) Act, 1867, or otherwise by law, and an obstruction in the execution of the Act."

The petitioners did not set forth any scheme by which the respondents might have provided a water supply, but they founded on section 89 of the Public Health Act, 1867,* as authorising them to

* The Public Health Act, 1867 (30 and 31 Vict. c. 101), section 89, enacted,—“With respect to the improvement of burghs having a population of less than ten thousand according to the census last taken, and not having a local Act for police purposes, and with respect to parishes (exclusive of any parts of such parishes as are situated within the district of any Local Authority other than the Parochial Boards of such parishes): (1) the Local Authority, if they think it expedient so to do, may acquire and provide or arrange for a supply of water for the domestic use of the inhabitants, and for that purpose may conduct water from any lake, &c., and do and execute all such works, matters, and things as shall be necessary and proper for the aforesaid purpose, . . . and for the purposes aforesaid the Local Authority shall be held to have all the powers and rights given to promoters of undertakings by the Lands Clauses Acts; . . . (6) It shall be lawful for the Local Authority to borrow, for the purpose of constructing, purchasing, enlarging, or reconstructing such works as are herein authorised for providing a supply of water for the use of the inhabitants of the district, or for the purpose of entering into and implementing any contract or arrangement with any person for such supply, and on the security of the after-mentioned special water assessments, where such exist, and of general assessments, or either of them, such sums of money, and at such times, as the Local Authority shall deem necessary for that purpose, and to assign the said special water assessments and general assessments, or either of them, in security of the money to be so borrowed, and the bonds to be granted on such borrowings . . . may be in or near to the form contained in the schedule hereto annexed; and such bonds shall constitute a lien over the assessments thereby assigned, and shall entitle the creditors therein to recover the sums thereby due out of the first and readiest of the said assessments. . . .”

borrow any sum required for the purpose on the security of the special water assessment and of the general assessments. No. 93.

Answers were lodged by the County Council of Elgin in which they averred "that the net assessable rental of the area included in the special water supply district is only £1200, so that an assessment of 2s. 6d. per £, which is the maximum assessment in a special water supply and drainage district for all purposes under the Public Health Amendment Act, 1871, sec. 1, would only yield £150 per annum. The assessment at present payable for all purposes under the Public Health Act amounts to 6d. per £. The balance for which the inhabitants could be assessed for any new water scheme amounts to only £120, which would be capable of meeting the annual instalment of principal and interest of the sum of £2215 only. This is the only available assessment from which to meet expenses for sewerage, drainage, the erection of permanent hospitals, and the like, as well as the cost of providing a supply of water and keeping it in an efficient state of repair."

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They further averred that they had obtained a report from an engineer as to the cost of obtaining a supply of water by gravitation from outside districts. He reported on certain schemes, but the estimated cost was £4719, 5s.

"The respondents having thus found it impracticable to procure an increased supply of water for Hopeman from outside districts by gravitation, turned their attention to the existing sources of water supply, with the view of seeing whether these could not be made available."

"In addition to the company well, Messrs Milne and Hogg have instructions to bore and sink another well or wells, and to make further investigations for affording a local supply to the village. The proprietor and tenants of ground suitable for the purpose have given permission to enter on it and prospect for a suitable site or sites, and operations are at the present moment being conducted with the view of ascertaining same. It is confidently anticipated that a large additional supply of water can in this manner be obtained."

"The respondents accordingly submit that no further step should be taken in the petition until the scheme which they have adopted for bringing a supply of water to the special district in question has been completed and tested. They maintain that they are entitled to provide such a supply by digging wells, or by availing themselves of existing sources of supply, and that they are not bound, at an expenditure which is entirely out of proportion to the means of the district or the objects to be attained, to introduce a gravitation supply. They understand that a section of the inhabitants, at whose instigation the present proceedings have been taken, desire to have a gravitation supply, the cost of which would have to be mainly borne by the county, and which will require to be immediately followed by extensive drainage and sewage works, the whole cost of which (the maximum assessment being already exhausted by the cost of the water supply) would necessarily be thrown entirely upon the county. The respondents submit that they are the judges of how a supply of water for the domestic use of the inhabitants of Hopeman should be obtained, and they have resolved that it should be from wells, as being the only practicable mode in the circumstances already narrated. Owing to a section of the inhabitants desiring a scheme of a different nature, they have not assisted the respondents in providing a supply of water by the means in question, but on the contrary have ob-

No. 93. in particular as to the water supply of the said Hopeman district, and that by remit to a man of skill or otherwise; and thereafter, on Feb. 5, 1897. Local Government Board for Scotland v. County Council of Elgin. advising this petition and the procedure following thereon, to find that the said Local Authority have refused or neglected to do what is required of them in the said Public Health Act, 1867, or otherwise by law, by refusing or delaying to introduce into the said district a supply of water sufficient and suitable for the domestic use of the inhabitants and for the sanitary and other public purposes thereof, and that their said refusal or delay is an obstruction in the execution of the said Act; and further, to ordain the said Local Authority forthwith to take such steps and to execute such works as shall be necessary to procure a sufficient and suitable supply of water for the domestic use of the inhabitants of the said district, and that at the sight of, and to the satisfaction of, some person or persons to be named by your Lordships."

The petitioners averred that the present supply of water for Hopeman was inadequate and dangerous to public health; that the respondents had delayed for a long period to deal with the matter, and had no present intention of doing so, and that this failure was a refusal or neglect to do what was required of them, and an obstruction in the execution of the Act. "That in the circumstances above set forth, the failure of the Local Authority to introduce a proper supply of water for domestic and sanitary purposes is a refusal or neglect to do what is required of them by the Public Health (Scotland) Act, 1867, or otherwise by law, and an obstruction in the execution of the Act."

The petitioners did not set forth any scheme by which the respondents might have provided a water supply, but they founded on section 89 of the Public Health Act, 1867,* as authorising them to

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They further averred that they had obtained a report from an engineer as to the cost of obtaining a supply of water by gravitation from outside districts. He reported on certain schemes, but the estimated cost was £4719, 5s.

"The respondents having thus found it impracticable to procure an increased supply of water for Hopeman from outside districts by gravitation, turned their attention to the existing sources of water supply, with the view of seeing whether these could not be made available."

"In addition to the company well, Messrs Milne and Hogg have instructions to bore and sink another well or wells, and to make further investigations for affording a local supply to the village. The proprietor and tenants of ground suitable for the purpose have given permission to enter on it and prospect for a suitable site or sites, and operations are at the present moment being conducted with the view of ascertaining same. It is confidently anticipated that a large additional supply of water can in this manner be obtained."

"The respondents accordingly submit that no further step should be taken in the petition until the scheme which they have adopted for bringing a supply of water to the special district in question has been completed and tested. They maintain that they are entitled to provide such a supply by digging wells, or by availing themselves of existing sources of supply, and that they are not bound, at an expenditure which is entirely out of proportion to the means of the district or the objects to be attained, to introduce a gravitation supply. They understand that a section of the inhabitants, at whose instigation the present proceedings have been taken, desire to have a gravitation supply, the cost of which would have to be mainly borne by the county, and which will require to be immediately followed by extensive drainage and sewage works, the whole cost of which (the maximum assessment being already exhausted by the cost of the water supply) would necessarily be thrown entirely upon the county. The respondents submit that they are the judges of how a supply of water for the domestic use of the inhabitants of Hopeman should be obtained, and they have resolved that it should be from wells, as being the only practicable mode in the circumstances already narrated. Owing to a section of the inhabitants desiring a scheme of a different nature, they have not assisted the respondents in providing a supply of water by the means in question, but on the contrary have ob-

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structed them in every possible way. If the respondents are bound to provide a supply of water by gravitation, whatever the expense, other villages will no doubt seek to obtain the same advantages at the cost of the ratepayers in the county, who derive no benefit from the expenditure upon such works. . . .

"In the whole circumstances the respondents maintain that the petition should be refused, with expenses, in respect (1) that it is not competent under section 97 of the statute; (2) that there are no relevant averments of the respondents having refused or neglected to do any duty imposed upon them by law or by the Public Health Act, 1867; (3) that the scheme which the respondents are in course of carrying out will give a supply of water sufficient and suitable for the domestic uses of the inhabitants of Hopeman, and for the sanitary and other purposes thereof. In any event the respondents maintain that the proceedings should be sisted for six months until the scheme which they are in course of carrying out has been completed and tested."

Argued for the petitioners;—The petition was competent.¹ Under the Act of 1867, the Local Authority were empowered to provide a proper water supply, and having such a power for the public benefit, they were bound to exercise it.² The answers of the respondents were unsatisfactory. It was no answer to plead that they had reached the maximum assessment for all purposes under the Public Health Act, for it had been decided³ that where a Local Authority had exhausted the resources of the special water supply district, it might borrow money upon the security of the whole authority, and assess the rest of the district for payment of the loan and interest. The real question was, whether they had done their duty, or had refused, or were delaying to do it. A remit fell to be made to a reporter to report upon the existing state of matters, with a view to the Local Authority being compelled to take action.

Argued for the respondents;—The petition was incompetent. The Local Authority were under the statute the judges of the expediency of introducing a water supply, and in rejecting the gravitation scheme they were acting after due consideration and within their powers. The petition and complaint would only have been competent if the respondents had absolutely declined to consider the matter in question. While they had rejected the gravitation scheme, they were formulating one which would turn the present sources to the best account. *Tolmie*³ was no authority for the proposition that a Local Authority could, when they had exhausted their special assessing powers, fall back upon the general assessment. In none of the petitioner's cases was there a Local Authority actually in course (as here) of carrying out a system for giving good water to a district. The Court would grant time in order to see what the effect of the Local Authority's operations would be.

¹ Board of Supervision v. Local Authority of Pittenweem, July 8, 1874, 1 R. 1124; Board of Supervision v. Local Authority of Galashiels, Dec. 5, 1874, 12 S. L. R. 111; Board of Supervision v. Local Authority of Lochmaben, Feb. 28, 1893, 20 R. 434; Board of Supervision v. Local Authority of Montrose, Dec. 3, 1872, 11 Macph. 170, 45 Scot. Jur. 108.

² Walkinshaw v. Orr, Jan. 28, 1860, 22 D. 627, 32 Scot. Jur. 237; Julius v. Lord Bishop of Oxford, 1880, L. R., 5 App. Cases, 214; Queen v. Bishop of Oxford, 1879, L. R., 4 Q. B. D. 245.

³ Tolmie v. Parochial Board of Urray, June 21, 1890, 17 R. 1027.

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LORD PRESIDENT.—The jurisdiction conferred on the Court of Session by the 97th section of the Public Health Act, like the corresponding jurisdiction conferred in identical terms by the Poor-Law Act, has been found, I believe, to operate beneficially in furthering the execution of statutory duties. On each occasion, however, on which it is invoked we must be satisfied that the Local Authority convened has refused or neglected to do what is by law required of them, or that an obstruction has arisen in the execution of the Act.

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In the present case the failure of the Local Authority to introduce a proper supply of water is what is alleged to constitute a refusal or neglect and an obstruction.

When the case is sifted, the true question is this,—Is the refusal of the Local Authority to provide a water supply by gravitation for the Hopeman special district a refusal to do their duty under the Act? and is the Court to compel them to provide a water supply by gravitation?

Now, I do not dwell on the fact that the duty of the Local Authority under the statute is, “if they think it expedient,” to provide a water supply for the inhabitants (and this is the governing direction applicable to special districts as well as undivided areas). The primary duty of the Local Authority is to consider the question, but I make no doubt that any recalcitrancy or perversity in deciding it might be dealt with under this section.

The position of this Local Authority, however, is a definite one. “Under the statutes which we administer,” say they, “we have an assessing power limited to 2s. 6d. per £1; we have considered and calculated the cost of bringing water by gravitation to this district, and no scheme can be devised the cost of which will not greatly exceed our assessing powers.” They go on to say that this more ambitious plan being beyond their powers, they are busy improving the existing supply which is got from certain wells, and they feel pretty sure that when their improvements have been made the supply, if not affluent, will be adequate for the somewhat homely requirements of the district. Their primary answer, however, to the demand of the Local Government Board that they shall provide water by gravitation is *non possumus*.

Now, the possible answers of the Local Government Board to this position would seem to be two. They might say—“Your calculations of the cost of a gravitation supply as compared with the yield of a 2s. 6d. rate over your assessable area are wrong; you overrate the one or you underrate the other.” They might have thought out some gravitation scheme and tabled it in detail, which is within the financial ability of the Local Authority, and they might have challenged the Local Authority to carry out this scheme or be held as contumacious. They have no such case at all.

Or they might say, “You are wrong in your law as to your financial ability; your assessing power is not circumscribed by the 2s. 6d. limit.” This they have said, and as this is a question about the administration of a statute directly within their province, and as the present application has no other ground to rest on, I listened and read, in the confident expectation that

No. 93. there was something to overcome what seemed the clear limitation to 2s. 6d. imposed by the statutes. In this, however, I have been disappointed. The learned counsel for the Local Government Board, so long as they had only the statutes before them, did not offer any analysis or construction which would evade or alter the apparently clear terms of the statutes; and they relied solely on the case of *Tolmie*.¹ Now, I am willing, because I am bound, to treat *Tolmie's*¹ case as having been well decided. But the theory of *Tolmie's*¹ case is that if money has been borrowed for the construction of a water supply for a district, and if, owing to miscalculation, the actual cost exceeds the 2s. 6d. limit, then a ratepayer outside the district cannot refuse payment of an assessment levied to relieve the Local Authority of a loan, which had been made for the purposes of the district supply, but not the less was a debt of the Local Authority. The difference between that case and the present is so clear that one is not more than tempted to appreciate the difficulty of Lord Rutherford Clark or the dissent of Lord Lee. *Tolmie's*¹ case does not throw the smallest doubt on this—that whatever means of extrication may be open for those who outrun it, the legitimate administration of the Local Authority of a special district is bounded by the 2s. 6d. limit; and any Local Authority which announced its intention of undertaking a scheme which avowedly transcended that limit would be liable to interdict at the instance of a ratepayer.

Feb. 5, 1897.
Local Govern-
ment Board
for Scotland v.
County Coun-
cil of County
of Elgin.

Yet the present complaint against the Local Authority is simply that they decline to take this adventurous course. I say so, because as already pointed out, the petitioners do not table any gravitation scheme as possible of execution within the 2s. 6d. limit.

Nothing that I have said implies any optimist views of the scheme in which the Local Authority are engaged, and the immense delay which has taken place in getting any amendment of a very defective condition of things makes it natural that some pressure should be thought wholesome.

But, on the question whether by refusing to introduce a supply of water by gravitation the Local Authority have refused to do what is required by law, I cannot withhold my judgment in their favour; and no other question is before us. I am therefore for refusing the petition. It is unnecessary to say that a decree to this effect would confer no indemnity for any delay for the future in improving the water supply according to the measure of the Local Authority's powers, or debar the Local Government Board from resorting to this Court should the occasion arise. It is fair to say that I add this for greater clearness, and for no other reason.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT refused the petition.

MACRAE, FLETT, & RENNIE, W.S.—JOHN C. BRODIE & SONS, W.S.—Agents.

¹ *Tolmie v. Parochial Board of Urray*, 17 R. 1027.

CHARLES HILL WHITSON, Pursuer (Reclaimer).—*Sol.-Gen. Dickson—Clyde.* No. 94.

THE BLAIRGOWRIE DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF THE COUNTY OF PERTH, Defenders (Respondents).—*Balfour—C. J. Guthrie—Craigie.*

Feb. 6, 1897.
Whitson v.
Blairgowrie
District
Committee.

Road—Authority to take materials from enclosed land—Specification of time and place—Blasting—General Turnpike Act, 1831 (1 and 2 Will. IV. c. 43), sec. 80.—A district committee of a county council served a notice upon a proprietor intimating that they intended, in the exercise of their statutory powers, to take road material from an enclosed field upon his estate, at a spot which “will on application by you to . . . the road surveyor of the said district, be . . . specifically pointed out on a map of the locality or on the ground.”

In the course of the proceedings before the Sheriff which followed upon the notice, it appeared that the intention of the committee was to carry an existing quarry on unenclosed ground westwards into the proprietor's enclosed land, and the spot where the enclosed land would be entered upon was pointed out on a map of the locality.

The Sheriff pronounced an interlocutor finding that the committee were “entitled to proceed with their proposed operations, but under the restriction and condition” that, if the operations were carried more than fifty yards into the enclosed land they should provide a service bridge to give the proprietor access from one side of the workings to the other, and that no blasting should take place when agricultural work was being carried on within 100 yards of the spot where the blast was to be made:

The extract decree bore, *inter alia*, that the Sheriff found that the committee were entitled to search for, dig, and carry away road material from the proprietor's enclosed land at a spot which would be pointed out by the road surveyor on application by the proprietor.

In an action by the proprietor for reduction of the notice, interlocutor, and extract, *held (aff. judgment of Lord Kyllachy)* (1) that the spot at which the material was to be taken was sufficiently identified as that which had been pointed out in the proceedings before the Sheriff; (2) that it was not necessary that any time limit should be imposed on the proposed operations, either in the notice or the decree; (3) that blasting, as a usual and necessary method of quarrying, was authorised by the statute; and (4) that the insertion by the Sheriff of the condition as to the erection of a service bridge was not a good ground for reducing the decree.

Opinion by the Lord President that the insertion of the condition as to the erection of the service bridge was within the discretion conferred upon the Sheriff by section 80 of the General Turnpike Act, 1831.

Opinion by Lord Adam that although the condition requiring the erection of the service bridge might be beyond the Sheriff's power, in respect that it would be necessary to take land belonging to the pursuer for the support of the bridge, the only result would be that if the quarry reached the point specified, the Committee would have either to stop working or make a fresh application to the Sheriff.

FOR a number of years prior to 1895 the Eastern District of the 1st Division. County Council of Perthshire, and their predecessors, the Cally District Road Trustees, had been in use to obtain road metal from a quarry known as Catscraig Quarry, situated within a piece of rough unenclosed ground on the estate of Parkhill, belonging to Charles Hill Whitson. In the beginning of 1895 the District Committee had worked the whinstone in the quarry to the limit of the unenclosed land, and to the margin of an enclosed field on the farm of Westfields of Rattray, part of the estate of Parkhill. Ld. Kyllachy.

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On 28th February 1895, the District Committee served the following notice on Mr Whitson :—"Take notice that the Blairgowrie or Eastern District Committee of the County Council of the County of Perth, appointed under the 'Local Government (Scotland) Act, 1889,' and as road trustees acting under and in virtue of the 'Roads and Bridges (Scotland) Act, 1878,' adopted in the said county, in exercise of the powers conferred upon them by the said Acts and statutory provisions therewith incorporated,* but always upon the terms and conditions thereby provided for, intend by themselves or such persons as may be authorised by the said Committee to search for, dig, and carry away materials for making or repairing highways (as 'highway' is defined by section 3 of said Act of 1878) within the said district, and the footpaths thereof, and for building, making, or repairing bridges or other works within the said district connected with such highways, from enclosed land whereof you are the proprietor, and of which David Fernie, farmer, Westfields, Rattray, is the present occupier, situated within the said district, in the parish of Rattray, and on the estate of Parkhill, and at a spot on such land within an arable field on the farm of Westfields, situated on the west side of the den or ravine known as Catsraig Quarry, which spot so to be entered upon will on application by you to Robert Grant, residing at Bengarth, Rattray, the road surveyor for the said district, be also specifically pointed out on a map of the locality or on the ground: and you are hereby required to appear before the Sheriff of the said county or his Substitute, within the ordinary Sheriff Court House at Perth, upon Friday the 15th day of March 1895 years, at twelve o'clock noon, being the time and place appointed by the said Sheriff or his Substitute for such appearance, to shew cause, if any such there be, why such materials should not be so taken."

Sundry procedure, including a proof, followed upon this notice before the Sheriff-substitute of Perthshire (Grahame). In the course of these proceedings it was explained that the intention of the committee was to carry the existing quarry westward into the enclosed field mentioned in the notice, and the spot where the enclosed land would be entered on was indicated on a map of the locality. Thereafter the Sheriff-substitute pronounced the following interlocutor:—"Repels the

* Section 8 of the Act 1 and 2 Will. IV. cap. 43, which is incorporated in the Roads and Bridges Act, 1878 (41 and 42 Vict. cap. 51), authorises the trustees of any turnpike road "to search for, dig, and carry away materials for making or repairing" such road or the bridges connected therewith "in or out of the enclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person," except in certain specified cases; "provided always, that before taking such materials from any enclosed land from which the same shall not have been in use to be taken, fourteen days' previous notice in writing, signed by two trustees, shall be given to or left at the usual residence of the proprietor and occupier of the soil or quarry from which it is intended to take the same, or his or her known agent, to appear before the Sheriff or any two Justices of the Peaces acting for the shire where the said lands are situated, to shew cause why the said material shall not be so taken, and in case such proprietor, occupier, or agent shall attend pursuant to such notice, or shall neglect or refuse to appear, proof on oath in such case being duly made of the service of such notice, such Sheriff or Justices shall authorise or prohibit the trustees from taking such materials or make such order as they shall think fit."

respondent's objection to said notice upon the plea of incompetency; finds that said committee are entitled to proceed with their proposed operations, but under the restriction and condition that should these operations be carried into the respondent's enclosed land beyond a distance of fifty yards, they shall provide a service bridge which shall afford a sufficient and convenient access from the lower portion of the respondent's lands to the upper or northern part thereof, and that the blasting operations in connection with the quarry shall be conducted in such a way and at such times as not to interfere with the agricultural operations of the tenant of said lands, and in particular that no blasting shall take place when agricultural work is being performed by the occupier, or any one authorised by him, within 100 yards of the spot where the blast is made: Finds neither party entitled to expenses, and decerns."

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The extract of the Sheriff-substitute's decree bore, *inter alia*, that the District Committee were entitled, in the exercise of their statutory powers, to search for, dig, and carry away materials for making or repairing highways or bridges within their district, "from enclosed land whereof the said Charles Hill Whitson is the proprietor, and of which the said David Fernie is the present occupier, situated within the said district, in the parish of Rattray, and on the estate of Parkhill, and at a spot on such land within an arable field on the farm of Westfields, situated on the west side of the den or ravine known as Catsraig Quarry, which spot so to be entered upon will, on application by the said Charles Hill Whitson or the said David Fernie to Robert Grant, residing at Bengarth, Rattray, the road surveyor for the said district, be also specifically pointed out on a map of the locality or on the ground." The conditions as to the building of the service bridge and blasting followed.

In December 1895 Mr Whitson brought an action for reduction of the notice served upon him by the District Committee, the interlocutor of the Sheriff, and the extract decree.

The pursuer averred, —(Cond. 7) "The said statutory notice, decree, and extract are invalid, and not authorised by the statutes in terms of which they bear to proceed, and they are further void from uncertainty and ambiguity. Neither the said notice nor the said decree and extract identify the spot or place from which the materials are to be removed, or specify any limit to the proposed operations either in respect of the quantity of material to be removed or in respect of the length or distance to which the operations are to be carried along the line of said whinstone vein or otherwise. The defenders have no right to apply for, and the Sheriff has no authority to grant, a licence to remove materials without specifying both the locality and extent of the operations necessary for that purpose. Moreover, such licence should be limited to the necessities of the particular occasion in respect of which the application is made. In the circumstances above condescended upon, the licence as granted by the Sheriff is not only illegal and unwarranted but grossly injurious and oppressive to the pursuer. The said extract is further incompetent in respect it is disconform in material particulars to the Sheriff's interlocutor."

He pleaded that the notice, the interlocutor, and the extract were unauthorised by statute, and that they were wanting in the specification of essential particulars, and further that the extract was disconform to and unwarranted by the interlocutor.

The defenders pleaded that the pursuer's averments were irrelevant.

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On 1st July the Lord Ordinary (Kyllachy) assoilzied the defenders.* The pursuer reclaimed, and argued;—(1) Section 80 of the Act 1 and 2 Will. IV. cap. 43, had not been rightly understood by the Road Trustees. They could at their own hand search for stones, and only

* “OPINION.—I do not think I need make avizandum with this case. It appears to me that the pursuer's objections to these proceedings are hypercritical. The extract decree is, as far as I can see, quite in terms of the Sheriff's interlocutor; and the Sheriff's interlocutor—putting out of view in the meantime certain conditions which he adjects, and which are not in controversy—seems to me to be just in terms of the defenders' notice. The question therefore is as to the validity of the defenders' notice. Is it or is it not a notice within the statutes, and particularly section 80 of the Statute 1 and 2 Will. IV. ?

“Now, it is said that the notice is bad in respect that it does not define the area within which the powers in question are to be exercised. In my opinion it does sufficiently define that area. It defines it, in the first place, as being within the estate of Parkhill. That may or may not be enough. Probably it would not be enough. But it further defines it as being within the farm of Westfields, of which David Fernie is the tenant. I do not know whether or not that would be enough. I incline to think it would perhaps be enough. But the notice goes further, and defines the area as an area to be pointed out within a certain arable field—an arable field which, according to the plan, consists of about 8 acres, and of which the situation is well defined. I am not prepared to say that a notice to take materials within a certain field consisting of about 8 acres is a bad notice—a bad notice under the statute. The statute does not define the maximum magnitude of the area to be specified in the notice. The question whether the area within which the powers are proposed to be exercised is or is not too wide, is a question which the statute leaves to the Sheriff, and on which I take it the Sheriff is final; and therefore as regards this objection, my opinion, in the first place, is, that the area here does seem to be sufficiently specified, and does not *prima facie* seem to be too wide. But even if it were thought to be too wide, that is not in my view a ground for reducing the Sheriff's judgment, because that matter is—as I read the statute—a matter for the Sheriff, and the Sheriff has either dealt with it, or, what comes to the same thing, was not asked by the pursuer to deal with it.

“But then it is said that the notice, interlocutor, and decree are bad because they do not define the time for which the power is to be exercised. Now, it is quite true that they do not. The power which has been granted—or rather the power with respect to which the notice was given, and which the Sheriff has granted—is a power to take materials from this enclosed land for an indefinite time—a time only limited by the necessities of the roads in this neighbourhood, and which necessities will probably be continuous. But I do not find that the Scotch statute (I say nothing of the English statute mentioned in argument) requires that the notice shall specify a time limit. I think it, on the contrary, leaves it for the Road Trustees to give notice either for a certain time or for an indefinite time, and leaves it to the Sheriff to define the time, if the time in the notice is indefinite and the landlord is able to satisfy the Sheriff that a definition should be made. In this case the time being indefinite, I have no doubt that the Sheriff, if asked, would have considered the question whether a time limit should be fixed, as he might quite possibly have come to the conclusion that such should be fixed; but nothing of that kind appears to have been suggested. But, as I said before, either the Sheriff was asked to fix a limit and declined, or the matter was not brought before him as a matter on which the pursuer desired his intervention.

“On the whole therefore I see no reason for disturbing the Sheriff's interlocutor sustaining the defenders' notice.”

required the Sheriff's authority to dig and carry them away from enclosed land. When they made application to the Sheriff they were bound to state definitely whence the stones were to be taken, and the Sheriff was bound in giving authority to define the limits of its exercise in place and time. It was an unreasonable construction of the Act to hold that unlimited authority might be given to quarry the whole of a seam of stone, if required. Under the corresponding English statute, it was held that the authority given must be reasonably defined.¹ (2) The right to dig and carry away did not include the right to blast. That was not a usual method of obtaining road metal at the date of the Act 1 and 2 Will. IV. cap. 43, the practice then being to gather surface stones. The burden on the proprietor could not be increased without statutory authority.² (3) The Sheriff had no power to impose the condition as to the building of a service bridge, which would involve the taking of more land from the pursuer. (4) The interlocutor was not a sufficient warrant for the extract.

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Argued for the defenders;—(1) The interlocutor and decree were not wanting in definition. The intention of the defenders was to continue the quarry from a definite point, viz., the point it had already reached, and this they were entitled to do. They made no claim of any right to stop the existing workings and go to a different part of the pursuer's field. The English Act was in different terms from the Scotch. The latter contained no provision requiring a limitation as to time to be imposed when authority was granted under it. The English cases, therefore, did not apply. The point might have been raised in Scotland, but had not been raised.³ (2) "To dig" meant to quarry according to the usual methods, of which blasting was one, and a necessary one. (3) The condition as to the erection of the bridge was in the pursuer's favour, and he could not use it to found an objection to the validity of the authority given to the defenders. Even if the pursuer had a right to take the objection, the insertion of this condition could not be held to vitiate the decree. The statute gave a discretion to the Sheriff, and the insertion of such a condition was a reasonable exercise of the discretion given him. Further, the defenders would not make the bridge if the pursuer objected. At all events the question did not arise until the quarry had been carried fifty yards into the field. (4) The extract was in conformity with the interlocutor, but if not, a new extract could be got.

At advising,—

LORD PRESIDENT.—We have no jurisdiction to review on its merits any order made by the Sheriff; and the only question before us is, whether the Sheriff has exceeded his statutory powers in making the order libelled.

Now, it cannot be disputed that the District Committee is entitled to take stones for the roads from a quarry, or from enclosed land (with the exception of orchards and other places specified), and to go on taking them

¹ 5 and 6 Will IV. cap. 50, sections 53 and 54; *Rex. v. Manning*, 1757, 1 Burr. 377, *per* Lord Mansfield, at p. 382; *Manvers v. Bartholomew*, 1878, L. R., 4 Q. B. D. 5; *Hooper v. Hawkins*, 1886, 51 J. P. 246.

² *Henderson v. Dunfermline District Committee*, May 14, 1896, 23 R. 727.

³ *Grahame v. Renfrewshire Road Trustees*, May 29, 1851, 13 D. 1012, 23 Scot. Jur. 466.

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so long as the roads require the stones. In the case of enclosed land, from which stone has not been previously taken, notice must be given to the proprietor, and the Sheriff must either authorise or prohibit the taking the material, the Sheriff having power to make such order as he thinks fit. This last provision shews that it is competent to the Sheriff to give a conditional or qualified permission.

When we turn to the proceedings in this case, the notice, at first sight, certainly reads as if the District Committee were asking very wide powers; and I am not surprised if it caused some alarm. But, when the notice is examined, it appears that the authority craved was to take stones by quarrying into the field named, at a particular spot. The notice, at first sight, reads as if the Committee wished to have a roving power over this field of eight acres; but this perhaps arose from a mistake on the part of the Committee as to what they required to notify. They have given notice of their intention to search for, as well as to carry away, and the Sheriff's order echoes the notice on this point. But as I read the section, no notice is required to entitle the Committee to search for stone in the lands; all they require to give notice of is their intention to take materials from the lands. Well then, in the proceedings before the Sheriff, Mr Grant, the surveyor, according to the promise in the notice, pointed out the place of the proposed taking of materials; and in substance what is proposed is simply to carry a quarry from which materials have hitherto been got for the roads, further westwards into the field in question. I may remark in passing, that the Sheriff's order, rather mechanically adopting the words of the notice, speaks of the place of operations as one which will (in the future) be pointed out by Mr Grant. I do not read this as meaning that the authority will apply to any spot or spots which Mr Grant may from time to time point out, but as applying to the place already pointed out by Mr Grant. It would have been better had it been otherwise expressed, but the words of the order may be justified if they are read as meaning, that if anyone likes, Mr Grant will point out the place again.

Well now, if this operation, which the Sheriff has authorised, had been likely to be accomplished by a few cartfuls of stone being taken away, I really do not see what objection could be taken to it. And the next thing to observe is, that the Act imposes no limit, except the requirements of the roads, on the amount which may be taken. It would appear that, in this case, it is contemplated that the Committee will go on taking materials for an indefinite time, and the Sheriff has made some conditions as to access when the operations have gone on a certain distance. I can only say that I do not think that these conditions (which are in the interest of the landlord, if the workings are lawful, and need not be enforced unless he desires them), are either in themselves illegal or denote a contemplation of endurance which makes the order illegal.

I agree with the Lord Ordinary in what he says of the absence from the order of the specification of a limit of time. A further objection was taken that blasting is not a lawful operation under section 80, and that the order is bad because it conditionally authorises blasting. I think this objection untenable. The Committee have right under the section to remove materials for making and repairing roads and also for building. In my opinion they

are entitled to do what is usual and necessary to effectuate that power, and blasting is an operation usual and necessary for these purposes. No. 94.

The result is that I agree in the conclusion of the Lord Ordinary. It may be well to say, however, that I am not to be held as concurring in the observations made *obiter* by the Lord Ordinary as to what would or would not in other cases be sufficient specification of the place from which it is proposed to take materials. The burden which this section imposes on landlords is a heavy one, and is not to be augmented by a latitude which might embarrass the use of property. The Sheriffs have, as I read the statute, no power to dedicate for all time the whole of a large enclosed field to the operations of the District Committee. Shorter views are to be taken. In the present instance, there is nothing to prevent the pursuer from using the field in any way he thinks fit, and if any use so made should in the future bring the ground within the protected subjects specified in this section, then I see nothing in this order which will entitle the District Committee of the day to encroach on such ground. Feb. 6, 1897.
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I am for adhering.

LORD ADAM.—I am of the same opinion. With reference to the condition imposed by the Sheriff upon the Committee, that, in case of their operations being carried into the field beyond a distance of fifty yards, they should build a service bridge, it may be that he had no power to insert any such condition, since the pursuer's land would be required for building such a bridge. But the only result of that is that, if the quarry does reach that point, the Committee may have either to stop working, or to go back to the Sheriff. There are accordingly, in my opinion, no grounds for interfering with the Sheriff's order.

LORD KINNAR concurred.

LORD M'LAREN was absent.

THE COURT adhered.

SKENE, EDWARDS, & GARSON, W.S.—JAMES RUSSELL, S.S.C.—Agents.

THE ELECTRIC CONSTRUCTION COMPANY, LIMITED, Pursuers

(Reclaimers).—*Salvesen—Constable.*

HURRY & YOUNG, Defenders (Respondents).—*Sol.-Gen. Dickson—Clyde.*

No. 95.

Feb. 6, 1897.
Electric Construction Co.,
Limited, v.
Hurry &
Young.

Expenses—General Finding—Taxation—Objection to Auditor's report—A. S. July 15, 1876, General Regulation 5.—The Court having decerned in favour of the pursuers in an action and found them entitled to expenses, the defenders, on the motion for approval of the Auditor's report, objected that the Auditor should not have allowed the pursuers the expenses of the proof, in which they had been unsuccessful.

Held that the objection came too late.

(SUPRA, Jan. 14, 1897, p. 312.)

In this case the Court, on 14th January 1897, decerned in favour of the pursuers in terms of the conclusions of the summons, and found them entitled to expenses.

Upon the motion for approval of the Auditor's report, the defenders objected that the Auditor should have disallowed the expenses of the

1ST DIVISION.

No. 95.

Feb. 6, 1897.
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struction Co.,
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proof, in which the pursuers had been unsuccessful. They argued that this was a part or branch of the case in the sense of the Act of Sederunt of 1876.*

The pursuers argued;—The objection should have been taken when the case was decided, and could not be entertained now.¹

At advising,—

LORD PRESIDENT.—The Court is of opinion that the objection comes too late.

LORD ADAM, LORD M'LAREN, and LORD KINNENR concurred.

THE COURT approved of the Auditor's report.

WALLACE & PENNELL, W.S.—RICHARD JOHNSTONE, S.S.C.—Agents.

No. 96.

Feb. 16, 1897.
M'Kie's Tutor
v. M'Kie.

WILLIAM CRAWFORD (M'Kie's Tutor), First Party.—*Blackburn*.
MRS ANNE HAMILTON M'KIE, Second Party.—*D. Dundas—Constable*.

Succession—Will—Revocation—Conditio si testator sine liberis decesserit.
—A, sixteen months after his marriage, executed a will, by which he left his whole estate to his wife. Five years later a child was born of the marriage, and fourteen months afterwards A died. *Held* that the *conditio si testator sine liberis decesserit* applied, and that the will became inoperative on the birth of the child.

Elder's Trustees v. Elder, 21 R. 704, and 22 R. 505, and *Dobie's Trustees v. Pritchard*, 15 R. 2, commented on.

1st Division.

PETER LAWRIE M'KIE was married to Miss Anne Kennedy in September 1888. There was no contract of marriage between them. There was one child of the marriage—Angela M'Kie—who was born upon 24th April 1895.

Mr M'Kie died on 8th July 1896, survived by his widow and child, and leaving a disposition and settlement deposited with his agents, dated 5th February 1890.

By his settlement Mr M'Kie bequeathed his whole means and estate, heritable and moveable, to his wife, whom he also appointed his sole executrix.

The nett value of his estate was £14,046 or thereby. Of this sum £3000 was contained in a bond and disposition in security, so that the legitim fund was about £3680, and the *jus relictæ* a similar amount.

Mr William Crawford, Duns, was appointed factor *loco tutoris* to Miss Angela M'Kie on the petition of her mother as her guardian.

A doubt having arisen as to the share of her father's estate to which Angela M'Kie was entitled, a special case was presented by Mr Crawford, as factor *loco tutoris*, of the first part, and Mrs M'Kie, of the second part, which narrated the foregoing facts.

* The A. S. July 15, 1876, General Regulation 5, provides,—“Notwithstanding that a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings.”

¹ *Welsh v. Russell*, May 19, 1894, 21 R. 769; *Murray v. Macfarlane's Trustees*, Nov. 6, 1895, 23 R. 80.

The first party maintained that the fact of the birth of a child subsequent to the execution of the disposition and settlement by Mr M'Kie revoked it or rendered it invalid; that therefore Mr M'Kie died intestate, and that Angela M'Kie was entitled to the sum in the bond for £3000—subject to the second party's right of terce or one-third part of the interest of the bond—and to one-third of the remainder of his estate as legitim, and one-third as dead's part. No. 96.
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The second party, on the other hand, maintained that the birth of the child about fifteen months prior to the testator's death did not revoke or invalidate the deed, that Mr M'Kie did not die intestate, and that the second party was in virtue of the deed entitled to the whole estate of her deceased husband, subject only to the child's claim for legitim.

The following question, *inter alia*, was submitted for the opinion and judgment of the Court:—"Did the birth of the child subsequent to the execution of the said settlement by the said Peter Lawrie M'Kie have the effect of revoking the said settlement or rendering it invalid?"

Argued for the first party;—There were no circumstances here to counterbalance the presumption that the birth of a child revoked a will.¹ The lapse of fourteen months between the birth of the child and the testator's death did not do so, for mere lapse of time had always been held to be insufficient.² Indeed, unless the testator had made it "as plain as a pikestaff"³ that he did not intend the succession to go to the child, the condition would apply.

Argued for the second party;—The presumption was of varying force, and might be rebutted by circumstances. Here the circumstances were sufficient to displace it,—the will was executed only sixteen months after marriage; the child would receive a sufficient provision as legitim; the testator survived his child's birth for more than fourteen months without doing anything to revoke the will; and the will was conceived in favour not of a stranger, but of the testator's widow. Lapse of time, especially if coupled with other circumstances, was sufficient.⁴ Lord Rutherford Clark in *Dobie*² went further than any other Judge or writer. The presumption rested on a rule of equity that a will made under circumstances which were very different from the actual circumstances at death ought not to be treated as the testator's last will.⁵ Everything in this case, however, pointed to the intention of the testator being that his will should stand.

LORD ADAM.—The question in this case is whether Mr M'Kie's settlement, by which he left the whole of his estate to his wife, was revoked by the birth of a child occurring after its date.

Now, having regard to the doctrines laid down in the case of *Elder's Trustees*,⁵ I think there is a principle that when a child is born the pre-

¹ *Millar's Trustees v. Millar*, July 20, 1893, 20 R. 1040.

² *Dobie's Trustees v. Pritchard*, Oct. 19, 1887, 15 R. 2; *Munro's Executors v. Munro*, Nov. 18, 1890, 18 R. 122.

³ *Colquhoun v. Campbell*, June 5, 1829, 7 S. 709, Lord Glenlee, at p. 711.

⁴ *Erskine*, iii. 8, 46; *Colquhoun v. Campbell*, June 5, 1829, 7 S. 709, Lord Pitmilley, at p. 712.

⁵ *Elder's Trustees v. Elder*, March 16, 1894, 21 R. 704, Lord Adam, at p. 708, March 16, 1895, 22 R. 505, Lord McLaren, at p. 511.

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sumption of law is that its birth renders a previous settlement invalid—a presumption which can only be rebutted by proof of facts and circumstances shewing that the intention of the testator was that the will should stand. I think that this is not a very satisfactory position from the point of view of a Judge. I could understand that a good principle to adopt would be that of Roman law, viz., that the birth of a child revokes unconditionally a previous settlement. That would seem to have been the opinion of Lord Rutherford Clark as given in the case of *Dobie's Trustees*,¹ but it has not been adopted in the more recent views of the law, and the question accordingly depends on the consideration of facts and circumstances. Now, to draw inferences from facts and circumstances is always a very difficult function to perform. It is like making a new will for a man. The only circumstances referred to here are, in the first place, the lapse of fourteen months between the birth of the child and the death of the father, which does not appear to me to be of sufficient importance to rebut the general presumption; and, secondly, the fact that the will was in favour of the mother and not of a stranger, which is certainly of importance, but which is also, in my opinion, not strong enough to rebut the presumption.

Accordingly, in my opinion, we should answer the question in the affirmative.

LORD M'LAREN.—It may be that in the opinion of some lawyers the rule with which we are here concerned is not founded on the best consideration of equity, or really represents the most probable intention of the testator. But the rule has been recognised in our practice for a long time, and we must apply it with the aid of the known expositions of the law. One thing is manifest, that the presumed revocation of a will by the subsequent birth of a child is not an absolute presumption. There may be exceptions to it. I am sorry to say that it is very difficult to find from the authorised expositions of the law what these exceptions are.

The case of *Elder*² is important in this connection, as it settled this point, that the Court will not allow proof of declaration of the deceased as either setting up the will or as fortifying the presumption against the subsistence of the will. For in that case the Lord Ordinary had allowed a proof, but the interlocutor was recalled by the Inner-House, and judgment was given upon the known and undisputed facts appearing on the record.

I should hesitate to say that the presumed revocation was a mere question of circumstances. It seems to me impossible to find a solution of the practical questions with which the Courts have to deal under such an indefinite standard. It rather appears to me that the presumption can only be displaced by something that amounts to a tangible and clear expression of the testator's wish that his will should subsist, *e.g.*, by his executing a codicil to it, or by his taking measures of precaution shewing that he treated his will as a subsisting document. Certainly there is no authority for holding that mere lapse of time is sufficient to overcome the presumption. In the light of principle it is very difficult to see why it should—why, in

¹ 15 R. 2.

² 21 R. 704, and 22 R. 505.

other words, a document which is dead should be revived by the elapse of time. The effect of lapse of time is to strengthen the counter presumption which may arise from some indication of the testator's wish, which by itself might be insufficient,—for example, if the testator had taken great care to preserve his will, or had made some written reference to it after the lapse of years from the birth of a child. I have been led to consider what kind of evidence is sufficient to overcome the presumption of revocation, because we cannot answer the question raised in the present case without considering the kind of evidence which is admissible to rebut the presumption. There is really nothing in this case which is adverse to the presumption except the survivance of the testator for a relatively short period without making a new will. I agree with Lord Adam that this circumstance is not sufficient of itself.

I have come to this conclusion not without regret, for I cannot help thinking that when the testator made his will his real view was that it should stand until his child, if he should have a child, should reach the years of discretion. I do not think a man in the position of the testator, leaving a wife and a young child surviving him, could make a more reasonable will than was here made, and I cannot help regretting that the presumption must be applied, for I think we are denying effect to a will which really represents the testator's intention.

The LORD PRESIDENT and LORD KINNAR concurred.

THE COURT answered the question in the affirmative.

RUSSELL & DUNLOP, W.S.—J. & J. TURNBULL, W.S.—Agents.

PETER COCKBURN AND OTHERS, Pursuers.—*Comrie Thomson—
T. B. Morison.*

No. 97.

PETER HOGG AND OTHERS, Defenders.—*Balfour—Clyde.*

Feb. 18, 1897.
Cockburn v.
Hogg.

Process—Jury Trial—Notice of Motion for a new trial.—Time—
A. S. 16th Feb. 1841, sec. 36—*Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 4.*—In determining whether a notice of motion for a new trial has been timeously given, the February week instituted by the Court of Session Act, 1868, sec. 4, is to be regarded as in the same position as the Christmas recess under the A. S. 16th February 1841.

PETER COCKBURN AND OTHERS brought an action for reduction of 2ND DIVISION. the settlement of their mother, Elizabeth Rutherford or Cockburn, widow of the late Peter Cockburn, dairymen, Leith, against Peter Hogg and Others, the trustees named in the settlement. The action was tried before the Lord Justice-Clerk and a jury on 6th February 1897. The jury at 6.30 P.M. on that day returned a verdict finding that the settlement was not the deed of the deceased. The Court adjourned on 6th February for the February week, and did not sit again until Tuesday, February 16th. On February 17th the defenders gave notice of a motion for a rule to shew cause. At the calling in the Single Bills next day the pursuers objected that under the A. S., 16th February 1841, sec. 36, the notice of motion was too late, as it had not been given within ten days of the trial. The defenders answered;—The February week not having been instituted in 1841 could not have been provided for by the Act of

No. 97. Sederunt, but the February week was *ejusdem generis* with the Christmas recess, and the notice consequently was timeous.*
 Feb. 18, 1897.
 Cookburn v. Hogg.

LORD JUSTICE-CLERK.—I think that we must allow this motion.

LORD YOUNG concurred.

LORD TRAYNER.—I agree. The principle of the matter is that notice of motion to shew cause should be given within six days after the sitting of the Court after vacation or recess. To make the matter quite clear, perhaps an Act of Sederunt should be passed dealing expressly with the February week.

LORD MONCREIFF concurred.

THE COURT granted the motion.

REID & GUILD, W.S.—W. HAMILTON, S.S.C.—Agents.

No. 98. JAMES LINDSAY & SON, Pursuers (Respondents).—*Sol.-Gen. Dickson—Aitken.*
 Feb. 19, 1897.
 Lindsay & Son v. Scholefield. HENRY SCHOLEFIELD AND OTHERS, Defenders (Reclaimers).—*Ure—Salvesen.*

Ship—Charter-party—Cargo of fruit—Exception of shipowners' liability for "inherent deterioration"—Agent and Principal—Deviation from charter-party by charterers' agent—Ultra vires.—By charter-party a steamship was chartered to proceed to Seville and there load from the charterers or their agents 1500 half chests of oranges, and being so loaded to proceed to Leith direct, and deliver the same agreeably to bills of lading, "the steamer to have liberty before loading fruit to load lead or mineral, also cork-wood, for owners' benefit, the same to be discharged after fruit." A marginal note on the charter-party bore that the captain was to apply to F. G. for cargo.

The bills of lading for the fruit bore that it had been shipped "in good order and well conditioned," and took the shipowners bound to deliver it in the like good order and condition, subject to specified exceptions, including "not responsible for . . . inherent deterioration."

By agreement between F. G. and the master of the steamer, the fruit was loaded before, and was also to some extent discharged after, the mineral and the cork-wood, with the result that the fruit was about six days longer in the hold than it would have been had the vessel been loaded in terms of the charter-party.

The fruit having been delivered at Leith in a deteriorated condition, the charterer brought an action for damages against the shipowners, pleading

* The A. S. 16th February 1841, sec. 36, enacts,—“When the party against whom the verdict has been found intends, without lodging a bill of exceptions, to apply for a new trial in causes which have been tried at the sittings after the end of the session, or during the Christmas recess, or at the Circuits, such party shall give notice of a motion for a rule to shew cause why the verdict should not be set aside and a new trial granted, within six days after the commencement of a new session, or the meeting of the Court after the Christmas recess, or ten days after the trial of the cause if the cause has been tried during the session or immediately before the sitting down of the session.”

The Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 4, enacts,—“ . . . it shall be lawful for the Court at the time of the Christmas recess to adjourn for a period not exceeding fourteen days, and to adjourn at such time during the month of February as shall be most convenient for a period not exceeding seven days. . . .”

that the damage had been caused by the undue detention of the fruit in the hold of the ship consequent on the deviation from the charter-party. No. 98.

The defenders maintained that they were not liable, in respect that the damage had arisen from the "inherent deterioration" of the fruit, and further, that F. G. having agreed that the order of loading should be varied from that provided in the charter-party, the pursuers were not entitled to found on any damage resulting from the variation. Feb. 19, 1897.
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Held, after a proof (in affirming the judgment of Lord Kyllachy), (1) that the agreement between F. G. and the master was not binding on the pursuers, and (2) that the defenders were liable in respect that they had undertaken to deliver in good order and condition, and had failed to do so, or to prove that the damage was due to one of the excepted causes.

By charter-party dated 6th November 1895 between Henry 2ND DIVISION. Scholefield & Son, managing owners of the steamship "Andalusia," Ld. Kyllachy. of Newcastle-on-Tyne, on the one part, and James Lindsay & Son, fruit salesmen, Edinburgh, on the other part, it was mutually agreed that the said steamer should proceed to Seville and there load from the charterers or their agents 1500 half chests of oranges, and being so loaded should proceed to Leith direct, and deliver the same agreeably to bills of lading. "Steamer to load as fast as she can receive, as customary, weather permitting (Sundays and holidays excepted), and to be discharged, as customary, as fast as steamer can deliver, in a safe berth as ordered by charterers. . . . Steamer to have her holds properly cleaned before loading fruit, and she shall not be ballasted with sand or mud, or anything prejudicial to the cargo, but has liberty to load lead or mineral before loading fruit, also cork-wood, for owners' benefit, same to be discharged after the fruit. Ballast to be properly separated from oranges and other cargo. . . . Should anything occur to the steamer after the fruit is shipped, causing her to be detained at any port or place more than twenty-four hours, captain, if practicable, shall instantly telegraph information of same to the charterers, and, in any case, give them earliest possible advice; the owners shall also be bound, if delay exceeds seven days, to allow the charterers the option of forwarding the cargo immediately by some other steamer, and if at less than chartered freight the steamer to receive the difference, less cost of transhipment. In the event of the steamer breaking down whilst at sea with fruit on board, the captain is bound to avail himself of assistance offered to tow or otherwise to enable him to reach his destination with the least delay possible."

On the margin of the charter-party there was written—"The captain to apply to Mr Francisco Gomez, La Productora Exportadora de Naranjas, Seville, for cargo."

The bills of lading for the oranges bore that they were "shipped in good order and well-conditioned, . . . and are to be delivered in the like good order and well-conditioned," subject to specified exceptions, including (written by the master) "weight, quantity, and quality unknown. Not responsible for leakage, rust, or inherent deterioration."

On delivery at Leith the oranges were found to be in a damaged condition.

In December 1895 Lindsay & Son brought an action against the owners of the "Andalusia," concluding for £304, 15s. as the amount of the loss sustained through the damaged condition of the oranges when delivered.

The pursuers averred that the damage to the oranges was caused

No. 98. by the insufficient means of ventilation on board the vessel, and to the undue detention of the oranges in the vessel in consequence of the other cargo having (in breach of the charter-party) been loaded after the oranges, and discharged at Leith before them.

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The defenders admitted that the other cargo had been loaded after the oranges, and that some of it had been discharged before them, but they averred that "the oranges were shipped before the rest of the cargo, with the knowledge and express approval of the shipper, who represented to the captain that as the oranges were all upon the quay, and exposed to the weather, it would be better that they should be put into the ship's holds, in the event of bad weather coming on. The captain assented to this, and the oranges were accordingly put into the holds." The defenders further founded on the exemption above quoted in the bill of lading, and alleged that when shipped the oranges were in a condition of "inherent deterioration."

The pursuers pleaded;—(1) The defenders having received the goods in question in good order and condition, and having failed to deliver same in like good order and condition, as above set forth, and the pursuers having in consequence suffered loss and damage to the amount sued for, decree ought to be granted, as craved. (2) The pursuers having suffered loss and damage to the extent sued for owing to the fault and breach of contract of the defenders, are entitled to decree, in terms of the conclusions of the summons.

The defenders pleaded, *inter alia*;—(3) The pursuers not having suffered any loss owing to the fault or breach of contract of the defenders, the defenders are entitled to absolvitor.

A proof was allowed. The evidence disclosed the following facts:—The steamer arrived at Seville, and was ready to load on the 15th November. But she had to wait her turn for her mineral cargo, which turn did not arrive until the 18th. In these circumstances the captain arranged with Gomez, the shipper of the fruit (who had at that time no copy of the charter-party), that the fruit should be loaded at once; and it accordingly was so loaded on the 15th, 16th, and 17th November, and stowed at the fore and aft ends of the hold. The cork-wood, or part of it, was put on board simultaneously, and placed fore and aft between the oranges and the fore and aft hatches. On the 18th the mineral began to be loaded, and the loading occupied five days, being completed on the evening of the 22d, by which time also the deck cargo of cork had been put on board. The steamer did not sail until the 23d. The result was that the oranges, which, if loaded last in terms of the charter, would have been only (on the average) one and a half days stowed in the vessel's hold before sailing, were in fact in that position for (on the average) six and a half days before sailing. Similarly at discharge, the cork-wood had to be discharged first, and in consequence the oranges were kept on board for at least an additional twelve hours. Altogether the voyage, as regarded the oranges, was prolonged by about six days beyond the period permitted by the charter.

The import of the evidence *quoad ultra* sufficiently appears from the opinion of the Lord Ordinary.

On 28th November 1896, the Lord Ordinary (Kyllachy) decerned against the defenders for £157 in full of the sum sued for.*

* "OPINION.—. . . The owners . . . say that under the charter-party the grower and shipper of the fruit was charterers' agent, and that as such he

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The defenders reclaimed, and argued ;—In so far as the damage was due to the oranges having been in the hold for six days more than they would have been had they been loaded in terms of the charter-party, the defenders were not liable, for Gomez, the agent of the pursuers, had consented to this deviation from the charter-party. It was a deviation within his powers, for it was not a radical alteration, merely a variation in detail.¹ The pursuers' remedy, if they had any, was against their own agent Gomez. But if Gomez did not bind the pursuers so neither did the captain bind the defenders.² [LORD TRAYNER.—No. The charterers' agent and the captain are not *in pari casu*. You, as shipowner, are responsible for the breach of the contract by the person to whom you entrusted the execution of the contract at this port, namely, your captain.] The shipowners were not responsible if their captain, without their authority, did not fulfil their contract. [LORD YOUNG.—Then you did not fulfil your contract. You should have had an agent who would have done so.] In any view, the defenders were not responsible, since the loss was due to the inherent

consented to the change made in the order of loading. Now I shall assume that that is proved. I am not, I confess, prepared to accept the captain's account of the shipper's motive. I think the weight of the evidence is against the suggestion that the oranges, or any material part of them, were at this time lying on the quay exposed to the weather. But that, for one reason or another, the shipper did consent to the fruit being shipped first is, I think, sufficiently proved. Indeed, the shipper Gomez admits the fact, although he says that his consent proceeded on the condition, or at least on the understanding, that the steamer should load her mineral and sail within twenty-four hours after the fruit was stowed.

"The question, however, is whether it was in the power of the shipper (charterers' agent although *quoad hoc* he may be held to be) to discharge or vary material conditions of the charter. I am not able so to hold. That an agent constituted by a charter, for the purposes of the charter, can without special authority alter the charter seems to me to be a startling proposition. I asked at the discussion if there was any authority for it, and the only case which was quoted was the case of *Sickens*, 29 Law J. (C. P.), 25. But that case seems to me to be an authority the other way. No doubt the liberty there taken by the charterers' agent was rather larger than that taken here. But the question is hardly one of degree. Deviations that are not material may not perhaps count, but, subject to that qualification, the principle, I think, is as expressed by Chief Justice Erle in the case referred to, where he points out that 'if the plaintiff's counsel had succeeded in his argument, it might have thrown doubt upon the well known, and in mercantile transactions most important, rule, that the power of a special agent to bind his principal is limited by the authority given to that agent.'

"The owners being therefore, with respect to the order of loading, in breach of the charter, the next point which seems reasonably clear is, I think, this,—that although the necessary result of the change in the order of loading was to make the ventilation of the oranges during the voyage more important and also more difficult, the ventilation provided was certainly not such as to redress the difficulty. As to the amount of ventilation, there was certainly a good deal of looseness, and perhaps also a good deal of exaggeration, on both sides ; but taking even the testimony of the owners' witnesses, it must, I think, be allowed that for such a cargo, stowed as this cargo was, the ventilation provided was, to say the least, somewhat scrimp.

¹ *Sickens v. Irving*, 1859, 29 L. J., C. P. 25.

² *Abbott*, Merchant Shipping, 13th edit. p. 128.

No. 98. deterioration of the oranges. [LORD TRAYNER.—What do you understand by “inherent deterioration?”] Such a condition existing in the oranges when they were put on board as would lead to their decay through the operation of ordinary causes. [LORD TRAYNER.—But that definition would apply to all oranges that could be put on board, for they would necessarily have the seeds of decay in them as soon as they were plucked. You must interpret the expression in a reasonable sense.] The evidence, fairly read, shewed that the oranges were in a bad condition, and not fit for carriage when they were put on board. Lastly, the pursuers had failed to prove that the means of ventilation were insufficient.

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Argued for the pursuers;—Assuming that Gomez, the shipper of the fruit, was the charterers’ agent, he was a special agent, for the limited purpose of seeing to the loading of the cargo in terms of the charter-party; he had no authority to vary the terms of the charter-party, at least in any essential particular, which the variation in question certainly was. The whole tenor of the charter-party made it plain that despatch was of the essence of the contract. On the question as to the cause of the deterioration, the Lord Ordinary had

It may be that the cork-wood was loosely stowed in the hatches, and that from the hatches to the ventilators—fore and aft—there was a certain air space along the top of the cork-wood and the top of the oranges, that air space ranging up to 12 or even 18 inches. It may also be the case that the cork-wood and oranges were not actually in contact, and that there was a space of a few inches, or in some places as much as 12 inches, between them. Still it cannot be said that there was anything like full and free ventilation. It certainly cannot be said that the fruit had the same chance of full ventilation as it would have had if stowed last, and therefore under and next to the hatches, instead of some distance away from them. In short the ventilation might have sufficed under favourable conditions, but it hardly, I think, sufficed for fruit which had been stowed for 6½ days before sailing, and which was placed and stowed as was the case here.

“I therefore come to the conclusion that the owners were in default, and are liable in such damages as the charterers can instruct. The remaining question in the case is whether, and how far, damage has been proved.

“On this head the *prima facie* view is, of course, necessarily with the charterers. The oranges unquestionably arrived in very bad condition. Unquestionably, also, their condition was such as usually results from, and would be explained by, an unduly prolonged voyage, or insufficient ventilation—insufficient, I mean, with reference to the conditions of the voyage. At the same time it is of course possible that the true cause of the deterioration of the fruit was something different, and that, conceding the ship’s default, that default may be shewn to have been in result immaterial. Accordingly such, as I understand it, is the case which the shipowners make. They say that the season of 1895 was a bad season—that the orange crop had suffered from rains as it approached maturity, and that in consequence other cargoes which had every justice done them fetched no more in the market than the cargo in question. They say also, and separately, that had the oranges been shipped in terms of the charter—that is to say, *after* the cork-wood and mineral—they would, as it turned out, have been exposed to weather which would probably have done them more harm than their confinement for six extra days in the ship’s hold.

“There has been a good deal of evidence led on the point thus raised, and I have carefully considered it. But the result is that I do not consider that the shipowners have succeeded in displacing the natural inferences which arise from the condition and history of this cargo. . . . ”

reached the sound conclusion on the evidence, but it was not necessary for the pursuers to put their case so high. The defenders had accepted the fruit as in good order and condition, and had undertaken to deliver it in the like good order and condition. This they had not done, and they were therefore liable unless they proved that they were within one or other of the excepted causes. This they had failed to prove.

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LORD JUSTICE-CLERK.—By charter-party between the pursuers and the defenders the steamship “Andalusia,” belonging to the defenders, was chartered to carry a quantity of oranges for the pursuers from Seville to Leith. Under the charter-party the defenders had liberty to load minerals and also cork-wood on their own account, but it was stipulated that this additional cargo should be loaded before the fruit and discharged after it. What actually happened was this: By arrangement between the master of the vessel and Gomez, the shipper of the fruit, the fruit was loaded before the rest of the cargo, and consequently some of the other cargo was discharged before the fruit, with the result that the fruit was on board for about six days longer than it would have been had it been loaded in the manner provided in the charter-party. When it reached Leith the fruit was found to be in a much deteriorated condition, and the pursuers have in consequence brought this action, in which they claim damages from the defenders, alleging that the deteriorated condition of the fruit was due to the prolonged detention on board consequent on the violation of the charter-party and the insufficient means of ventilation on board. The defenders deny that the ventilation of their ship was defective, and they say further that the deterioration of the fruit was caused by “inherent deterioration,” which is one of the exemptions from liability for which they stipulated in the bills of lading. The defenders also maintain that if the deviation from the charter-party either caused or contributed to the injury of the fruit, they are nevertheless not responsible, seeing that the pursuers, through their agent Gomez, assented to the deviation.

The first question is as to whether the fruit, when it was put on board, was in good order and condition, or was in a condition of inherent deterioration. I can see no ground in the evidence for saying that the fruit was in a condition of inherent deterioration,—that is to say, that it was in such a condition when it was put on board that it would become bad within an unduly short time independently of any other cause of deterioration coming into operation after it was put on board. I can find no ground for holding that it was in such a condition, and I am of opinion therefore that the defence that the damaged state of the fruit was due to its inherent deterioration fails. The Lord Ordinary is of opinion that the deterioration was caused by the fruit being put on board too soon and discharged too late, contrary to the provisions of the charter-party, coupled with the insufficient means of ventilation on board. On this last point the evidence is conflicting, but I see no ground for doubting the soundness of the Lord Ordinary's view that the means of ventilation were unsatisfactory, or as his Lordship expresses it, “somewhat scrimp.” In the view I take of the case, however, it is not necessary to come to a conclusion on that matter. It is sufficient, in my opinion, that the fruit was not loaded in the manner provided in the

No. 98. charter-party,—for it cannot be doubted that the natural result of its being nearly a week longer on board would be deterioration, and that the defenders have failed to shew that the fruit was in a condition of inherent deterioration when it was put on board.

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There only remains the question as to the effect of the agreement between the master and Gomez. I agree with the Lord Ordinary that Gomez had no authority to consent to such an alteration of the charter-party to the effect of binding the charterers, and I am of opinion that the responsibility for the consequences of the deviation lies with the shipowners, who, through their master, took the fruit on board in a manner contrary to the stipulations of the charter-party.

On the whole matter, I think that the Lord Ordinary's judgment ought to be affirmed.

LORD YOUNG.—I am of the same opinion. The object of the parties was that this vessel should be primarily a fruit-carrying vessel, with a limited permission to the shipowners to load other cargo; and accordingly the charter-party contains very distinct provisions with the view of carrying out this object. It is provided that the fruit should be loaded last and taken out first, the obvious intention being that it should be on board for as short a time as possible. In point of fact the fruit was put on board first and was not taken out first, with the consequence that it was on board for nearly a week longer than it would otherwise have been. The defenders say that this violation of the contract was due to an arrangement between the master of the ship and Gomez, the agent of the charterers, but I am of opinion that such an arrangement does not justify or excuse the breach of contract on the part of the shipowners. I also agree that the fruit was certainly, according to the evidence, in a bad condition when it reached Leith. That, I understand, was not disputed. Then the bills of lading bear that the fruit was shipped in "good order and well conditioned," and the shipowners undertake to deliver it in the like good order and well conditioned, which, as I have said, they did not do. I do not say that that leads necessarily to the liability of the shipowners, but I think it does unless they shew that the damaged condition of the fruit is reasonably to be accounted for by some cause for which they are not responsible. But so far from there being any evidence to shew that the damaged condition of the fruit was due to a cause for which the shipowners are not responsible, I think that the evidence shews that the fruit was sound and wholesome when it was put on board, and that the reasonable conclusion is that its condition when it arrived at Leith was due to the violation of the provisions of the charter-party, which I cannot doubt were inserted for the very purpose of preventing just such a deterioration in the fruit as actually occurred. On the whole matter I agree that the Lord Ordinary's interlocutor ought to be affirmed.

LORD TRAYNER.—I agree. The Lord Ordinary's view rather appears to be that it is proved that the damaged condition of the fruit was due to the shipowners' breach of contract in loading the fruit before and not after the other cargo, and to their neglect to provide sufficient means of ventilation. I do not in the least question that ground of judgment, but I am of opinion

that the pursuers would equally be entitled to prevail, even although they have not proved substantively that the damage was due to the shipowners' breach of contract. The charter-party provides that the fruit should be delivered "agreeably to bills of lading," and the bills of lading acknowledge that the fruit has been "shipped in good order and well conditioned," and take the shipowners bound to deliver in the like good order and well conditioned, subject to certain specified exceptions. If therefore the fruit is not delivered in the like good order and well conditioned, the shipowners must shew that the damage was due to one or other of the excepted causes either as specified in the charter-party or in the bills of lading, otherwise they are responsible for the damage. Now, the only exception upon which the defenders founded is contained in the words inserted in manuscript on the bill of lading, "not responsible for inherent deterioration." I agree that these words are a qualification of the obligation to deliver. Having inserted the exception, the defenders are entitled to any benefit which they can derive from the insertion. But when I asked what was the meaning of the words, the answer was that they exempted the shipowners from responsibility for damages due to defects existing in the cargo at the time it was shipped. Now, if the shipowners could prove that the fruit when it was shipped was in such a condition as would necessarily or reasonably lead to the result which was disclosed at Leith, that would be an excellent answer to the pursuers. But I am very far indeed from thinking that the defenders have been successful in shewing this. I think the evidence shews that the fruit was plucked at the proper time, and in good condition, and was packed in good order and carefully, and that there was no inherent deterioration.

Therefore taking this simple ground of judgment, I think the pursuers are entitled to prevail. I think that the defenders having undertaken to deliver in good order and condition, and not having done this, are liable unless they bring themselves within one of the excepted causes, and this I think they have failed to do. But while I proceed on this ground, I repeat that there is nothing in the opinion of the Lord Ordinary, either in fact or in law, to which I do not assent.

LORD MONCREIFF.—I agree. I assent to the Lord Ordinary's ground of judgment, but I am quite prepared to put the judgment on the simple ground adopted by Lord Young and Lord Trayner.

THE COURT adhered.

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—BOYD, JAMESON, & KELLY, W.S.—Agents.

THE COUNTY COUNCIL OF THE COUNTY OF ELGIN, First Parties.—
Ure—W. Campbell.

THE MAGISTRATES AND TOWN-COUNCIL OF THE BURGH OF ELGIN,
Second Parties.—*D. F. Asher—C. D. Murray.*

Police—Consolidation of County and Burgh Police—Representation of burgh on Standing Joint Committee—Police (Scotland) Act, 1857 (20 and 21 Vict. cap. 72), secs. 2 and 61—Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), secs. 11, 18, and 97.—By section 61 of the

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No. 99. Police (Scotland) Act, 1857, burghs may agree to consolidate their police with the county police, and in the event of their doing so, it is provided that the magistrates and council of the burgh shall appoint to be members of the police committee appointed by the commissioners of supply under section 2 of the Act one or more of their number as may be agreed upon, "who shall have the like powers as members of such committee with the members appointed by the commissioners of supply."

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The Local Government Act, 1889, section 11 (1) vests the whole powers of the commissioners of supply in the county council "save as herein-after mentioned," and section 18 (5) provides that the standing joint committee of the county council and commissioners of supply shall be deemed to be the police committee under the Police Act, 1857.

In 1893 an agreement was entered into between a county council and the police commissioners of a burgh for the consolidation of the county and burgh police, it being provided that the police commissioners of the burgh should have right to appoint three of their number to be members of the standing joint committee.

Held that the burgh representatives were entitled to sit as members of the standing joint committee when acting as the police committee, but that they were not entitled to do so when the joint committee was transacting other county business, and therefore that the burgh representatives were not entitled to vote in the election of the permanent chairman of the standing joint committee.

1st DIVISION. In March 1893 the County Council of the county of Elgin and the Lord Provost, Magistrates, and Town-council of the city and royal burgh of Elgin, which had a population of more than 7000, entered into a minute of agreement to the effect that the police establishments of the county and burgh of Elgin should be consolidated, as from and after 1st March 1893. Until the date of the agreement the Magistrates and Town-council of the burgh, as the Commissioners of Police acting under the General Police and Improvement (Scotland) Act, 1862, maintained a separate police force.

By the minute of agreement it was, *inter alia*, agreed "that the second party [the Magistrates] shall have right to appoint three of their number to be members of the Standing Joint Committee of the county of Elgin, but shall not be entitled to vote or act on any matters or things under section 18, subsections 6 and 7, of the Local Government (Scotland) Act, 1889."

The agreement was duly carried into effect. Thereafter the burgh of Elgin did not maintain a separate police force, and it sent three representatives to the Standing Joint Committee of the County Council. These representatives were regularly summoned to and attended the meetings of the Standing Joint Committee at which police business was dealt with. Their right to sit and vote at such meetings was however called in question on 3d June 1895, when a doubt was suggested as to the legality of their attending the meetings, and, in any case, as to the legality of their voting at the election of a chairman of the Standing Joint Committee.

In consequence of this doubt, a special case was presented by the County Council of Elgin, of the first part, and the Magistrates, &c., of the burgh of Elgin, of the second part, which set forth the facts before narrated.

The first parties maintained that the clause in the agreement entitling the second parties to appoint three of their number to be members of the Standing Joint Committee was *ultra vires*, and could not receive effect.

The second parties maintained that the agreement was legal and binding. No. 99.

The following questions were submitted for the opinion and judgment of the Court:—“(1) Are the second parties entitled to appoint three of their number to be members of the Standing Joint Committee of the county of Elgin when acting as the Police Committee under the Police Act, 1857? and (2) If the preceding question is answered in the affirmative, are the members so appointed by the second parties entitled to vote in the election of the chairman of the Standing Joint Committee, or at any rate to do so when it is acting as the Police Committee under the Police Act, 1857?”

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The under-noted sections of the Police (Scotland) Act, 1857, and the Local Government (Scotland) Act, 1889, were, *inter alia*, referred to by the parties.*

* The Police (Scotland) Act, 1857 (20 and 21 Vict. cap. 72), enacts, section 2,—“The commissioners of supply of every county shall . . . appoint certain of their own number, being not more than fifteen and not less than three, which persons so appointed . . . shall be called ‘the police committee,’ . . . and such police committee shall elect one of their own number to be their chairman. . . .”

Section 61.—“It shall be lawful for the commissioners of supply of any county, and for the magistrates and town-council of any burgh situated in or adjoining to such county, to agree together for the consolidation of the county and burgh police establishments . . . and the magistrates and council of the burgh shall thereupon forthwith . . . appoint to be members of the police committee hereinbefore mentioned one or more of their number as may have been fixed in such agreement who . . . shall have the like powers as members of such committee with the members appointed by the commissioners of supply. . . .”

The Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), enacts, section 11,—“Subject to the provision of this Act, there shall be transferred to and vested in the council of each county, on and after the appointed day, or at such times as are in this Act in that behalf respectively specified, (1) the whole powers and duties of the commissioners of supply, save as hereinafter mentioned”

Section 18.—“(1) For the purposes in this section mentioned, and with respect to the powers of borrowing transferred or conferred by this Act, or any other Act, there shall be a standing joint committee of the county council and the commissioners of supply, consisting of such number of county councillors, not exceeding seven, as shall be appointed by the county council annually at their meeting in the month of May, and such number of commissioners of supply, not exceeding seven, as shall be appointed by the commissioners of supply annually at their meeting on the same day. Six shall form a quorum of the committee, and the committee may act notwithstanding any vacancy upon it. (2) The Sheriff of the county (or in his absence one of his substitutes to be by him nominated for that purpose) shall be *ex officio* a member of the said standing joint committee, and the committee shall elect one of their own number to be chairman thereof. . . . (5) The standing joint committee appointed in terms of this section shall, after the appointed day, be deemed to be the police committee under the Police Act, 1857, and shall have all the powers of such committee and be subject to all the provisions of that Act, except in so far as these provisions are expressly modified by this Act. (6) No works involving capital expenditure (in this Act referred to as capital works) shall be undertaken in any county, or any district thereof, under or in pursuance of powers transferred or conferred by this Act, or any other Act, without the consent in writing of the standing joint committee appointed in terms of

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Argued for the County Council ;—The clause in the 61st section of the Act 20 and 21 Vict. cap. 72, which made provision for a burgh being directly represented upon the police committee constituted under that Act, had no application to the standing joint committee constituted under the Local Government (Scotland) Act, 1889. The composition of the standing joint committee was laid down by section 18 (1) and (2) of that Act, and no one could be on the committee for any purpose whatever, except those mentioned in the section. There was nothing in the section to suggest that there were to be added to it any members by agreement for special purposes. Further, the Local Government Act contained exhaustive provisions with reference to the representation of burghs in county councils, and the proper course was for the burgh to be represented on the county council under section 8, which by subsection 3 applied to “any burgh which contains a population of more than 7000, but does not maintain a separate police force.” The burgh representatives on the county council would then be eligible for election to the standing joint committee in the same way as the other county councillors. In addition to its duties in connection with the police, the standing joint committee had important duties to perform with which the county was alone concerned, and which would render any direct representation on the part of a burgh quite inappropriate. The agreement no doubt excepted some of these from the cognisance of the burgh's representatives, but it was silent as regarded others, in particular the power of borrowing money. Alternatively, if the police commissioners were entitled to be directly represented on the standing joint committee, these representatives were not entitled to vote in the election of the chairman of the standing joint committee. The standing joint committee was one body for all purposes. It had only one chairman (1889 Act, section 18, subsection 2). There could not be a second permanent chairman of the committee *qua* police committee.

The Burgh argued ;—Under the Police Act of 1857, section 2, the commissioners of supply had to appoint certain of their number, “being not more than fifteen and not less than three,” who along with certain official persons were to be “the police committee.” By section 61 of that Act, when a burgh agreed to consolidate its police with the county police, the magistrates and council of the burgh had power annually to appoint “to be members of the police committee herein before mentioned one or more of their number as may have been fixed in such agreement, who, while the agreement subsists, shall have the like powers as members of such committee, with the members appointed by the commissioners of supply.” By section 18 of the Local Government Act of 1889, subsection 5, the standing joint committee was to be “deemed to be” the police committee under the Police Act of 1857, and was to be subject to all the provisions of that Act. By section 97 of the 1889 Act the power of making consoli-

this section. (7) Capital works shall include the erection . . . of buildings, the construction . . . of roads and bridges, &c.”

Section 97.—“Nothing in this Act contained shall be held to abrogate or repeal . . . the consolidations of county and burgh police establishments which have been made under and by virtue of the powers contained in sections 61 and 63 of the same Act (Police Act, 1857) or the power of making such . . . consolidations after the passing of this Act . . .”

tion was expressly reserved. The 1889 Act merely changed the personnel of the committee, and enlarged its area of jurisdiction, and the standing joint committee simply came in the place of the police committee under the Act of 1857, having the same duties and the same powers, and it was equally competent therefore for a burgh to send representatives to the standing joint committee *qua* police committee as to the police committee under the Act of 1857. Section 8, subsection 3, of the Act of 1889, had no application to the case of the Burgh of Elgin, which could not be represented upon the County Council, and which maintained a separate police force at the date when the Act of 1889 came into operation. There was nothing incongruous in the burgh representatives being members of the standing committee for some purposes, while they were excluded from it for others. The Act expressly recognised members of a committee for special purposes only,—section 78, subsection 3. Further, the burgh representatives, as members of the standing joint committee, were entitled to vote in the election of the chairman of that body, or at any rate to vote in the election of the chairman of that body when it was acting as the police committee “under the Police Act, 1857.”

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LORD PRESIDENT.—This case has been very well argued by all the counsel whom we have heard, but I cannot say I think it presents any difficulty for decision. In the 61st section of the Police Act, 1857, it was declared to be lawful for the commissioners of supply, acting in treaty with the town-council of a burgh, to agree upon the consolidation of the county and burgh police forces. In that same section it was provided that as a term of the consolidation agreement it should be arranged that one or more members of the town-council should be appointed as members of the police committee of the county, and sit in that capacity. Now, the question we have to consider is, how far that power has been kept alive and transferred to the county council under the Act of 1889. It seems to me that this has been done with what—perhaps fortuitously—is a remarkable degree of clearness. First of all, as to the power itself, it is expressly carried forward by section 97, because nothing the Act contains is to be held to abrogate the power of making consolidations after passing of this Act. Next, I inquire who then has the power that is carried forward? And the answer to that is plainly to be found in section 11, subsection 1, by which there are transferred to the county council the whole powers of the commissioners of supply, “save as hereinafter mentioned.” “Save as hereinafter mentioned” has no application to the present question.

Well, then, the next question is, shall the powers so transferred have effect in altering the constitution of the committee to which the police forces are entrusted? That question again is specifically answered in section 18, subsection 5, which says that the standing joint committee shall be deemed to be the police committee under the Police Act, 1857, and shall be subject to all the provisions of that Act. One of the provisions of that Act was that there might be introduced into the police committee one or more gentlemen from the consolidating burgh. And therefore it seems to me that the Act has in those three several appropriate places distinctly made plain,—first, that the power of consolidation is to remain; second, by whom it is to be exercised; and third, with what effect upon the police committee. These

No. 99. considerations seem to me to be decisive of the first question in this case, but it is well to attend to the working of the system which is introduced, and the only difficulty in the way of giving free effect to those express provisions is the fact that the new police committee is not merely the police committee, but is the standing joint committee specially constituted, not merely for police purposes but for other purposes which are in the view of the Act of very high importance. The standing joint committee has the very responsible duty of determining whether works involving capital expenditure, which have been decided upon by the county council, shall be authorised, and they have also the power of determining whether the borrowing powers of the county council shall or shall not be exercised. But then, it seems to me that here again the phraseology of the statute clears the difficulty which is thus created. It is quite clear that it would be an anomaly, if not an impossibility, to hold that under the treaty of consolidation relating solely to police there should be seated on the standing joint committee for all purposes these three gentlemen from the burgh, with power to interfere with matters with which they have no concern whatever,—whether works of capital expenditure, not within but outside the burgh and in the county, should be authorised, and whether the county is to be burdened with loans. As I have said, the section clears that, I think, in a very distinct way. It does not say that the standing joint committee shall be for all purposes a police committee—that would be preposterous—that it was to be deemed to be the police committee when sitting to consider whether a loan should be authorised. The true reading is that, as it is intended to vest this body with the powers given to the police committee under the Act of 1857, for the effectuation of these powers it shall be deemed to be the police committee under the Act of 1857. Not that it is, but that it shall be deemed to be, the police committee to execute police functions. Now when we have that before us, it becomes plain that the power which the county council now have is not to introduce people to sit upon the standing joint committee in its general functions, but to place them on it when executing its police duties,—that in short the standing joint committee is, to use an intelligible phrase, in police business, the acting police committee, and then these gentlemen come into their proper place. Now, that is exactly what this agreement has done, and I think the agreement is very well framed, because it expresses what I think would have been implied by law in an agreement which lacked that expression. It says that they shall not be entitled to vote or act on any matters or things under the clauses relating to capital expenditure. I agree with the criticism which was made by Mr Campbell in opening—that the draftsman had better have gone on to have referred to borrowing; but I make bold to say that the law would do what the draftsman omitted to express—that these gentlemen would have no right under this agreement to sit on questions relating to the authorisation of loans. Therefore I am in favour of answering the first query in the affirmative. As regards the second, the process of reasoning by which I arrive at that affirmative answer of the first compels me to limit my affirmation of the second to the second alternative; because, holding as I do that these gentlemen are not introduced into the general business of the standing joint committee, I must go further and say that

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when the standing joint committee meets for its general affairs they have No. 99.
 no place; and as one of the first duties is to elect a chairman, and that is
 not specifically a police matter—as that is a power which they exercise not Feb. 23, 1897.
 under the Act of 1857 but under the Act of 1889, section 18, subsection 2 County Coun-
 —the burgh members have no right to interfere. But it is consistent with cil of County
 that that I should hold that if the chairman of the standing joint com- of Elgin v.
 mittee should be absent when police business is being transacted, the burgh Magistrates of
 members have a perfect right to take part in the appointment of a chairman Elgin.
 for the day, that being part of the business before the police committee.

These are my views upon this matter, and I should propose to your Lordships to give judgment accordingly.

LORD M'LAREN and LORD KINNAR concurred.

LORD ADAM was absent.

THE COURT answered the first question in the affirmative, and affirmed the second alternative of the second question.

JOHN C. BRODIE & SONS, W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.

THE LORD ADVOCATE, Pursuer (Respondent).—*D.-F. Asher—A. J. Young.*

WILLIAM THOMSON, Defender (Reclaimer).—*W. Thomson.*

JOHN HUTCHESON, Defender (Reclaimer).—*Orr.*

No. 100.

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 v. Thomson.

Stamp—Contract-note—Penalties for insufficient stamping—Action for penalties against individual partners of firm.—The Lord Advocate laid an information against A and B, stockbrokers, carrying on business under the firm name of A, B, & Company, charging “both and each or one or other of them” with having on occasions specified issued contract-notes in the said firm name which were not duly stamped, contrary to the Statutes 54 and 55 Vict. cap. 39, sections 1 and 53 (2), and 56 and 57 Vict. cap. 7, section 3, whereby the said A and B had “both and each or one or other of them” incurred fines to amounts stated.

The defenders objected that the information was incompetent as laid, in respect that there was no conclusion against the firm. *Held* that the information was well laid.

Revenue—Exchequer Prosecutions—Court of Exchequer (Scotland) Act, 1856 (19 and 20 Vict. cap. 56), sec. 6.—Question whether an Exchequer prosecution must be tried by a jury.

THIS was an information laid by the Lord Advocate against Exchequer
 William Thomson and John Hutcheson, stockbrokers, Glasgow, upon Cause.
 whom a subpoena had previously been served. The information 1st DIVISION.
 contained eight counts. Each count set forth that William Thomson Ld Stormonth-
 and John Hutcheson, stockbrokers, carrying on business under the Darling.
 firm name of Thomson, Hutcheson, & Company, did “both and each or one or other of them,” on a date stated, “make or execute in the said firm name a contract-note in respect of the purchase [or sale] effected by them as brokers or agents on account of” Cecil Deacon, of stock described, “or a contract-note advising the said” Deacon “of the purchase by them as brokers or agents of the said stock on his account; which contract-note was transmitted by them to the said . . . and was a contract-note within the meaning of section 52 of 54 and 55 Vict. cap. 39, and chargeable by law with a duty of one shilling, and was not duly stamped, being stamped with a duty of one

No. 100. penny only, contrary to the Statutes 54 and 55 Vict. cap. 39, sections 1 and 53 (2), and 56 and 57 Vict. cap. 7, sec. 3."

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The information concluded;—"Whereby the said William Thomson and John Hutcheson have both and each or one or other of them, in respect of each of the eight contraventions above libelled, incurred a fine of £20."

William Thomson lodged answers, in which he denied in the case of each count that he had executed any contract-note as alleged. He also submitted,—"In any event, the action being one of civil jurisdiction, it should be directed against Thomson, Hutcheson, & Company."

John Hutcheson lodged answers to the following effect:—"The alleged contract-notes are referred to for their terms."

"Denied that the advices were contract-notes within the meaning of 54 and 55 Vict. cap. 39, or are contrary to the Statutes 54 and 55 Vict. cap. 39, secs. 1 and 53 (2), and 56 and 57 Vict. cap. 7, sec. 3."

"Explained that the business was conducted on what is known as the 'cover system.' There was no stock purchased for or on behalf of any such person as Cecil Deacon, and there never was any sale or purchase of any marketable security, as defined in sec. 53 of 54 and 55 Vict. cap. 39.*"

"In any event, the action being one of civil jurisdiction, it should be directed against Thomson, Hutcheson, & Company."

Thomson pleaded;—(2) The action is incompetent, *et separatim*, it is irrelevant. (3) All parties not called.

The like pleas, numbered 1 and 2, were proponed for Hutcheson.

On 5th January the Lord Ordinary (Stormonth-Darling) pronounced the following interlocutor:—"Finds for the pursuer upon each of the eight counts of the information, subject to the declaration that the pursuer shall not be entitled to recover more than one fine of £20 sterling under each count; and therefore adjudges the defenders, jointly and severally, to forfeit and pay to the pursuer a sum of £160 sterling, being one fine of £20 sterling in respect of each count of the information; and decerns against the defenders accordingly: Finds the pursuer entitled to expenses, and modified to three-fourths of the taxed amount thereof," &c.†

* This defence, which was also stated by Thomson, was rejected by the Lord Ordinary, and was not persisted in before the Inner-House.

† "OPINION.—The defence to this suit for penalties under the Stamp Act is two-fold—(1) That the information is badly laid as being directed against the individual partners of a firm without calling the firm itself; and (2) that the documents said to have been insufficiently stamped are not contract-notes within the meaning of the Stamp Act at all. There is a separate defence by one of the partners that he took no part individually in executing or transmitting the alleged contract-notes.

"The first of these defences goes to the competency of the action, and must be considered at the outset.

"Ever since the case of *Reed & M'Call v. Douglas*, 11th June 1814, Fac. Coll., it has been settled practice that the creditor of a firm in a civil debt cannot sue any of the partners without constituting his debt against the firm. This rule, as explained by Lord Justice-Clerk Inglis in *Muir v. Collett*, 24 D. 1119, rests on considerations of equity, and especially on these,—that the firm is a separate *persona*, whose funds are not at the disposal of an individual partner, and that the firm, or the partners not called, may possibly have a good defence against the claim, or be in possession of a discharge. It is obvious that these considerations do not apply with anything

The defenders reclaimed, and argued ;—*On the competency.*—The civil delict charged in the information was committed by the firm, and the firm, being a separate *persona* from the partners,¹ should have been called as defenders. In the Court of Exchequer Act, under which the proceedings were taken, “person” included public or private company.² The proceedings were civil, not criminal. The Crown’s right of imprisonment in the event of the fines incurred not being paid was merely a compulsitor to secure their payment.³ It was derived from the old law, which permitted imprisonment for debt, the right to imprison in respect of Crown debts having been reserved when imprisonment for debt in general was abolished. But proceedings which gave a right of imprisonment merely as a means of enforcing payment were civil, and not criminal.⁴ In a similar case employers had been held responsible for the delict of their servant,⁵ and such responsibility shewed that the delict gave rise to a civil debt. Even

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like the same force where all the individual partners are called (though the firm is not), and I am not aware that the rule has ever been enforced, except when a selection was made from the partners. It may be well, however, to begin by assuming, as counsel did, that in the case of a civil debt the rule holds even when (as here) all the partners are called as individuals. But the Crown maintains that this is not a civil debt, and on that point I heard an elaborate argument.

“If all cases could be sharply divided into the two categories of civil and criminal, with different kinds of liability attaching to each, there would be a good deal to say for the view that this is simply a civil claim. The Crown demands money, and nothing but money. It demands it in a proceeding which, though peculiar to the Court of Exchequer, follows the course of a civil action. The defenders do not require, as in a proper criminal case, to be personally present at the hearing. The nature of the imprisonment for which, under schedule G of the Exchequer Act, a warrant must be given in the case of failure to pay the sum sued for, is not imprisonment for a definite period, but imprisonment until the money is paid, and this distinction, in the case of summary complaints, is made the test of whether jurisdiction is civil or criminal, by the 28th section of the Summary Procedure Act. Lastly, the theory on which this claim is made against two individuals is, not that each is liable only for his own default, which is the ordinary rule of criminal liability, but that each is liable also for the default of the other, or of a clerk or servant of both acting within the scope of his employment, which is the ordinary rule of civil liability.

“It appears to me, however, that the rigid classification of every case as either wholly civil or wholly criminal—a classification appropriate enough in a primitive state of things—has long since been superseded by the complicated course of legislation. The modern statute-book bristles with penalties of fines attached to offences which are typical examples of the *malum prohibitum*, as opposed to the *malum in se*. Some of these can only be incurred by personal delinquency; others are incurred through the fault of agents. When incurred, the money is, in one sense, a debt due to the Crown, but none the less does it retain its inherent character as a pecuniary fine imposed by way of punishment for an offence. The proceeding brought

¹ Partnership Act, 1890 (53 and 54 Vict. cap. 39), section 4 (2).

² 19 and 20 Vict. cap. 56, sec. 47; see also Interpretation Act, 1889 (52 and 53 Vict. cap. 63), sec. 19.

³ 19 and 20 Vict. cap. 56, Schedule G.

⁴ Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. cap. 53), sec. 28; *Lawson v. Jopp*, Feb. 16, 1853, 15 D. 392, 25 Scot. Jur. 236.

⁵ *Advocate-General v. Grant*, July 20, 1853, 15 D. 980, 25 Scot. Jur. 514.

No. 100. *quasi* criminal proceedings might be directed against a firm.¹ The defenders had a material interest to maintain that the firm should be called, for otherwise one partner who paid fines due to the Crown would have no right to claim relief from the other, or to claim against the partnership in the event of bankruptcy.

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Argued for the pursuer;—*On the competency*.—It was unnecessary to call the firm. The real transgressors were the partners, and the charge was rightly directed against them. The civil rule that recourse for payment of a debt could not be had against an individual partner until the debt had been constituted against the firm did not apply where, as here, all the individual partners had been convened into Court, or in proceedings like the present, where the appropriate course was to go against the real transgressors.² Any person who complained of a delict might select the wrongdoer whom he would call to account.³

for the recovery of the fine may be brought in a Court which is ordinarily a civil Court, and may be conducted according to the rules which govern civil actions, yet the proceeding itself is held to be neither wholly civil nor wholly criminal, but partly the one and partly the other. Thus in *Lawson v. Jopp*, 15 D. 392, a penalty and expenses awarded under the Salmon Fisheries Act of 9 Geo. IV., which together did not amount to £8, 6s. 8d., were held not to be a 'civil debt' in the sense of the Small-Debt Act of 5 and 6 Will. IV., so as to exempt the defenders from imprisonment. It is true that the imprisonment in that case was for a limited period, but that circumstance cannot have been the *ratio decidendi*, for Lord Colonsay expressed the opinion (at p. 396) that the Small-Debt Act, in mentioning 'civil debts,' was not intended to apply to 'pecuniary mulcts or fines, imposed by way of punishment for crimes or offences, though these may, in a sense, be called debts, and, although the party may be entitled to be relieved from imprisonment on payment.' Similarly, in *Whyte v. Simpson*, 1 Macph. 72, it was held that a prosecution in the Justice of Peace Court at the instance of an officer of excise for contravention of the Spirits Act of 1860 was not 'a cause depending before any civil Court in Scotland,' in the sense of section 24 of the Exchequer Act, so as to make the Crown liable in expenses, although in that case there was no limitation of the period of imprisonment that was to follow non-payment of the penalties. I do not know that a different decision would have been pronounced after the passing of the Summary Procedure Act of 1864, because section 28 of that Act was not intended to alter the character of the offences charged, but only to indicate the proper Court of review. At all events that Act cannot be held to apply to the present proceeding. Again, in *Lord Advocate v. Thomson*, 20 S. L. R. 3, an information by the Crown, brought in the Court of Exchequer for forfeiture of methylated spirits, under the Spirits Act of 1880, section 129, was held (by Lord Fraser) to partake of the nature of a criminal case to the effect of making the evidence of the accused incompetent.

"The specimen informations appended to the Exchequer Act shew that some conclude for sums forfeited or penalties incurred, and others merely for sums in which the person proceeded against 'is indebted to Her Majesty.' The latter class may fall under the description of civil debts; not so the former. The Stamp Act of 1891, on which this proceeding is founded, declares, section 53 (2), that 'every person who makes or executes

¹ *Fletcher v. Eglinton Chemical Co.*, Nov. 13, 1886, 14 R. (Just. Cases) 9.

² *Miles v. Finlay & Co.*, Nov. 16, 1830, 9 S. 18.

³ *Croskery v. Gilmour's Trustees*, March 18, 1890, 17 R. 697; *Palmer v. Wick and Pulteneytown Steam Shipping Co., Limited*, June 5, 1894, 21 R. (H. L.) 39, *per* Lord Watson at p. 43.

At advising,—

No. 100.

LORD PRESIDENT.—The Crown asserts, in the information before us, that both, and each or one or other, of the two individuals named have been guilty of an offence against the Stamp Acts. What both and each or one or other are said to have done was making and executing in the name of their firm, Thomson, Hutcheson, & Company, and transmitting, a contract-note which was not duly stamped. Feb. 23, 1897.
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Now, to take the simplest case, supposing one of the two partners to have executed the contract-note in the firm's name, and to have issued it without being duly stamped, I suppose it cannot be doubted that the individual who did so is liable in the penalty in that behalf exacted. The matter is not substantially complicated if it be supposed that the two partners acted in concert in having the contract-note so signed and issued

any contract-note chargeable with duty, and not being duly stamped, shall incur a fine of £20.' That is the appropriate language for creating an offence and imposing a penalty. Consequently, it seems to me that the proceeding for recovery of the fine is sufficiently penal in its character to disentitle the defenders from pleading a rule of practice which is confined to civil debts.

"I asked their counsel what interest they had to plead that the firm should be called. The answer was that they had a double interest—(1) to prevent the full penalty being exacted from each partner; and (2) to take care that the right of one partner paying the fine to obtain relief to the extent of one-half against the other should not be prejudiced.

"With regard to the first of these points, the position of the Crown is not, in my view, satisfactory. Its advisers declined to admit that their right was limited to recovering one fine for each offence. They seemed to go the length of maintaining that if a firm consisted of six partners, and if a contract-note executed by or on behalf of the firm was insufficiently stamped, the Crown would be entitled to exact £120. This is quite extravagant. The plain meaning of the Act of 1891, as amended by the Act of 1893, is that, when any stock or marketable security of the value of £5 or upwards is sold or bought by a broker or agent, a contract-note must be executed by the agent and transmitted to the principal; that it must bear a penny stamp if the value is below £100, and a shilling stamp if the value is £100 or upwards; and that if either no contract-note is made, or if it is insufficiently stamped, a fine of £20 shall be incurred. Obviously the stamping of the document is clerk's work, and if the prohibited thing is done in the ordinary course of the broker's business the fine is incurred whether it is done by or for the broker. There is no valid distinction between this case and such cases as *Advocate-General v. Grant*, 15 D. 980, which related to a penalty under the Excise Act of 1832, and *Lord Advocate v. Thomson* already cited. If the rule were otherwise, the door would be opened to unlimited evasion of the law. But it is equally plain that a fine which may be incurred thus vicariously must be a single fine, and has nothing to do with the number of persons in whose interest the thing is done. The Crown cannot have it both ways. I shall take care in the judgment I am to pronounce that the right to recover is limited to one fine for each offence. Accordingly, the defenders' interest to state their plea on that ground disappears.

"With regard to the other ground, there can be no apprehension, I should think, since the case of the *Wick and Pulteneytown Shipping Company*, 20 R. 275, affd. 21 R. (H. L.) 39, that there is any bar to a co-delinquent's right of relief, where his acts are not tainted by fraud or moral delinquency.

"Accordingly, it seems to me that the defenders have no appreciable interest to state their preliminary plea. It is an equitable plea, and if

No. 100. unstamped, although the firm signature would necessarily be adhibited by one of the two. In this case again both the two individuals have transgressed the law, and each is severally liable to prosecution.

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These very plain and obvious considerations make it impossible for me to sustain the plea that this prosecution is incompetent because the firm is not sued for the penalties. I am not here required to consider whether the Crown might not, if it had so chosen, have sued the firm, although I should consider this a much more doubtful question than the present. But if it be legally possible for an individual to contravene the Stamp Act by making and issuing in his firm's name an unstamped contract, then we cannot throw out this proceeding, which asserts that this has been done.

Whether, supposing both partners, or only one partner, to have incurred the penalty, the company funds would be properly chargeable with the amount, is a question with which the Crown has nothing to do. If the Crown succeed in proving a contravention against both or either of the two individual partners, it will be entitled to a judgment against each person convicted for a penalty, which can be recovered out of all that belongs to him. How the two may settle their accounts *inter se*, the Crown has no need to anticipate or interest to consider.

It was allowed by the learned counsel for the Crown that, while there is no real dispute about the facts, yet there is no plea of guilty on the record, and accordingly that the interlocutor is premature and must be recalled. We can only in the meantime repel the second and third pleas for Thomson, and the first and second pleas for Hutcheson, and remit to the Lord Ordinary to proceed as shall be just.

LORD ADAM concurred.

LORD M'LAREN.—I concur in the whole of your Lordship's observations. I should like to add for the consideration of the Lord Ordinary—because we are not called upon to decide the point—whether it is not a necessary part of the proceedings in Exchequer prosecutions that disputes on matters of fact should be referred to a jury. The point was touched upon in debate, and at least deserves to be looked into, for I must say that, as at present advised, I do not see that any other course can be followed.

LORD KINNEAR.—I agree with your Lordship.

THE COURT recalled the interlocutor of the Lord Ordinary, repelled the second and third pleas in law for the defender Thomson, and the first and second pleas in law for the defender Hutcheson, and remitted to the Lord Ordinary to proceed as might be just.

P. J. HAMILTON GRIERSON, Solicitor of Inland Revenue—W. A. HYSLOP, W.S.—
Agents.

there be no equity to support it, it ought to fail. That is, I rather think, a short but sufficient answer to it, for, even if the defenders' argument that the proceeding is a purely civil one were sound, the want of interest would seem to deprive the plea of all validity. But in my view the proceeding is not a purely civil one. It is civil only in some respects, its main quality being criminal, or, as I should prefer to call it, penal.

"If the proceeding be a competent one, the only remaining question is whether the defenders, or either of them, have stated any good answer on the merits. I am of opinion that they have not. . . ."

THE MOST NOBLE ALEXANDER WILLIAM GEORGE DUKE OF FIFE, First Party.—*D. Dundas—Clyde.* No. 101.

FRANCIS GEORGE (Clerk to the Deveron Fishery Board), Second Party. Feb. 23, 1897.
—*Johnston—W. Campbell.* Duke of Fife
v. George.

Fishings—Salmon Fisheries (Scotland) Act, 1862 (25 and 26 Vict. c. 97), sec. 6, subsec. 6—Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. c. 123), Schedule F—Statute—Possession—Width of cruives—Old decree regulating width—Subsequent regulation by Commissioners.—By section 6, subsection 6, of the Salmon Fisheries Act, 1862; the Commissioners were empowered “to make general regulations with respect to . . . the construction and use of cruives . . . provided that such regulations shall not interfere with any rights held at the time of the passing of this Act under royal grant or charter, or possessed for time immemorial.”

By schedule F of the Salmon Fisheries Act, 1868, a regulation of the Commissioners that no cruive should be less than four feet broad at any part of it was ratified, in so far as consistent with the Act of 1862.

Held that a proprietor of cruive fishings under Crown charters of ancient date, which did not specify the width of the cruives, who had since 1774 exercised his right in accordance with a finding of the Court of that date (in an action of declarator) that the cruives should not be less than 37 inches in width, was not exempted from the regulation in schedule F by the proviso in subsec. 6.

Fishings—River—Cruives.—The proprietor of lands on both banks of a river and of the cruive fishings thereon, in an action of declarator in 1774, was found entitled to keep the cruives at a width of 37 inches, and to withdraw water from the river at the cruive dyke by a lade for the purpose of driving a mill, the entry of the lade to be two feet above the bed of the river.

By the Salmon Fisheries Act, 1868, cruives were required to be four feet wide.

In a special case presented in 1896, *held* that the proprietor was bound, when required by the Fishery Board, to widen the cruives to four feet, although it was admitted that the change would diminish the flow of water in the lade, *diss.* Lord Adam, who was of opinion that the proprietor was entitled to keep the cruives of the width of 37 inches, but not to use them when of that width for fishing purposes.

In November 1896 a special case was presented by the Duke of 1ST DIVISION.
Fife, first party, and by Francis George, solicitor, Banff, clerk to the Fishery Board of the district of the River Deveron, second party, for the determination of the question whether certain cruives on the River Deveron belonging to the Duke were subject to the statutory regulations after mentioned.

By section 6 of the Salmon Fisheries (Scotland) Act, 1862 (25 and 26 Vict. c. 97), it is enacted that,—“The Commissioners shall have the powers and perform the duties hereinafter specified,—that is to say, . . . (6) to make general regulations with respect to the following matters, viz.:—The due observance of the weekly close time; the construction and use of cruives; the construction and alteration of mill-dams or lades or water-wheels, so as to afford a reasonable means for the passage of salmon; the meshes of nets (so that they shall not intercept smolts or salmon fry); obstructions in rivers or estuaries to the passage of salmon; provided that such regulations shall not interfere with any rights held at the time of the passing of this Act under royal grant or charter or possessed for time immemorial.”

By section 10 of the Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. c. 123), it is enacted,—“The bye-laws contained in the

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schedules A, B, C, D, E, F, and G to this Act annexed, shall in all respects be held to have been duly made and published, but only in so far as consistent with and authorised by the recited Acts," viz., the said Act 25 and 26 Vict. c. 97; 26 and 27 Vict. c. 50; and 27 and 28 Vict. c. 118, "and to such extent shall be as valid and binding as if the same had been expressly enacted in this Act."

The schedule F of the said Act is in the following terms, viz.:—
"We, the Commissioners appointed under the said Acts, and empowered thereby 'to make general regulations with respect to the construction and use of cruives,' do hereby make the following general regulations with respect to the construction and use of cruives:—

. . . II. No cruive shall be less at any part of it than four feet broad in the clear, provided that where an upright post is used to support the cruive, thereby dividing the width into two parts, the aggregate width exclusive of such post shall not be less than four feet."

The first party maintained that article 2 in schedule F requiring cruives to be four feet wide would interfere with rights held by him at the time of the passing of the Act under royal grant or charter or possessed for time immemorial, and that he was protected from its application by the proviso in section 6 of the Salmon Fisheries (Scotland) Act, 1862.

The case contained the following joint statement:—"The first party is proprietor, in virtue of royal grants or charters of very ancient dates, of the salmon-fishings in the River Deveron, from the sea for about four miles upwards. The said royal grants or charters, and the titles of the first party and his predecessors connecting therewith, comprehend the right of fishing both by cruives and by net and coble. The first party is also proprietor of the lands on both sides of the river for the same extent. The cruive dyke belonging to the first party is situated on the said River Deveron, about two miles from the sea, near to the Rack Mill, in the parish and county of Banff."

"In an action of declarator in the Court of Session, at the instance of Lord Banff and others, proprietors of upper fishings in said river, against James second Earl of Fife, the predecessor of the first party, then in possession of said fishings and cruives, raised for the purpose of regulating the position, dimensions, and use of the cruives and cruive dyke then belonging to the said Earl, and now belonging to the first party, and to prevent the withdrawal of water from the river at said cruive dyke by a lade for the said Rack Mill, the Court, by interlocutors dated 16th February and 8th December 1773, and 4th August 1774, found that the defender James Earl of Fife, and his tacksmen, were entitled to maintain and uphold the cruive dyke now belonging to the first party in the form and shape in which it then was, but that the defenders were bound to place three cruives at least in the said dyke; that each of these cruives must be an ell in height and an ell in breadth."

"By the said interlocutors it was found that the said Earl of Fife was entitled to withdraw water from the river at the cruive dyke by a lade for the purpose of driving the said Rack Mill belonging to his lordship, the entry to the mill lade from the river to be two feet above the bed of the river. The said interlocutors were, on an appeal by the pursuers Lord Banff and others, affirmed by the House of Lords in the year 1781."

"The first party and his predecessors, proprietors of the said cruive dyke, cruives, and fishings, have uninterruptedly maintained, under

and in virtue of the said interlocutors of the Court, the three cruives of the width of an ell (37 inches) each, in terms of the said interlocutors. During the weekly close time, the inscales have been taken out or removed in terms of the said interlocutors." No. 101.

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"The parties are agreed that the widening of the cruives to 4 feet would, by lessening the pressure of water, assist the free passage of fish; but if the cruives are so widened, the first party's water supply for Rack Mill, his right to which was judicially affirmed by the interlocutors above referred to, will, or may, be prejudiced during the summer months."

The questions of law for the opinion of the Court were:—" (1) Is the first party entitled, in the circumstances set forth, to maintain and continue to use the said cruives at their present width? or (2) Is the first party bound, when called upon to do so by the Fishery Board represented by the second party, to widen the said cruives to a width of four feet each? or (3) Is the said Fishery Board entitled so to widen the said cruives?"

Argued for the second party;—The regulation in schedule F did not alter or prejudice the first party's rights in the sense of the proviso in the Act of 1862. When the regulation of 37 inches for the width of the cruives was laid down, it was laid down by the only Court competent to do so. The origin then of the cruives being a decree of Court regulative of possession, the first party could scarcely plead that his right was founded on immemorial possession. Moreover, his charters were not said to contain any specific regulations as to the size of the cruives. The Act of 1862 introduced a new system of regulations, and must be given effect to. The first party's interpretation of the proviso would render null the enacting part of the statute.¹ The meaning of the proviso was just that the Commissioners could not under the guise of a regulation diminish the rights of a proprietor of salmon-fishing. (2) The first party must bear the expense of altering the cruives in conformity with the schedule.¹

Argued for the first party;—The extent of his rights had been defined by the decree of the Court of Session and the House of Lords explaining the royal grants, and it must be held to have been competently fixed for all time coming. The case then fell exactly within the words of the proviso, which would receive no meaning whatever if the second party's contention was sustained. In *Kennedy's*¹ case possession was required to explain the use. Here there was immemorial possession of a defined use. Further, it was admitted that the widening of the cruives would diminish the first party's water supply.

At advising,—

LORD PRESIDENT.—The main question raised by this special case is, whether the first party is entitled to maintain and continue to use his cruives at their existing size, which is 37 inches, or is bound to conform to the regulations of the Commissioners, which require cruives to be of the width of 4 feet.

Now, *de facto*, the Duke's cruives, 37 inches wide, have been there for upwards of a hundred years; but then their origin is very clearly shewn in the special case. The first party does not ascribe the size of the cruives to

¹ *Kennedy v. Murray*, July 8, 1869, 7 Macph. 1001, 41 Scot. Jur. 560.

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any specific provision to that effect in the royal charters under which he is in right of his salmon-fishings. On the contrary, the size of 37 inches was laid down by the Court of Session in the decree mentioned on record; and from the terms of the decree, it is clear that the Court prescribed cruives of this size by way of equitably harmonizing the exercise of the rights of the Earl of Fife with the interests of the upper riparian proprietors. In short, the provision of the 37 inch cruives was a regulation laid down by the Court of Session, which was then the only body competent to do, in particular cases, what is now done by the Commissioners through general regulations. I do not think, therefore, that the first party can be said to have any right to this particular size of cruive under his charters; and I do not think that the mere fact of the cruives having been there since 1774 discloses a case of a right possessed for time immemorial in the sense of the Act, especially when the origin of the cruives is seen to have been a decree regulative of possession. The Act of 1862 introduces a new system of regulation; and regulations made under it apply not merely to structures to be erected in the future, but to existing structures, as was held in the case of *Kennedy v. Murray*.¹ This being so, I see nothing in the history of the cruives now under consideration to afford to them any immunity from the regulations of the Commissioners.

A special point was made regarding the effect of widening the cruives on the flow of water into the mill-lade. But I suppose the necessary result of widening cruives is to affect the flow of the water; and this is one of the incidental results of the regulations which must be submitted to. Here, again, the first party has no special right conferred by charter which places his mill-lades in a protected position. The provision in the decree which relates to this matter is again of a regulative character, confers no immunity, and does not denote any right of the character which is safeguarded in the Act of 1862.

I am, therefore, for answering the first question in the negative. It was decided in the case of *Kennedy*¹ that the cost of the operations necessary to produce conformity with the regulations falls on the proprietor; and therefore the second query should be answered in the affirmative. This does not necessarily imply that the board might not be entitled, in case of failure on the part of the proprietor, themselves to widen the cruives; and therefore, considered in the abstract, the third query is not properly alternative to the second. But it is so put, and no circumstances are stated as giving rise to it, except the contention of the first party on the question of expense. Accordingly I think that we should hold it to be superseded.

LORD ADAM.—By sec. 6, subsec. 6, of the Fisheries Act of 1862, the Commissioners are directed to make general regulations with respect to, *inter alia*, the construction and use of cruives, provided that such regulations shall not interfere with any rights held under royal grant or charter or possessed from time immemorial.

The right of cruive fishing, and, so far as I know, all other rights of salmon-fishing, are exercised under conditions and regulations imposed by

¹ 7 Macph. 1001, 41 Scot. Jur. 560.

Act of Parliament, or otherwise any alteration of such conditions and regulations would, in one sense, be an interference with such rights of salmon-fishing. If that be the meaning of the Act, I do not see how the Commissioners could make any regulations altering or affecting the previously existing conditions and regulations, as that would be interfering with the right of fishing. No. 101.
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It appears to me, therefore, that regulations altering or modifying the existing regulations are not, in the sense of the Act, interference with the right of fishing, but merely with the mode and manner in which such right shall be exercised.

In this case one of the conditions or regulations under which the Duke's right was exercised was that the cruives should be at least one ell in height and one ell in breadth—that is, 37 inches.

One of the general regulations issued by the Commissioners required that no cruiue shall be less than four feet broad in the clear. It appears to me that this regulation does not interfere with the Duke's right of fishing, but is merely an alteration of the conditions on which it is to be exercised, and that his Grace is bound to conform to it.

It is said, however, that if the cruives are so widened his supply of water to the Rack Mill may or will be prejudicially affected. It appears to me, however, that his right to take water is not interfered with by the regulation.

I think, therefore, that the first question should be answered in the negative.

I think the second and third questions should also be answered in the negative. I think the Duke is not bound to widen the cruives unless he pleases, and that the Fishery Board are not entitled to widen them.

The remedy is, that if the Duke proceeds to fish with cruives of a less breadth than four feet he may be stopped by interdict.

LORD M'LAREN.—I concur with the Lord President. We must assume that the Commissioners have a statutory power of regulation, and therefore it is not an answer or good objection to a regulation of this kind that the mode of enjoyment of the right of fishing is altered in some respects, and nothing more, I think, has been said in this case. It is substantially still a right of cruiue fishing. At the same time it is perfectly clear that the Commissioners cannot under the guise of regulations take away or substantially diminish the rights of a proprietor of salmon-fishing, and it was for the purpose of safeguarding these rights that the clause in question was inserted.

LORD KINNEAR.—I agree with the Lord President, and I have nothing to add, except that with reference to what Lord Adam has pointed out as to the remedy of the Fishery Board it does not appear to me that by answering the second question in the affirmative we are deciding anything contrary to Lord Adam's view as to the proper mode of enforcing the Board's right. That question is not specifically raised in this special case. The question put to us is, what are the rights and obligations of the parties, and, agreeing with your Lordships as to the obligations of the Duke of Fife, I do not see that we are called on to consider how that obligation is to be enforced since the parties have not thought fit to raise that question.

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THE COURT answered the first question in the negative, the second in the affirmative, and superseded consideration of the third.

J. K. & W. P. LINDSAY, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

No. 102.

Feb. 23, 1897.
Paton v.
M'Knight.

JAMES PATON, Pursuer (Respondent).—*Wilson—T. B. Morison.*
JOHN M'KNIGHT, Defender (Appellant).—*D.-F. Asher—Hunter.*

Process—Amendment of record—Expenses—Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 29.—Circumstances in which the Court allowed the appellant in a Sheriff Court action to amend his defences, on condition that he should find caution for the sum of £30, to meet the expense of the prior proceedings in the case in the event of it turning out that he was in fault in not originally proposing the defence embodied in the proposed amendment.

1st Division.
Sheriff-sub-
stitute of the
Lothians and
Peebles.

THIS was an action for payment of £30 raised in the Debts Recovery Court at Edinburgh by James Paton, printer, Edinburgh, against John M'Knight, builder, Edinburgh.

The pursuer averred that he had let a piece of ground to the defender by holograph offer, dated 5th June 1895,* written by Mr William Ormiston, ordained surveyor, Edinburgh, to the pursuer, on behalf of the defender, and accepted by the pursuer by letter, dated 7th June;† that following upon this offer and acceptance the defender had entered into possession of the ground, and that the half year's rent due at Martinmas, amounting to £30, was unpaid.

The defender stated that Mr Ormiston had, on the pursuer's behalf, advertised the ground to be let, and that negotiations had followed between him and the defender, but he denied that Mr Ormiston had his authority to write the letter of 5th June, and that there had been any completed contract of let. He averred that Mr Ormiston was well aware that the defender wanted the ground mainly for the purpose of erecting stables thereon, and informed him that there would be no difficulty in getting warrant for their erection; that in reliance on Mr Ormiston's written assurance to this effect the defender took possession to the effect of setting down thereon a quantity of debris from a building he was dismantling; that on applying to the Dean of Guild for warrant to erect the buildings he proposed, including stables, he found that the Court were strongly opposed to granting

* The alleged offer was contained in the following letter by Mr William Ormiston to the pursuer:—"On behalf of Mr John M'Knight, builder and quarrymaster, I offer to lease from you, for a period of ten years from Whitsunday of this year, that yard or piece of ground situated to the north of Lonsdale Terrace greens, and lying between the greens of Chalmers Crescent and Lauriston Gardens, at the annual rent of £60, payable half-yearly on the usual terms; the ground to be unrestricted as to the extent or character of the buildings, but no works causing nuisance to be carried on. Power also to be given to the lessee to sublet. At the termination of the lease the buildings to be removed by the lessee or purchased by you at a valuation. I will be glad to hear from you at your earliest convenience."

† Mr Paton's reply was in these terms:—"I am favoured with yours of the 5th, making offer on behalf of Mr John M'Knight of £60 per annum, for a period of ten years from Whitsunday of this year, for the ground at Lauriston Gardens, which I hereby accept on the conditions stated in your letter."

warranty, and that he therefore removed the debris he had placed on the ground, and left it *in statu quo ante*. No. 102.

After a proof the Sheriff-substitute (Hamilton), on 9th July 1896, found it proved that the defender agreed to lease the ground from the pursuer for the period of ten years from Whitsunday 1895, at the annual rent of £60, payable half-yearly at Martinmas and Whitsunday, repelled the defences, and decerned against the defender in terms of the prayer of the petition. Feb. 23, 1897.
Paton v.
M^r Knight.

The defender appealed to the First Division, and thereafter moved the Court for leave to amend his defences by adding statements thereto to the effect "that by the terms of the said pretended let to the defender of the land in question, it was an express condition that the land should be unrestricted as to the extent or character of the buildings that might be erected thereon, excepting only in so far as works causing nuisance were concerned. . . . The pursuer has never given, and now refuses to give, the defender possession of the land alleged to have been leased to him in conformity with this express stipulation." He further stated that as matter of fact, and as it appeared from objections made in the Dean of Guild Court, the ground was subject to rights of passage and various other restrictions, which rendered it impossible for the defender to make any use of it. The defender not having got possession of the ground as let, was not due any rent. The delay which had occurred in giving possession to the defender had caused him loss to an amount greatly exceeding that sued for.

The defender also craved leave to add corresponding pleas.

The defender stated at the bar that in September 1896 he had dropped his original application to the Dean of Guild Court, and presented a new petition for warrant to erect stables and an office; that he had been ordered to call the conterminous proprietors, and that they appeared and stated the objections referred to in his proposed amendment.

Argued for the defender;—The defender had taken a lease of the subjects on the express understanding that they were free from restrictions. He relied, and was entitled to rely, on the landlord's assurance to this effect, and had only become aware that the landlord was unable to fulfil his obligations in this respect when he saw the objections to his second application in the Dean of Guild Court. He was accordingly in no way to blame for omitting to state the defence he now proponed in his original defences. In these circumstances the defender should be allowed to make the alteration on his record which he proposed without any condition being imposed as to expenses, or, the question of expenses should at all events be reserved.

Argued for the pursuer;—The amendment now made at this late stage of the case completely changed the character of the defence originally stated, and should only be allowed on payment of expenses since the date of closing the record.¹

LORD PRESIDENT.—It was not, I think, seriously maintained by the

¹ Keith v. Outram & Co., June 27, 1877, 4 R. 958; Morgan, Gellibrand, & Co. v. Dundee Gem Line Steam Shipping Co., Dec. 9, 1890, 18 R. 205; Guinness, Mahon, & Co. v. Coats Iron and Steel Co., Jan. 21, 1891, 18 R. 441.

No. 102. respondent that these new statements contained in the minute of amendment are irrelevant, and, accordingly, counsel for the respondent very properly did not seriously resist the motion that the record should be amended in this sense. The real difficulty is as to the terms.

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M'Knight.

Now, the case made by the appellant upon this head is this. He took the ground in question on the express condition that it was unrestricted, and he says that, receiving a responsible and authoritative statement to that effect, he was not bound to make sceptical inquiry into that statement. He has only in the course of exercising his rights as tenant found out that there are restrictions, and accordingly he maintains that he is excusable for having omitted to state as his original defence what was not within his knowledge. That may turn out to be well founded in fact, or it may not; and, according as the one or the other event happens, would seem to depend the question whether the appellant is to pay for the costs, which have, according to the hypothesis, been thrown away.

Now, we might make the appellant pay the whole costs of the case as hitherto conducted. If he then turned out to be right, he would seem to be very grievously treated by our award. On the other hand, if we were to allow him to put on his amendment on nominal terms, I must say I cannot think that would be logical. It would be either too much or too little. Under the Act of Parliament we have a free hand to determine the terms on which an amendment should be allowed, and I think in the present case the proper course is to make the appellant find caution for some sum which one would estimate as being the possible amount of the expense which will have been lost. I am not an auditor, but perhaps £30 would express that view, and I would therefore propose that this course should be taken. I am conscious that there is no precedent for this, but it is certainly within the terms of the statute, and seems the most logical way for giving it effect.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Open up the record: Allow the proposed amendment upon the appellant's finding caution for expenses to the extent of £30 to the satisfaction of the Clerk of Court: Upon such caution being found and amendment made, allow the respondent to lodge answers to such amendment."

P. MORISON, S.S.C.—JAMES F. MACDONALD, S.S.C.—Agents.

No. 103.

Feb. 23, 1897.
Gibson & Co.
v. Anderson &
Co.

GIBSON & COMPANY, Pursuers.—*A. J. Young.*
ANDERSON & COMPANY, Defenders.—*Jameson—Watt.*

Reparation—Breach of Contract—Taking decree in absence—Damages—Consequential damages—Publication in "Black List."—In an action of damages against a defender for taking decree in absence in the Debts Recovery Court against the pursuer, in breach of an agreement not to do so, held that in assessing the damages the jury were entitled to take into account damage resulting from the publication of the decree in a "Black List," that being proved to be the natural and invariable consequence of a decree in absence being taken in the Debts Recovery Court.

Davies & Co. v. Brown & Lyell, June 8, 1867, 5 Macph. 842, commented on.

THIS was an action of damages at the instance of Gibson & Company, retail chemists, Edinburgh, against Anderson & Company, wholesale manufacturing chemists, Leith. No. 103.

The pursuers averred that the defenders, having raised a Debts Recovery action against the pursuers for £43, being the amount of an account for goods supplied by them to the pursuers, had agreed to stop proceedings in consideration of an immediate payment of £25 by the pursuers, and to give the pursuers a reasonable time to pay the balance, but that in breach of this agreement the defenders, although they duly received the sum of £25, had culpably and negligently taken decree in absence against the pursuers for the balance of their account, which decree was published in the "Black List," and that the pursuers had sustained serious loss through the defenders' illegal act. Feb. 23, 1897.
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1ST DIVISION.
Lord Kin-
cairney.

The case was tried before the Lord President and a jury on 11th January 1897, upon the issue whether "the defenders wrongously, and in breach of their agreement with the pursuers not to do so, took decree in absence against the pursuers in the Debts Recovery Court, at Edinburgh, to the loss, injury, and damage of the pursuers." At the trial the defenders objected to the pursuers leading evidence of damage resulting from the publication of the decree in the "Black List" in the *Scottish Gazette*, and similar papers. The objection was repelled, and evidence was led shewing that damage had resulted from persons hearing of such publication. Two witnesses had seen the entry in the *Scottish Gazette*. Richard Clark, wholesale druggist, deponed that he had seen the entry of the decree in the *Scottish Gazette*, and that though he had continued to supply goods to the pursuer on the same terms as before he had exercised a stricter supervision. James H. Robertson gave similar evidence.

In the course of the proof Mr Kerr, Sheriff-clerk-depute in the Small-Debt and Debts Recovery Department, Edinburgh, gave evidence to the effect that decrees in absence in the Debts Recovery Court were invariably published in the "Black List," as a matter of course, and Mr Anderson, a partner of the defenders' firm, admitted that such publication was the "natural result" of a decree in absence.

In charging the jury the Lord President asked them to separate the damage which could be traced to the publication of the decree in absence in certain newspapers from the damage that could not be so traced.

The jury found for the pursuers and assessed the damage at £300, "and they further state that it makes no difference in their finding whether the evidence of the witnesses Richard Clark and James H. Robertson is taken into consideration or not."

The defenders applied for a rule on the ground of excess of damage. The rule was granted.

Argued for the pursuers;—(1) The jury were quite entitled to take into account damage resulting from the publication in the "Black List," such publication being the natural and invariable result of the decree being taken. The opinions expressed in *Davies v. Brown*¹ were *obiter dicta*, and were also expressed in ignorance of the relation that existed between the taking a decree in absence, and its publication in the "Black List." They could not be taken as authoritative on the present case. (2) The award was reasonable, and should not be disturbed.

¹ *Davies & Co. v. Brown & Lyell*, June 8, 1867, 5 Macph. 842, 39 Scot. Jur. 471.

No. 103. Argued for the defenders;—The award was excessive. The jury had taken into account damage resulting from publication in the "Black List." This they were not entitled to do.¹ The pursuers could only recover for such damage as they proved to have resulted directly from the taking of the decree. But most of the instances in which it was proved that the pursuers had suffered loss from injury to their credit appeared to have been the result of the publication of the decree in the "Black List."

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LORD PRESIDENT.—The ground of action in this case is, that whereas it had been agreed with the pursuers that the defenders should not proceed and take a decree in an action in the Debts Recovery Court in Edinburgh, yet, in breach of that agreement, they went on and took a decree out, to the loss, injury, and damage of the pursuers.

Now, two questions have been argued to us. The first is as to whether, in support of a case of damages on this head, the pursuers were not limited to the injury arising from the persons present in Court, or inspecting the records of the Sheriff Court, learning of the decree having been taken. I put the question in that form because I think that that is really the logical extent to which Mr Jameson's argument carries him. He has maintained, on the authority of the case of *Davies*,¹ that a person taking a decree in breach of an agreement is not liable for the larger amount of damage which may ensue because, through the publication of certain lists of decrees in absence, a larger public is reached than that which frequents the Sheriff Court or inspects the records of the Sheriff Court. Now, I shall consider this question, first of all, apart from the case of *Davies*¹ altogether. I suppose it is sound doctrine that when a man is sued for breach of an agreement he is liable in the natural and ordinary consequences of that breach; and accordingly the question would naturally occur, if a decree is taken in the Debts Recovery Court, what is the ordinary and natural consequence so far as regards the degree of publicity which the fact obtains. Now, it was thought at the trial by the pursuer—and I think quite properly—that it was well that he should lay a foundation of fact on this question, and he asked the Sheriff-clerk-depute, as the functionary who had knowledge of the degree of publicity obtained by such decrees, and Mr Kerr says,—“Decrees in absence of the Debts Recovery Court are invariably published. That follows as a matter of course.” And Mr Anderson, of the defenders' firm, says, very frankly,—“I am aware that it is the custom to publish decrees in absence in such papers as the *Scottish Gazette*. If decree in absence were taken against a trader, publication in these papers would be the natural result.” It could not, I suppose, be more frankly or pointedly put than it is in these words; and, as Mr Young pointed out, when Mr Anderson was narrating, in cross-examination, his reasons for the agreement, he avows that Mr Gordon, who represented the pursuer, expressed anxiety to have the matter taken out of Court, “I suppose in order to avoid publicity.” Accordingly, in this case it would appear, whatever the law may be, that as matter of fact the foreseen and

¹ *Davies & Co. v. Brown & Lyell*, June 8, 1867, 5 Macph. 842, 39 Scot. Jur. 471.

natural consequence of a decree being taken is that that reaches the know- No. 103.
 ledge of the commercial class who are concerned with such information Feb. 23, 1897.
 through the medium of certain newspapers—commercial newspapers. I do Gibson & Co.
 not say that the matter would be a bit different if some of the ordinary v. Anderson &
 newspapers had found it profitable to have a column containing information Co.
 of this kind. The question simply is, what is the custom—what is the
 natural consequence of a decree of this sort being taken. I suppose it
 would be a matter of evidence whether many or few people frequented the
 Sheriff Court and inspected the roll, and whether many or few people have
 access through this other channel to the news in which they take an interest.

Now, I leave to others to comment on the decision which is supposed,
 doubtless erroneously, to tend to exclude what apart from authority would
 seem *prima facie* to be very good evidence. It is scarcely to be supposed
 that if the question had been presented to the Court on proved facts such as
 I have adverted to, the Court would have rejected evidence which clearly
 shewed that the degree of publicity actually obtained was the natural and
 foreseen consequence of a breach of agreement such as this. I may mention
 merely by way of explanation of what took place at the trial, that, feeling
 there was apparent plausibility in the argument of the defenders founded
 on that case, I thought it well that the jury should separate the damage
 which they considered to arise from the knowledge of this fact of the decree
 in absence having reached certain persons through these newspapers from
 the general evidence where there is no such tracing of the information to
 that particular class of newspapers; but it turned out that the jury did not
 think—there were only two gentlemen whose names were suggested—that
 the figure of the damages would be altered supposing these gentlemen had
 never heard of the decree at all.

Now, I pass from that special question to the more general question
 argued by Mr Jameson, that the verdict for £300 is unconscionable or
 exorbitant and excessive.—[His Lordship then referred to the evidence on
 the question of damages.] I have specified these things, not by way of
 furnishing an exhaustive collection that will work out £300, for I confess
 my sum would have been a somewhat smaller one; but your Lordships, I
 understand, in practice do not set aside a verdict merely because you think,
 or because the presiding Judge thinks, that £200 might have been more like
 it than £300, and I must, speaking as I am bound to do, frankly, say that
 I think a verdict for £200 would have been completely unassailable.
 Accordingly, I daresay I have fulfilled my part in the expression of opinion
 I have now indicated, that while I think the award is a liberal one, I do not
 think it so excessive a measure of damage as to entitle the Court to interfere.

LORD ADAM.—The only ground on which the verdict is assailed is that
 the amount of damage given is excessive, and it is said to be excessive, as
 I understand the argument for the defenders, principally because the jury
 have taken into consideration what they were not entitled to consider—the
 damages suffered from the fact of this decree in absence having come to the
 ears of certain people through a newspaper called the *Scottish Gazette*. It
 is contended that the only damage which the pursuer is entitled to recover
 is, as Mr Jameson put it when he first opened his case, damage resulting

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from the knowledge having come to the ears of people from other sources than the *Scottish Gazette*. This paper seems to be one of those papers that are not uncommon now-a-days—*Stubbs' Gazette* being perhaps the best known paper of the kind—which are the chosen home of what is called the “Black List,” that being a list where a record is published of all parties who, like the pursuer in this case, have had decrees in absence taken out against them in the Court. Now, I did not gather from Mr Jameson that he could draw a distinction between publication in a paper of that description and the publication of the same thing in any other paper which is the vehicle of ordinary news. I think when Mr Jameson was pressed in the course of the argument to say whether publication in a paper containing a Black List as its principal information differed from publication in an ordinary newspaper, he could not say that it did. Therefore, as your Lordship has pointed out, he was driven in the end to maintain that no damage could be awarded except what was traceable to persons who had been in Court or had examined the records of the Court. The question, as it appears to me, is whether we are to follow the well-known doctrine applicable to cases of this kind, that the damage to be awarded is the damage naturally flowing from the breach of contract. If we follow that rule, the evidence here shews quite clearly and distinctly that the damages arising from the publication in the *Gazette* is just that which naturally—not only probably, but we may say certainly—would flow from such a decree being taken, because it is proved in this case—and it would have been assumed without proof—that one of the natural results flowing from such a decree being taken is, that it is immediately published in papers such as the *Scottish Gazette*. I think therefore that the conclusion at which your Lordship has arrived, unless the case is to be treated as thoroughly exceptional, is the right one.

In support of his argument, the defender founded upon certain observations made by the Judges in the case of *Davies*.¹ Now, in the first place, I am not of opinion that these observations apply to this case. That was an action, as I understand it, for damages for malicious use of the forms of Court. The ground of action was that the defender, after he had been paid what was due him, had gone on and taken decree against the pursuer, and the issue was, whether that proceeding was malicious and without probable cause, which is quite a different issue from what we have here. It certainly was not a case, as put in the issue, of breach of contract. In the next place, as I understood what was read to me, the stage at which these observations were made by the Judges was when they were adjusting the issues to try the cause, and it does not appear to me that the question of what was relevant or was not relevant to the amount of damages came properly before them for consideration.

On the second point your Lordship, who tried the case, is of opinion that, supposing the jury had given the sum of £200, that would not have been unreasonable. In such a case I do not think the Court—even if they would have given £200 instead of £300—would hold the award to be such as twelve reasonable men could not have given, and to be so excessive as to justify the setting aside of the verdict. I therefore concur with your Lordship.

¹ 5 Macph. 842, 39 Scot. Jur. 471.

LORD M'LAREN.—In considering an application to set aside a verdict No. 103.
on the ground of excessive damages it must be kept in view that no two Feb. 23, 1897.
persons independently endeavouring to arrive at the true amount of damage Gibson & Co.
will ever fix upon the same figure, except in those cases, which are compara- v. Anderson &
tively infrequent, where the damage is ascertained by exact calculation. Co.
Experience proves that good judges, meaning to be perfectly fair, differ very considerably in the value they put upon a thing that depends upon estimation, and therefore, unless jury trial is to lose all finality, we must allow a considerable margin for difference of opinion, and I agree with your Lordship that while we might be content to put a lesser value upon the damage done to this gentleman's commercial reputation—which I am glad to see has not been great—yet the difference between £200 and £300 is not such a difference as would justify us in setting aside the verdict on the ground of excessive damages. It is no more than the difference that honest and skilled valuers of property might reasonably put on the same subject.

The chief interest in this case seems to me to depend on the question which was raised as to the value to be attached to the indirect evidence in the case; that is to say, to the evidence of people in whose estimation the pursuer is said to have suffered, because they had read his name in a publication of decrees in absence. Now, from the outset, it seemed to me impossible to take any clear distinction between the evidence admissible in a case of this kind and in the case of an ordinary action for defamation or injury to reputation. Supposing the statement had been that the defender in presence of certain persons in the trade, possibly at an exchange or place of resort in the trade, had said,—“I know that the pursuer is not able to meet a bill of £43,” in such a case the injury complained of is not the opinion merely of the persons to whom the statement is directly made, but in such cases a wave of opinion is set up, and in a very short time spreads through the whole class of persons with whom the aggrieved person is associated in business. It has never been doubted that it is a good case of damages to prove that a calumnious statement had been circulated and had reached persons whose good opinion was valuable to the pursuer, and whose opinion was affected by it. Nor does it make the slightest difference in such a case whether the wave of calumny is propagated by word of mouth, or through the medium of newspapers, as in cases where the calumnies are uttered at public meetings or under such circumstances that they enter the press as items of news. But now, if instead of stating circumstantially that the pursuer is unable to meet a claim of £43, the defender puts it to the test of taking a decree in absence against the pursuer, and thereby gives the information the widest publicity, does it make any difference? Of course, if it were a just decree, no responsibility is incurred,—every creditor is entitled to enforce his claim of debt, and no claim lies against him because of the injury which the debtor thereby sustains in his commercial reputation. But if, contrary to an agreement, the creditor takes a decree by an abuse of the forms of process, I cannot see that he is in a different position from a person who ultroneously makes the same statement which everyone would make on reading the decree, namely, that the debtor is unable to pay a claim of that amount. Therefore, it appears to me that the presiding Judge rightly admitted the evidence of witnesses who had derived their knowledge of the decree through the news-

No. 103. papers or through the publication called the *Scottish Gazette*, which contains this so-called black list. In saying so I do not mean to imply that if any greater harm is done by the insertion of the pursuer's name in a list along with other debtors than would result from its isolated publication, the defenders ought to be responsible for that. I think he should be responsible just in the same way as if in the law reports of the newspaper, in addition to the defended cases, it had been said,—“Decree in absence was obtained against Gibson & Company on this day.” But one can see that there are cases where the association of a name along with other names may constitute an aggravation of the injury or a separate ground of injury. It might not be very injurious to reputation, for example, that a person had not been admitted into a particular club, but if somebody published a list of persons who had been black-balled by this club, or, say, who had been refused admission to a racecourse, and the unfortunate complainer found his name associated with “blacklegs” on the turf, he might suffer injury to character and feelings of a very different character from that resulting from the mere publication of the fact that he himself, for some reason or other, had been refused admission to this social function. Now, if in the case of *Davies*¹ the observations made by the Lord President and Lord Curriehill had reference to a claim of damage of the kind I have indicated, I should entirely agree. If they meant anything more than that—if it was meant that publication in the Black List could not be used as evidence of injury to character, I should venture respectfully to differ; and I think we are free to consider this point independently of authority, because the observations founded on were observations thrown out in the course of a discussion of the relevancy, and in no way binding the Court to exclude evidence of the description we are now considering when the question is formally raised on a motion for a new trial. Strictly speaking, I am not sure that we could, in the absence of a formal exception to the Judge's ruling, reject the evidence or displace the verdict on this ground, but this is immaterial in my opinion, for I am satisfied that the evidence was rightly admitted. I am of opinion that the rule should be discharged.

LORD KINNEAR.—I agree with your Lordships. I think that if any question as to the admissibility of evidence were formally before us, no evidence was allowed to go to the jury that was not properly receivable. The wrong of which the pursuer complains arises from the publicity of proceedings which he says were wrongly taken against him. That is the sole ground of complaint. It is because they were made public, and so injured his credit among the tradesmen with whom he dealt, or his customers, that he has any claim for damage. It is the natural and ordinary, and, indeed, it appears to be the inevitable consequence of taking decree in absence in the Debts Recovery Court that the proceedings are at once made public by a variety of newspapers, including those papers which publish separate black lists. If that be the ordinary and necessary consequence of the defenders' breach of contract in taking decree, then I agree with all your Lordships that it is a consequence of which evidence is admissible. Therefore I think the learned Judge was perfectly right in allowing this evidence to go to the jury.

¹ 5 Macph. 842, 39 Scot. Jur. 471.

The only difficulty that has occurred to me in the case has been created by the citation of *Davies v. Brown*.¹ But in the first place, I agree with what has been already said about that case, that the observations relied upon were not necessary to the judgment, but were observations by the way, and therefore are not binding upon us. But then I should myself have very great reluctance in coming to any decision directly contrary to an opinion expressed by so high authorities as the learned Judges whose observations are quoted in *Davies v. Brown*.¹ But I am not at all persuaded that the Lord President and Lord Curriehill were really considering the question which we are called upon to determine now, or that they intended to say anything at all about the admissibility of evidence. In that case there was a very specific, detailed, and somewhat elaborate statement in the condescendence of publication in certain newspapers; and the observations of the learned Judges were all made with reference to that statement only. They knew nothing more of the case than what they saw in the condescendence, and it was as a criticism of the condescendence that they made the observations in question. Now, it is not the function of the condescendence to set out in detail the evidence on which the pursuer means to rely. Its proper purpose is to aver the facts upon which his claim is grounded, or, in a case of this kind, the facts which constitute the wrong of which he complains. And therefore it appears to me the Court may very well in that case have looked on this averment as an averment of a separate wrong, which the pursuer was bringing forward as a ground of claim. I do not think that if that were so there is anything to create any surprise or doubt as to the opinions expressed that that was not a relevant ground of action, for it merely came to this, that it might not be a direct or natural consequence of what the defender had done that this other wrong set forth in the specific averment was committed. But I cannot read these opinions as amounting to a judgment that it is not relevant to prove injuries to the trade or credit of a person making a complaint of this kind by reason of its having come to the knowledge of persons trading with him, not because of their having been in Court and learned the proceedings by their own ears, but because they had read it in the newspapers. That is what the defenders maintain here. I do not think that it is supported by the judgment in *Davies v. Brown*.¹ But if it were, then I should agree with your Lordships that we are not bound to follow it, and ought not to do so.

As to the other matter, I entirely agree with all your Lordships that it is a question for the jury to determine what is the proper amount of damage, and as your Lordship has said, it is a question of difficulty and of considerable delicacy. Whatever our own opinion is, we ought not to interfere with a verdict of a jury, unless it is quite evident that they have given not what we may think too much, but what is so excessive and exorbitant as to make it unreasonable that their verdict should stand. I do not think that is the case here, and therefore I concur in the judgment proposed by your Lordship.

THE COURT discharged the rule.

FRANCIS S. COWNIE, S.S.C.—WILLIAM MANUEL, S.S.C.—Agents.

¹ 5 Macph. 842, 39 Scot. Jur. 471.

No. 104. THE NORTH BRITISH RAILWAY COMPANY, Complainers (Reclaimers).—
D.-F. Asher—Cooper.

Feb. 23, 1897.
 North British
 Railway Co. v.
 Lanarkshire
 and Dumbartonshire Rail-
 way Co.

THE LANARKSHIRE AND DUMBERTONSHIRE RAILWAY COMPANY,
 Respondents.—*Sol.-Gen. Dickson—Malcolm.*

Process—Arbitration—Res Judicata—Plea of competent and omitted—

By Act of Parliament passed in 1891 the Lanarkshire and Dumbartonshire Railway Company were empowered to construct a line of railway from Glasgow to Dumbarton. Section 6, subsection 4, enacted that the railway should "be carried under the joint sidings and works of the North British Company and the Caledonian Company at Stobcross in tunnel, and the company shall not, without the previous consent of the companies owning the same, in the construction of such tunnel, break open the surface of the ground, or in any way raise or interfere with the rails of the North British Company or of the joint property of that company and the Caledonian Company."

The tunnel having been completed, the North British Company brought an action against the Lanarkshire and Dumbartonshire Company to have them ordained to remove a ventilating shaft which they had constructed within the North British and Caledonian Companies' depot at Stobcross, averring that they had not obtained the consent of the North British Company to its erection. The Lanarkshire and Dumbartonshire Railway Company having denied this averment, the cause was remitted for decision to an arbiter as required by the special Act of the Lanarkshire and Dumbartonshire Company. The decision of the arbiter was to the effect "that the construction of the shaft fell under the provisions of section 6, subsection 4, of the special Act, and required the consent of the North British and Caledonian Companies, and that the consent of the North British Company had not been obtained." The Lanarkshire and Dumbartonshire Company having thereafter served a notice to treat on the North British Company, intimating that they intended to take the ground upon which the shaft was constructed under their compulsory powers, the North British Company applied for interdict against them in any way following up the notice. In defence to this action the Lanarkshire and Dumbartonshire Company stated that the limitation on their power to acquire ground compulsorily imposed by section 6, subsection 4, of their Act applied solely to the joint sidings and works of the North British and Caledonian Companies, and that the ground proposed to be taken, though within the depot, was not part of their joint sidings and works. *Held (aff. judgment of Lord Kyllachy, diss. the Lord President)* that this defence, not being open to the respondents prior to the service of the notice to treat, could not have been dealt with by or pleaded before the arbiter, and therefore that it was open to the respondents still to maintain it.

1ST DIVISION. (SEQUEL of case reported 23 R. 76.)

Ld. Kyllachy.

In 1891 the Lanarkshire and Dumbartonshire Railway Company were empowered by Act of Parliament (54 and 55 Vict. cap. cci.), to construct a line of railway from Glasgow to Dumbarton. The line near its commencement at Glasgow passed in tunnel under the Stobcross Station or depot, which belonged jointly to the North British and Caledonian Railway Companies, and in constructing this tunnel the Lanarkshire and Dumbartonshire Company constructed a ventilating shaft on ground situated within the Stobcross depot.

In 1895 the North British Company raised an action against the Lanarkshire and Dumbartonshire Company concluding for decree ordaining them to close up this ventilating shaft, and to restore the surface of the ground to its former state.

The pursuers averred that the ground pierced by the shaft was a

part of the Stobcross depot which was wholly dedicated to the use of the North British Railway Company, and that the defenders had not obtained the consent of the pursuers to its construction, as required by section 6, subsection 4,* of the Act authorising the construction of the defenders' undertaking.

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The defenders admitted that the shaft was situated within the depot, but averred that they had obtained the consent of the pursuers to its erection. They further stated:—(Stat. 4) “ . . . The shaft does not in any way interfere with the working of the traffic in the depot. The ground in which it is placed is waste or vacant ground, and is not used for any purpose in connection with the depot.”

The defenders also pleaded that the action was excluded by section 6, subsection 10, of the defenders' Act, which provided a scheme of arbitration for the settlement of differences between the companies.

On 5th November 1895 the First Division, adhering to an interlocutor of Lord Kyllachy, found “that the question between the parties falls to be determined by an arbiter appointed by the Board of Trade,” and Major-General Hutchinson having subsequently been appointed arbiter by the Board of Trade, the Lord Ordinary remitted to him “to determine the question between the parties raised upon record.”

On 6th February 1896 Major-General Hutchinson reported to the following effect:—“ . . . I have to report that after having carefully inspected the ground in which the shaft in dispute is constructed, and having heard evidence adduced by both parties, and considered the same along with the relative plans and documents produced, I am of opinion that the construction of the said shaft falls under the provisions of section 6, subsection 4, of the Lanarkshire and Dumbartonshire Railway Act, 1891, and required therefore the consent both of the North British and the Caledonian Railway Companies. I am further of the opinion that the consent of the North British Railway Company was not duly obtained thereto. The plan which was submitted to the North British Railway Company's engineer on 24th May 1892 did not sufficiently disclose the existence of the shaft in question. That in effect is an enclosure containing an area of about 644 square feet on ground belonging jointly to the Caledonian and North British Companies, and within a few feet of the rails of the City and Suburban line of the North British Railway Company, the doubling of which at any future period would thereby be seriously interfered with, and there is nothing on the plan which can reasonably be held as directing attention to so serious an operation. Before proceeding with the construction of such a shaft, a proper working plan, shewing distinctly what was proposed to be done, should have been submitted, and the Lanarkshire and Dumbartonshire Railway Company having

* That subsection enacted,—“(4) Railway No. 1 shall be carried under the North British Company's Glasgow City and District Railway, and under the joint sidings and works of that company and the Caledonian Company at Stobcross in tunnel, and the company shall not, without the previous consent of the companies owning the same, in the construction of such tunnel, break open the surface of the ground, or in any way raise or interfere with the rails of the North British Company, or of the joint property of that company and the Caledonian Company, but the company may open the surface, where necessary, for the purpose of temporarily supporting or protecting the railways or sidings of those companies from injury during the construction of the railway.”

No. 104. failed to do this, I am of the opinion that the shaft should not be allowed to remain."

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On 19th February the Lanarkshire and Dumbartonshire Railway Company served upon the North British Railway Company a notice to treat, to the effect that they proposed to take under their compulsory powers certain ground, being that occupied by the ventilating shaft.

The North British Railway Company thereupon presented the present note of suspension and interdict to have the Lanarkshire and Dumbartonshire Railway Company interdicted from in any way following up the above notice to treat.

The complainers founded on the proceedings in the previous case and the award of the arbiter. They averred that the ground which the respondents proposed to take was part of the joint sidings and works at Stobcross belonging to themselves and the Caledonian Railway Company, that the respondents were prohibited by section 6, subsection 4, of their Act from taking that ground compulsorily, and further, that their attempt to do so was an attempt to get behind General Hutchinson's award.

They further averred;—(Stat. 8) "The contention of the respondents that the ground occupied by the ventilating shaft was not part of the joint sidings and works of the complainers and the Caledonian Railway Company at Stobcross, within the meaning of subsection 4 of section 6 of the Lanarkshire and Dumbartonshire Railway Act, 1891, was urged by the respondents before Major-General Hutchinson, and rejected by him."

The respondents answered that they were entitled to take the ground referred to in the notice to treat. "Said ground is part of that which the respondents are empowered by their said Act to acquire compulsorily within the Stobcross depot. The only limitation on the power of the respondents to acquire ground compulsorily within the Stobcross depot is that provided by section 6, subsection 4, which applies exclusively to the joint works and sidings, and the ground now proposed to be taken under said notice to treat is not included in such limitation."

The complainers pleaded;—(4) The engineer appointed by the Board of Trade having disallowed the shaft in question, notwithstanding the plea urged by the respondents before him, and repeated in this action, that said shaft is not situated on the joint sidings and works of the complainers and the Caledonian Railway Company at Stobcross, and his decision being final, interdict should be granted as craved.

The respondents pleaded;—(4) In respect that the operations of the respondents do not affect the complainers' Glasgow City and District Railway, or the joint sidings and works of the complainers and the Caledonian Railway Company at Stobcross, the complainers are not entitled to interdict.

On 15th July 1896 the Lord Ordinary (Kyllachy) repelled the fourth plea in law for the complainers, found that the question between the parties fell to be determined by an arbiter appointed by the Board of Trade, in terms of section 6, subsection 10, of the respondents' Act, and therefore sisted process to enable application to be made to the Board of Trade for the appointment of an arbiter.*

* "OPINION.—The complainers in this case are the North British Railway Company, who are joint owners, along with the Caledonian Railway Com-

The complainers reclaimed, and argued;—The respondents had in the former action averred that the ground upon which the shaft was constructed was not part of the works at Stobcross depot, and the terms of the award shewed that the question had been raised and considered by the arbiter. The decision of the arbiter was therefore *res judicata* and final. If the point had not been raised before the arbiter, it was a competent plea which had been omitted, and therefore could not be proponed now. No. 104.
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Argued for the respondents;—The point now raised was not open to the respondents prior to the notice to treat, and therefore was not and could not have been raised in the proceedings in the previous case. The record of these proceedings shewed that both the parties and the arbiter had proceeded on the assumption that the site of the shaft was within the area to which the provisions of section 6, subsection 4, of the special Act applied. The pleas of *res judicata* and competent and omitted were therefore not well founded. In any case, the questions raised in the former action not having been finally disposed of, but merely sisted for decision by the arbiter, the proper

pany, of a large area of ground known as the Stobcross Station or depot near to the Queen's Dock at Glasgow. The respondents are the Lanarkshire and Dumbartonshire Railway Company, incorporated by the Lanarkshire and Dumbartonshire Railway Act, 1891, and by that Act authorised to construct a line of railway from Glasgow to Dumbarton. The respondents have lately given notice, under the provisions of the Lands Clauses Act, incorporated with their special Act, to purchase and take for the purposes of their line a certain part of the ground of which the complainers are joint owners. And the object of the action is to obtain interdict against the respondents following up or proceeding under that notice.

"The complainers' objection is that the ground in question is part of their and the Caledonian Railway Company's joint sidings and works, and that under the provisions of section 6, subsection 4, of the respondents' special Act, the latter are prohibited from taking compulsorily any land occupied by the joint sidings and works of the two companies. By the section in question it is directed that under those joint sidings and works the respondents' line shall be constructed in tunnel, and that without the consent of the joint owners the surface of the ground shall not be broken. The complainers say, and it is not disputed, that the object of the respondents' notice is to acquire full rights over the surface of the ground to which the notice applies.

"The answer of the respondents is that the ground in question does not in fact form part of the joint sidings and works of the two companies, and that therefore section 6 of the special Act does not apply.

"The complainers reply, *inter alia*, that it is *res judicata* in a former action between the parties that the ground in question is within the area of the joint sidings and works. They say (1) that the contrary allegation was a defence proponed and repelled in the former action, and (2) that if not proponed and repelled it was a defence competent and omitted.

"Now, the conclusion of the former action was for removal of a certain ventilating shaft constructed by the respondents and projecting above the surface within the area now in dispute. And I shall assume, in the meantime, that the complainers have obtained, or are entitled to obtain, decree in the former action. In other words, that that action is now in such a position that no new or further defence can now be stated by way of amendment.

"But so assuming, I am, in the first place, not able to hold that the question, whether or not the ground in dispute is within the sidings and works of the complainers was a question raised and determined in the

No. 104. plea would not be either *res judicata* or competent and omitted, but *lis alibi pendens*.

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At advising,—

LORD ADAM.—The complainers, the North British Railway Company, are joint owners with the Caledonian Railway Company of a large area of ground known as the Stobcross Station or depot. The respondents are the Lanarkshire and Dumbartonshire Railway Company, and are authorised to construct a railway from Glasgow to Dumbarton.

On the 19th February 1896 the respondents served upon the complainers a notice to treat for the purchase of a portion of that area of ground, and the present suspension is brought for the purpose of interdicting the respondents from taking any further proceedings under that notice to treat.

The question at issue between the parties arises in this way. The Lanarkshire and Dumbartonshire Railway Act, 1891, under which the respondents claim to have right to purchase the land embraced in the notice, contains a

former action. The demand in that action was, as I have said, that the respondents should remove a certain ventilating shaft, and the only defence stated to that demand was that the shaft in question had been constructed with the consent of the two companies. No other defence was stated, or, as I shall point out presently, could have been stated as matters then stood. At anyrate no other defence was stated, and the issue being simply consent or no consent (an issue depending on the construction of certain plans and correspondence), the same was remitted under an arbitration clause in the special Act to Major-General Hutchinson, who some time ago reported negating the alleged consent. His report is produced. I need not recite its terms, but its substance was to negative the alleged consent. He may have expressed opinions on other points, but the point mentioned was the only point remitted to him, and the only point which he did or could decide. I cannot therefore hold that the defence in question was in the former action proposed and repelled.

“That, however, leaves it quite open to argue that the point now raised, viz., the point whether the ground in question is within the joint sidings and works, so as to make the consent of the two companies requisite, was a defence competent and omitted. Here again I am unable to accept the complainers’ argument. The defence was certainly omitted, but, as matters stood at the time, I do not at present see how it was competent. In other words, I fail to see, that if stated, it would have been a good defence. The respondents had neither acquired the surface, nor had they then taken any proceedings towards acquiring it. Whether, therefore, it was within the restricted area, or, as they now say, beyond it, they had no right to interfere with the surface without the consent of the complainers. They believed they had such consent, and so believing, thought it, I suppose, unnecessary to raise any question as to the precise limits of the restricted area. As their rights then stood, they had no title or interest to do so. In these circumstances, if the ground in question be in fact outside the restricted area, and if under their present notice the respondents acquire it in property, I do not see how the proceedings in the former action can form an obstacle to the exercise of the new rights which they (the respondents) thus acquire.

“That being so, it is unnecessary to consider whether it is still open to amend the record in the former action so as to introduce a new defence founded upon the averment that the ventilating shaft is outside the joint sidings and works, and that the ground which it occupies is in course of being acquired by the respondents under their notice to treat.

“I am not, I confess, as at present advised, prepared to hold such an

clause (section 6, subsection 4), to the effect that railway No. 1, thereby authorised, should be carried under the North British Company's Glasgow City and District Railway, and under the joint sidings and works of that company and the Caledonian Railway Company at Stobcross, in tunnel, and that the company should not, without the previous consent of the companies owning the same, in the construction of such tunnel, break open the surface of the ground, or in any way raise or interfere with the rails of the North British Company, or of the joint property of that company and the Caledonian Railway Company, but that the company might open the surface, where necessary, for the purpose of temporarily supporting or protecting the railways and sidings of these companies from injury during the construction of the railway.

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The complainers maintain that the land embraced in the notice to treat is land occupied by the joint sidings and works of the North British and Caledonian Railways. The respondents deny that this is so. I understand that if the land is occupied as the complainers say that it is, the respondents do not maintain that they have a right to acquire it compulsorily. On the other hand I understand that if the land is not so occupied, the complainers do not dispute the respondents' right to acquire it.

The question at issue between the parties is therefore one of fact—whether the land proposed to be taken forms part of the joint sidings and works of the North British and Caledonian Railway Companies in the sense of the 4th subsection of the 6th section of the Lanarkshire and Dumbartonshire Railway Act, 1891.

The complainers maintain that this fact has already been conclusively determined in their favour in a previous action between the parties—the proceedings in which I shall presently have to consider—but assuming for the present that the complainers are wrong in this, the question arises as to the farther proceedings in this case.

Now, subsection 10 of section 6 of the respondents' Act enacts, that if

amendment incompetent. No decree has been pronounced in the former action, nor has anything been done under it since the date of General Hutchinson's report. It would therefore, I think, be difficult to hold the introduction of a new and emerging defence to be outside the Court of Session Act of 1868. As I have said, however, I do not think it necessary to deal further with the former action at the present stage. It may, I think, conveniently stand over until the present case is finally decided.

"It remains, however, to consider by what procedure the facts at issue between the parties, with respect to the locality of the ground embraced in the respondents' notice, shall be determined. The respondents ask a proof. The complainers ask that the question shall be remitted to General Hutchinson under the arbitration clause, which is subsection 10 of section 6 of the special Act. On this matter I am of opinion with the complainers, and generally for the reasons expressed in my former judgment. I propose, therefore, to pronounce an interlocutor repelling the fourth plea in law for the complainers, finding that the question between the parties falls to be determined by an arbiter appointed by the Board of Trade in terms of section 6, subsection 10, of the respondents' Act, and therefore sisting process to enable either of the parties to make application to the Board of Trade for the appointment of an arbiter, with a view to the cause being remitted to such arbiter upon his appointment. I shall meantime reserve all questions of expenses."

No. 104. any difference should at any time arise between the company and the North British Company or their respective engineers with respect to any of the matters above referred to in the section, such difference should be determined by an engineer to be appointed by the Board of Trade on the application of either company.

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I think that the difference which has arisen between the parties, viz., whether the ground proposed to be taken is occupied by the joint sidings and works of the railway companies, or, in other words, whether the respondents' railway is being carried in tunnel under these sidings and works, as required by subsection 4 of section 6, is a difference to which the arbitration clause, contained in subsection 10, applies.

If, therefore, the Lord Ordinary is right in repelling the complainers' 4th plea in law, which I shall now consider, I agree with him that this case should be sisted to enable either party to apply to the Board of Trade for the appointment of an arbiter.

The complainers' 4th plea is to the effect that in certain previous proceedings between the parties the question now at issue between them was determined in their favour by an arbiter appointed under subsection 10, and that his determination is final.

It appears that the respondents had constructed a ventilating shaft through the surface of the depot into their tunnel beneath. In February 1895 the complainers raised an action against them to have this ventilating shaft removed. It is not disputed that this shaft is upon the ground sought to be compulsorily acquired by the respondents.

In that action the complainers quoted section 6, subsection 4, of the respondents' Act, and they averred that the shaft was not authorised by their Act of Parliament, and had been placed on the ground in direct violation of the provisions of that Act.

In defence the respondents did not deny that the shaft fell within the provisions of subsection 4 of section 6, but they averred that the shaft was constructed with the consent, express or implied, of the complainers; and they farther pleaded that the question should be referred to arbitration in terms of subsection 10 of that section. The Lord Ordinary sustained that plea by interlocutor of 11th July 1895, which was subsequently adhered to by the Court. He subsequently remitted the case to General Hutchinson (who had been named as arbiter by the Board of Trade), "to determine the question between the parties raised upon record, and to report his determination *quam primum*."

On the 6th February 1896 General Hutchinson issued a report, in which he states that he is of opinion that the construction of the said shaft falls under the provisions of section 6, subsection 4, of the Act, and therefore required the consent of the complainers and the Caledonian Railway Company, and that the consent of the complainers had not been duly obtained thereto, and then he states his reasons for coming to that conclusion.

It is, as I understand, upon that opinion or determination of the arbiter, viz., that the construction of the shaft falls under the provisions of section 6, subsection 4, of the Act, that the complainers maintain that the present question has been finally determined in their favour, because if the construction of the shaft falls under that subsection, it is because it is upon

ground occupied by the joint sidings and works of the railway companies, No. 104. which they say is the question at issue in the present case.

But, as I have already pointed out, this question was not raised in the former case. It was assumed,—nay pleaded,—by both parties that subsection 4 did apply to the case. The only question at issue was whether the respondents had obtained the consent of the railway companies to the construction of the shaft, and that was the only question remitted to the arbiter to determine, and the only question as to which his determination is final.

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There may, however, be grounds upon which the respondents may not be able to get behind this alleged determination of the arbiter, and accordingly the complainers maintain that the plea now insisted in by the respondents, viz., that the shaft is not within the area of ground embraced by subsection 4, was a plea which was competent and omitted, and cannot now be insisted in.

It will be observed, however, that whether the shaft was within the area embraced by subsection 4 or not, it was certainly within the area of the Stobcross depot, which was the property of the railway companies. If the respondents had the requisite consent to its construction, it was entirely immaterial whether it was within the larger or the more limited area, and equally so if they had not the requisite consent. I do not see, therefore, that it was a plea which they could have competently or effectually pleaded in the former action as matters then stood. But the situation of matters is now changed by the subsequent proceedings of the respondents. They have given notice to treat for the purchase of the ground on which the shaft is situated. That raises the question whether that ground is within the area of ground embraced in subsection 4. I think it is a question raised for the first time, and which, for the reasons I have stated, I think has never been determined. I think the respondents are entitled to have that question tried; and I agree with the Lord Ordinary that it should be determined in this action. If the respondents are right, they will be entitled to maintain the shaft on what will, in that case, be their own ground. If they are wrong, the shaft will then be removed under the former action.

I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD KINNEAR.—I agree with Lord Adam. The purpose of this action is to interdict the respondents from following up or proceeding under a notice which they have given, under the provisions of the Lands Clauses Acts, to take for the purposes of their line a piece of ground of which the complainers are joint owners. The complainers object that the ground in question forms part of the joint sidings and works of their company and the Caledonian Railway Company, which the respondents are prohibited from taking compulsorily by the provisions of section 6, subsection 4, of their special Act. The respondents answer that the ground in question does not in fact form part of the joint sidings and works of the complainers and the Caledonian Railway Company, and that it is part of the lands which the respondents are empowered by their Act to acquire compulsorily. The main question, therefore, between the parties is, whether the ground in question is or is not in point of fact a part of the joint sidings and works

No. 104. of the North British and Caledonian Railway Companies? I think that this question has not been determined by the judgment of the arbiter in the former action, and therefore that there is nothing in his decision to exclude inquiry in the present process.

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I agree that the decision of General Hutchinson assumes that the ground is within the protected area, but the question which he had to decide was submitted to him upon that assumption. He was not called upon to apply his mind judicially to the question of fact, because for the purposes of the arbitration it was assumed on both sides that no such question arose. The case maintained by the respondents was not that the ground in question was beyond the area of the joint sidings and works, but that the ventilating shaft to which the complainers objected had been constructed with their own consent. Now, I take it to be clear that in order to support a plea of *res judicata* it is necessary to shew not only that the parties and the subject-matter in two suits are identical, but also that the two suits present one and the same ground of claim, so that the specific point raised in the second has been as directly raised in the pleadings and concluded by the judgment in the first. Now, we do not know what evidence was in fact led before the arbiter, but we must look to the pleadings in the former action in order to see what the question was that was submitted to him, and it seems to me clear enough that the question whether the ground in dispute could have been acquired by the exercise of compulsory powers was neither raised upon the pleadings nor apposite to the case. On the other hand, the evidence of consent which may have been adduced in the former case would in no way support the case now made by the respondents. I think, therefore, that there has been no decision of the question raised by the present record.

If this be so, the next question is whether the plea which the respondents now put forward was competent and omitted in the former suit, and as to this I agree with the Lord Ordinary. It would not have been consistent with the respondents' case in the former action to maintain that the ground which they proposed to occupy by their shaft was land which they might acquire in the exercise of their compulsory powers, because they had not acquired the land, and had given no notice to treat. Their case was that they were entitled to use the ground for the construction of their tunnel without taking it under the statutes, because the complainers had consented to their doing so. That being decided against them, it appears to me that they raise an entirely different question when they claim right to acquire the ground in the exercise of their statutory powers.

LORD PRESIDENT.—The purpose for which the respondents propose to take the ground specified in the notice in question is the construction of a ventilating shaft, which has in fact been already completed. This same ventilating shaft had, indeed, been finished before it became the subject of the former action, the summons in which concluded for a decree ordering the respondents to remove it and to restore the ground to the *status quo ante*. The ground of this complaint was that the shaft was constructed in ground which was expressly protected against such interference by the 6th section of the respondents' Act of Parliament. The respondents refused to remove the shaft. It was perfectly plain that the question whether the shaft was

to come down, as being a contravention of the Act, or not was a difference between the parties in the sense of the section, and must go to arbitration. It went to arbitration, and General Hutchinson, the arbiter appointed by the Board of Trade, has, in so many words, decided that the 6th section applies to this shaft, and that it cannot be allowed to remain.

Now, it seems to me to be perfectly immaterial that the arbiter was reached through the portal of the Court of Session, and I treat his award exactly as I should do if the parties had gone to him direct, as they ought to have done under the Act. The disputed claim is embodied in the summons, and the difference between the parties was whether the shaft was illegal by reason of the 6th section, and must be removed.

Now, in the first place, I cannot think that, even if their present contention were quite new, it will do for a party to go before an arbiter to defend a work attacked on the ground that it is prohibited by a certain enactment,—allow the arbiter to find that the prohibition applies, and that the work is illegal—and then turn round and get the case tried over again on the ground that locally the shaft is not within the area protected by the section. Even if (as I do not think) the ground of defence had been solely that the shaft had been consented to, I should hold that the respondents had waived other grounds of defence and were bound by the result. The plea of “competent and omitted” has certain technical limitations which render the term inappropriate to proceedings outside the Scotch Courts of law. But, even in a Court of law, if a defender, having two pleas available against an action to have him ordained to pull down a building, viz., first, that the section alleged to be contravened does not apply, and, second, that he has complied with its provisions, states only the second plea and not the first, and judgment is given against him, I cannot see how he could afterwards seek to have the building held to be legal on the first and omitted plea.

Nor does it, in my judgment, make the matter at all different that the question now arises under a notice to treat. The complainers’ contention is that, notice or no notice, the shaft is struck at by the 6th section, and they produce General Hutchinson’s decision, which, as I have already said, in so many words, determines first, that the section applies to the shaft, and, second, that the terms of the section have not been complied with.

But then, I must say further that I think that the present contention of the respondents as to the local situation of the shaft was stated in the former action, viz., in the last sentence of the fourth article of the respondents’ statement of facts. It is true that there is no corresponding plea in law, but then I am not aware that a Board of Trade arbiter is bound by the rules of pleading which obtain in our Courts; and General Hutchinson inspected the ground, heard evidence, and explicitly pronounces on the local situation of the shaft. I may add that there is an averment on the present record that the present contention of the respondents was urged by them before General Hutchinson, and rejected by him. Had your Lordships thought fit to remit this averment to probation I should have had no objection, although I think that the summons, record, and the award furnish adequate evidence that the question in dispute has been already decided.

My opinion is that the award of General Hutchinson is final and conclu-

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- No. 104.** sive of the question whether this shaft is a contravention of the 6th section, and, accordingly, that the purpose for which the land in dispute is sought to be taken is illegal, and that the prayer of the note should be granted.
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- LORD M'LAREN was absent.
- THE COURT adhered.
- JAMES WATSON, S.S.C.—CLARK & MACDONALD, S.S.C.—Agents.

- No. 105.** DAVID M'FARLANE, Pursuer (Respondent).—*Jameson—Graham Stewart.*
- Feb. 23, 1897.
M'Farlane v. M'Farlane's Trustees.
- JOSEPH LINDSAY AND OTHERS (M'Farlane's Trustees), Defenders (Reclaimers).—*Chisholm.*
- Agent and Client—Accounting—Discharge—Settled Account—Trust—Beneficiary's right to taxation of business account of trust after settlement.*—A beneficiary having right to a share of residue under a trust-settlement granted a discharge to the trustees, and afterwards, on discovering the sum paid to the trustees' law-agent for law expenses and commission, raised an action of accounting against the trustees for the purpose of having the law-agent's account taxed, and any overcharge restored to the estate—the pursuer alleging that the charges were excessive.
- Held* that the pursuer was not precluded from raising the action by the discharge.

2D DIVISION.
Lord Kin-
cairney.

DAVID M'FARLANE, boilermaker, Dundee, raised this action against Joseph Lindsay and others, the testamentary trustees of George M'Farlane, Coupar-Angus, the pursuer's father, for reduction of a discharge dated 1st October 1895, granted by the pursuer to the trustees; * and further, and whether decree of reduction were pronounced or not, for an account of the defenders' intromissions.

The pursuer averred (Cond. 4) that the gross amount of the trust-estate was £7000, of which, in terms of the trust-deed, he was entitled to one-eighth, and that he had signed the discharge in reliance upon the statement of David Haggart, solicitor, Dundee, the trustees' law-agent, that everything was in order. That, in January 1896, he had got a copy of the trustees' account of their intromissions, and that he then ascertained that "a commission fee of £300 has been charged by the said defenders' law-agent for realisation of the said trust-estate, in addition to business accounts amounting to about £150. These sums are grossly excessive, and out of all proportion to the work done by the said law-agent."

The pursuer further averred that he had asked the trustees to have the law-agent's accounts audited, but that they had refused. He averred that £250 at least would be taken off the accounts if audited.

The pursuer pleaded;—(1) The pursuer having signed the said pretended discharge relying upon the defenders having examined and audited the accounts of the law-agent, which they failed to do, is entitled to decree of reduction as concluded for. (2) The pursuer, as

* In the discharge the pursuer acknowledged receipt of £709, 17s. 10d. as his share of his father's estate, and discharged the trustees and David Haggart, solicitor in Dundee, their agent, and the trust-estate of all claims. Appended to the discharge was "an abstract of the account of the intromissions of the trustees," which stated merely the amounts of the charge and of the discharge.

a beneficiary under the said trust, is entitled to call upon the defenders to have the said accounts and commission taxed, and for a count and reckoning as concluded for. (3) The defenders having made payment of said accounts and commission without taxation thereof, are liable to the beneficiaries so far as the same are excessively charged. No. 105.
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The defenders pleaded;—(1) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the summons. (2) The pursuer having granted the said discharge in full knowledge of the facts, and after having had the trustees' accounts under his notice, with time and opportunity to consider the same, the defenders ought to be assolized, with expenses. (4) The accounts of defenders' intromissions and the charges therein being regular and proper, the defenders are entitled to absolvitor, with expenses.

Production was satisfied, and on 22d October 1896 the Lord Ordinary (Low) held the defences as defences on the merits.

The Lord Ordinary (Kincairney), on 27th January 1897, pronounced this interlocutor:—"Having heard parties in the Procedure-roll, before answer, and under reservation of the defenders' pleas, appoints the defenders to lodge an account of their intromissions, and that within a week, and allows the pursuer to lodge objections thereto, if so advised, within six days thereafter."

On leave obtained, the defenders reclaimed, and argued;—Reduction of the discharge must precede the accounting.¹ The pursuer's averments relating to reduction were irrelevant. His position was that trustees were bound to submit their law-agent's accounts to taxation, even apart from any demand by the beneficiaries. The trustees were under no such absolute obligation. But assuming that the pursuer had a relevant case for reduction, this part of the case must be concluded before he could attack the accounts. The case of *Cockburn*² was not in point. In that case there was no formal account.

Argued for the pursuer;—The Lord Ordinary had adopted a practical and judicious course. The pursuer's objection applied to the law-agent's account, and especially to two items. The account had not been taxed.—(LORD YOUNG directed attention to the table of fees for conveyancing and general business, xvii. d.) The table supported the pursuer's complaint of overcharge. The pursuer need not reduce the discharge in order to reach the accounts. The strict doctrine of settled account was not applicable in a question between agent and client, and the case of *Cockburn*² was in point, for there was no distinction between a settled account as in that case, and a formal discharge as in the present case. This was practically a question between agent and client. Since the trustees had omitted and now refused to have their law-agent's accounts taxed, a beneficiary of the trust had a title to demand this.³ At least, if reduction were necessary, the pursuer's averments were relevant. The case of *Macpherson*¹ was distinguishable, for the objections were only brought after long delay, and after the pronouncement of a decree-arbitral and a decree in a multipoleinding.

¹ *Macpherson v. Macpherson*, July 16, 1841, 3 D. 1242, per Lord Justice-Clerk Boyle, p. 1260.

² *Cockburn v. Clark*, March 3, 1885, 12 R. 707.

³ *Clyne's Trustees v. Clyne*, June 17, 1848, 10 D. 1325, 20 Scot. Jur. 484; *Macdonald v. Macdonald*, Feb. 22, 1856, 18 D. 630, 28 Scot. Jur. 275.

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LORD JUSTICE-CLERK.—This is a peculiar case. The facts, so far as not in dispute, are that when the time came for dividing this estate a discharge was presented to each of the beneficiaries discharging not only the trustees but also the law-agent. This was a very unusual course in such a case. The pursuer signed a discharge in these terms. Now, he comes forward to impugn the trustees' accounts, but on one ground only, and that is that the trustees have never done what was their duty, viz., to have the law-agent's account taxed, in order that it might be ascertained that they had not been over-charged. It does appear *prima facie* that the account was over-charged. All that the pursuer desires is to have it ascertained whether the law-agent is entitled to as much as he has taken credit for in the account as his own remuneration. That is a matter certainly different altogether from the trustees' own intromissions. If the law-agent has over-charged his account, or if the trustees have carelessly allowed him to do so, it cannot be maintained that the beneficiary is not entitled to redress in one form or other. Perhaps it would have been better to raise this action as primarily an accounting, with the reductive conclusions merely ancillary. But what is really the essence of this case is the question whether these charges made by the law-agent are defensible or not. I think the course taken by the Lord Ordinary is well adapted to the purpose of ascertaining what is the proper answer to that question, and I am therefore of opinion that his interlocutor is right, and ought to be affirmed.

LORD YOUNG.—I can see no objection to the reductive conclusions coming first in the summons. It is immaterial whether they come first or last. So far as the reduction is concerned, it has been disposed of up to the point of considering the case on the merits. The production has been satisfied, and the defences held as defences on the merits.

It was explained that the pursuer is one of eight beneficiaries. After he had signed the discharge in the law-agent's office, his brother obtained a copy of the account.—(His Lordship then read article 4 of the condescendence.) If these charges are true, if it is the case that these sums are grossly excessive for the work done by the law-agent, then nothing has occurred, so far as we are informed, to prevent the trustees having them reduced, and any excess of payment returned to the trust-estate. If this be so, then I think it is their duty to have the over-charges rectified and over-payments returned. The only purpose of this action is to have these excessive charges rectified. The trustees are not barred from having that done. Why they should not do it I do not understand. The question is whether the beneficiaries are precluded by the discharges from having these excessive charges (assuming them to be so) put right, and requiring the trustees to take action to that end. The law-agent wrote to these beneficiaries and got them to come individually and separately to his office, and there at a private meeting he took from each a discharge in the terms of that by the pursuer. Such a proceeding constitutes no obstacle to the law-agent's charges being reduced if excessive. It is not necessary to have the discharges formally set aside. They certainly do not preclude the trustees from taking action, and I think

they do not preclude the beneficiaries from asking the trustees to take action. No. 105.
 I concur in what the Lord Ordinary has judiciously done in, as I think, the interest of all parties. The accounts will disclose the details of the law-agents' charges, and it will speedily be ascertained whether they are excessive or not by referring them to a competent person to examine them. Feb. 23, 1897.
 M'Farlane v.
 M'Farlane's
 Trustees.
 If they are right then there is an end of the case. If they are wrong then I have no doubt that the case will come to an end too by the law-agent, against whom I say nothing, refunding the amount charged in excess. I agree that the interlocutor of the Lord Ordinary should be affirmed.

LORD TRAYNER.—I have come to the same conclusion. The purpose of this action is to ascertain whether the beneficiaries have received the full amount to which they are entitled. That being the question, I think the course adopted by the Lord Ordinary is a judicious one, and ought not to be lightly interfered with. The Lord Ordinary's view is this,—There are two items in the trustees' account which are objected to. If these two items are correct, there is no need for any further accounting or for any reduction; if they are not correct, then the Lord Ordinary, inferentially, is of opinion that inquiry ought to be made into these charges, and that such inquiry is not precluded by the discharge.

But it has been urged upon us that inquiry is excluded by the terms of the discharge. Now, I agree with the general principle that a man who in the full knowledge of his rights grants a discharge, is not entitled afterwards to say,—“I have made a mistake and I should not be bound by the discharge which I have signed,” and on such a statement to set the discharge aside. But in this case the pursuer does not propose to open up the trust accounts or to challenge them as a whole. He challenges only two items in the accounts, which appear *prima facie* to be incorrect. He says to the trustees—“Your duty was to have had these accounts taxed; you did not perform that duty, and I ask you to perform it now.” I think the discharge does not preclude the pursuer from taking that position.

The trustees' duty, whenever the law-agent's charges were challenged, was to have had his account taxed. They did not do so, and I think it should be done now. In this view the course which the Lord Ordinary has taken is the best way of settling the only matter in dispute in the case, and it can do harm to nobody. I am for adhering to this interlocutor.

LORD MONCREIFF.—I am of the same opinion. The only objection to these accounts is as to two items, being charges by the law-agent, which the pursuer alleges are grossly excessive. It has been disclosed that this case in substance is one between agent and client. That being so, the pursuer is no more bound by the formal discharge which he has granted than he would have been by a docketed account. As the trustees will give no facilities, I think the pursuer is entitled to have the law-agent's accounts examined, notwithstanding the discharge. In this view the course adopted by the

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THE COURT adhered, and remitted to the Lord Ordinary to proceed.

T. F. WEIR & ROBERTSON, S.S.C.—DAVID MILNE, S.S.C.—Agents.

No. 106. THE ASSETS COMPANY, LIMITED, Appellants.—*D.-F. Asher—Salvesen.*

Feb. 23, 1897.
Assets Co.,
Limited, v.
Inland
Revenue.

THE INLAND REVENUE, Respondents.—*Sol.-Gen. Dickson—A. J. Young.*

Revenue—Income-Tax—Profits or Gains—Property and Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, First Case—City of Glasgow Bank (Liquidation) Act, 1882 (45 and 46 Vict. cap. clii.), sec. 17, and First Schedule (Memorandum of Association of the Company), sec. iii., subsections (a), (b), (c), (d), and (h).—In order to enable the liquidation of the City of Glasgow Bank to be finally closed the Assets Company, Limited, was formed in 1882, and acquired from the liquidators the whole assets of the bank in return for a payment sufficient to discharge the outstanding liabilities of the bank, with the expenses of the liquidation, and a general undertaking to pay all debts of the bank which might afterwards emerge. These assets consisted of real and other properties and securities, and of sums which the liquidators expected to recover from the estates of contributors. At the date of the transference the assets stood in the books of the liquidators estimated at certain values, but these values did not represent the amount paid by the company, which would have been the same if the book values had been increased or diminished to any extent.

The income of the company, as stated in the revenue accounts, consisted of the returns from these assets and investments. From time to time the company sold portions of the assets at prices exceeding the book values. The surpluses arising from such sales were not entered as income in the revenue accounts, but were credited to capital under the head of "suspense account for surplus assets." Large sums resulting from such sales and recoveries from debtors were carried to the credit of this account during each year subsequent to 1882, and in 1893 the directors, in terms of an interlocutor of the Court, distributed to the shareholders, from the sum standing in the suspense account, a sum of £15,000 as "repayment of surplus capital."

The Inland Revenue claimed that the company were liable to income-tax for the year 1894-95 on the full amount of the sums carried to the credit of suspense account, and assessed the liability on an average of three years preceding 1894.

In a case for appeal against the assessment, in which the foregoing facts were stated, *held* that as there was no statement of the price paid for each of the assets at the date of the transference, it was not possible to determine whether the realisation of the assets had resulted in a profit to the company.

Opinions (per Lord Young and Lord Trayner), that when a person buys a doubtful debt and recovers a larger sum than he paid for it, the gain is not profit in the sense of the Income-Tax Acts unless the purchaser is making a trade of buying such debts.

THE ASSETS COMPANY, LIMITED, objected to an additional assessment under schedule D of the Income-Tax Acts* upon the company

Exchequer
Cause,
2D DIVISION.
Ld Stormonth-
Darling.

* The Property and Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 100, enacts,—“And be it enacted, that the duties hereby granted contained in the schedule marked D shall be assessed and charged under the following

for the year 1894-95 upon a sum of £9000, afterwards restricted to No. 106. £7166, in respect of profits not included in the first assessment of £1673 for that year, and an appeal having been refused by the Commissioners for the General Purposes of the Income-Tax Acts, they were requested by the company to state a case, which was stated accordingly.

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The case bore :—

"The additional assessment was in respect of profits on sales of assets of the company on the average of three years to the 31st day of December 1893.

"The Assets Company, Limited, was registered in May 1882 in terms of an agreement, dated 11th May 1882, between the City of Glasgow Bank and the liquidators thereof, of the first part; and James L. Boyd and John Wilson for and on behalf of a company to be formed under the Companies Acts, and to be styled 'The Assets Company, Limited,' of the second part.

"The company was formed in order to enable the liquidation of the bank to be finally closed, so as to prevent accumulation of interest on the amount of claims unpaid, and the possibility of any further call on the remaining partners of the bank, and in order to preserve the outstanding assets of the bank for more advantageous realisation than could be effected in the ordinary course of liquidation. Accordingly, one of the objects of the company was, on behalf of the solvent contributories, to acquire from the liquidators of the bank the whole assets summarised in the appendix to the agreement, together with all other assets or rights of the bank, for a payment sufficient to enable the liquidators to pay and discharge the liabilities of the bank, and, in addition, a sum to be held and applied by the liquidators in meeting the expenses of the liquidation so far as not already paid, the company also giving a general undertaking to pay all debts of whatever kind of the bank. The liabilities were estimated to amount to £1,338,116, 6s. 9d. The company was promoted by the committee of contributories who had been appointed to advise with the liquidators in regard to any question arising in the liquidation."

The appendix to the agreement contained the following state of affairs :—

1. Cash due by bankers and cash on hand,	£168,968	7	4
2. Bills current taken by the liquidators from contributories and others, less rebate,	53,688	18	7
3. Bonds, debentures, stocks, &c.,	37,094	8	1
Carry forward,	£259,751	14	0

rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last mentioned duties as if the same had been inserted under a special enactment. Schedule D . . . Rules for ascertaining the said last mentioned duties in the particular cases herein mentioned. First Case—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act. Rules: First—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the 5th day of April preceding the year of assessment."

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	Brought forward,	£259,751	14	0
4.	Estates of large debtors, viz., James Morton & Co., Matthew Buchanan & Co., Glen, Walker, & Co., Smith, Fleming, & Co., J. Nicol Fleming, Lewis Potter, Potter, Wilson, & Co., and J. Innes Wright & Co., estimated at	243,000	0	0
5.	Heritable properties in Scotland, belonging to the bank, including business premises remaining unsold, valued at	72,857	18	1
6.	Balances of credit accounts and overdrafts, valued at	36,829	13	7
7.	Bills current at the stoppage of the bank, considered good,	3,350	0	0
8.	Past-due bills, valued at	12,681	17	0
9.	New Zealand and Australian Land Company's stock,	802,112	16	10
10.	Amount estimated as recoverable from contributories,	78,114	12	7
	Total,	£1,508,698	12	1
	Liabilities,	1,338,116	6	9
	Estimated surplus,	£170,582	5	4"

"The shares were to be offered (1) to the solvent contributories; (2) to the surrendering contributories; and (3) to the public. The whole capital of the company was subscribed by the solvent contributories of the bank.

"An Act of Parliament, entitled the City of Glasgow Bank (Liquidation) Act, 1882 (45 and 46 Vict. c. cli.), was obtained, *inter alia*, confirming the agreement and empowering the liquidators to give effect to it.*

"The objects of the company, as set forth in the memorandum of association, were" [given below †].

* The City of Glasgow Bank (Liquidation) Act, 1882, sec. 17, enacts:—"Where any shares or debentures in the company which shall be applied for and taken in pursuance of the powers in this Act shall be held for several persons or purposes in succession, such sums as the directors of the company shall declare to be dividends on the shares, and the interest on such debentures, shall be and be deemed to be annual income and applicable as such for the benefit of the persons or purposes for the time being entitled to the income of such shares, and all other sums, whether payable at intervals or not, shall be deemed to be capital, and applicable as such for the benefit of the persons or purposes for the time being entitled to the capital of such shares."

† MEMORANDUM.—"III. The objects for which the company is established are—(a) To adopt and carry out with or without modification [the said agreement]. (b) To purchase or otherwise acquire, improve, and cultivate lands and hereditaments, acquired under the before-mentioned agreement, or necessary or advantageous for the due development or improvement of the same, or for the advantageous disposal thereof, or for the conduct of the business of the company, whether freehold, leasehold, or of any other tenure in the United Kingdom, the Colonies, or other countries; to develop the resources of the same, by building upon, clearing, draining, and otherwise improving and farming the same; to stock and farm the same; to sell, feu,

"The capital issued was £500,000, divided into 100,000 shares of No. 106.
£5 each, fully paid up, and the further sum of £580,000 was raised
upon debentures.

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"Shortly after the passing of the said Act the company paid the
liquidators the sums agreed on, conform to discharge dated the 12th
day of October and registered the 30th day of December 1882.

"In June 1890 certain preference and ordinary stocks of the New
Zealand and Australian Land Company, which were among the assets
acquired from the liquidators, were distributed among the shareholders
of the appellant company. The market value of the said stock at the
date of distribution was £773,462.

"In the state of affairs of the bank as at the 22d day of October
1881, referred to in the minute of agreement, this stock was valued
at £802,112, 16s. 10d. Following upon the distribution the capital
of the company was reduced to £100,000, in 100,000 shares of £1
each, fully paid. The debentures had been gradually paid off, and in
1890 the debenture debt was entirely extinguished."

"In 1893, in terms of a special resolution duly confirmed by the
Court, a sum of £15,000 was paid to the shareholders out of the sums
credited to suspense account. This was treated by the interlocutor
of the Court, and was entered in the company's accounts, as 'Repay-
ment of surplus capital.'

"A copy of 'The City of Glasgow Bank (Liquidation) Act, 1882,'
a copy of the 'memorandum and articles of association' of the com-
pany, and a copy of the discharge of 12th October 1882, above referred
to, are produced, and may be referred to as part of this case.

"The assets and investments of the company consist of various
real and other properties and securities, and of sums expected to be
recovered from estates of contributors of the bank.

"The income of the company stated in its published revenue
accounts consists of the returns from these assets and investments.

lease, exchange, mortgage, pledge, or otherwise deal with all or any of the
real and personal property of the company. (c) To pay for any purchase, in
whole or in part, in cash, or by ordinary shares, preference, guaranteed, or
deferred shares in the company, in either case fully paid up or partly paid
up, or by the debentures of the company. (d) To hold stock, share, de-
bentures or other securities of other companies, and to dispose of the same.
. . . . (g) From time to time by special resolution to modify the con-
ditions contained in the memorandum of association, so as to increase the
capital of the company by the issue of new shares of such amount as may
by the directors be thought expedient, or to consolidate and divide capital
into shares of larger amount than the amount hereby fixed, or to convert
the paid-up shares into stock or to reduce the capital to such an extent and
in such a manner as may by such resolution be determined. (h) To invest
the moneys of the company upon such securities in the United Kingdom,
the Colonies, or elsewhere, as may from time to time be determined."

The articles of association provided,—“44. The company may by a special
resolution, but not otherwise, . . . at any time or from time to time
sell and dispose of the whole or any part of the business and assets repre-
senting the capital stock of the company to any other company or society,
and may also dissolve the company and wind up its business.

“69. The directors may declare and pay out of the profits of the com-
pany, but not otherwise, a dividend on the amount paid up on account of
the respective shares of the company, and they may also at the end of any
half year declare and pay an interim dividend or other payment by way of
bonus, or otherwise, at such rate as they may deem expedient.”

No. 106. From time to time the company sold portions of its assets or investments at prices exceeding the values at which they were estimated in the books of the liquidators. These values did not affect the amount paid to the liquidators, which would have been the same if the book values had been increased or diminished to any extent.

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"In the first year of the company's existence the surplus was £189,830, 7s., being the excess of the liquidators' or book values over the sum paid by the company. The sums at the credit of suspense account during each year subsequent to 1882 are as follows:—

As at 31st December	1883	£206,163 16 6
Do. do.	1884	217,709 7 5
Do. do.	1885	117,442 1 9
Do. do.	1886	122,106 17 4
Do. do.	1887	55,260 16 2
Do. do.	1888	29,460 1 3
Do. do.	1889	70,578 6 8
Do. do.	1890	40,009 9 3
Do. do.	1891	49,301 8 2
Do. do.	1892	54,713 6 10
Do. do.	1893	61,507 19 8
Do. do.	1894	48,753 17 9

"For many years there were heavy shrinkages on the book values, as shewn above. These were not deducted from revenue, and the appellants were assessed and paid tax on their full revenue without any deduction on account of said shrinkage.

"The surpluses arising from sales" were "not entered in the revenue accounts, but" were "credited to capital under the head of 'Suspense Account for surplus assets.'

"Surpluses from such sales and from recoveries from debtors of the bank have arisen prior to and during the three years of average.

"The company's report for year to 31st December 1893 contains the following statement:—The directors congratulate the shareholders upon the repayment of surplus capital agreed to at meetings held in January and February. The special resolution providing for distribution of £15,000 having been duly confirmed by the Court, this amount, which is equal to 3s. per share, will be paid on 18th current, along with the dividend now recommended. The capital of the company remains intact at £1 per share.'

"Copies of the company's annual reports and statements of accounts for years to 31st December 1890, 1891, 1892, and 1893, are appended hereto, and form part of this case. The assessment under appeal, if based on these accounts, should be reduced to £7166 on an average of three years as follows, and has been restricted accordingly:—

" Year 1891,	£9,291
" 1892,	5,411
" 1893,	6,794
	<hr/>
	3)21,496
" 1894-95,	<u>£7,166</u>

"The actual surplus for the year to 5th April 1895 was £2245. . . .

"The appellants contend,—(1) That the contract with the bank No. 106. ought not to be treated as a sale; (2) alternatively, that if it be treated as a sale, it was a sale of a *universitas* for a general price; (3) that the recoveries in excess of the liquidators' values (book values) are not profit or income in the sense of the statutes, and that they are not liable for income-tax on the amount; (4) that in any event they ought not to be assessed on a higher sum than the actual surplus for the year, viz., £2245. Feb. 23, 1897.
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"The Surveyor of Taxes, Mr R. S. Forbes, submitted that, having in view the decisions of the Judges in tax cases, *Northern Assurance Company v. Russell*,¹ 8th February 1889, and *Scottish Investment Trust Company v. Forbes*,² 24th November and 12th December 1893, the company was liable to tax on the full amount of its profits from the realisation of its investments, and was properly assessed therefore on an average of three years preceding 5th April 1894.

"We, the Commissioners, refused the appeal (excepting as to any excess of assessment upon an adjustment as before mentioned)."

Argued for the appellants;—The tax proposed was on profits. There were no materials for estimating these. The figures in the liquidators' books did not represent the price paid for the assets. They were mere entries of valuations, and did not affect the consideration granted to the liquidators, which consisted of a sum to cover the amount of the bank's debt, and an obligation to meet any subsequent liability. Not until the assets were all realised could the profits of the company's transaction be ascertained. It was impossible to calculate the profit on the sale of particular assets, for the price paid for each particular asset was not ascertainable. The tax was proposed on sums carried to suspense account, but these were not profits in terms of the Income-tax Acts, even assuming that they did represent the difference between the price paid and the price realised. They represented surplus capital, with which alone the company could deal. They had no power to make payment from the fund acquired by the sale of assets in the way of dividend. It could only be distributed as repayment of capital.³ The tax only affected profits of any trade, manufacture, adventure, or concern in the nature of trade. The company was not a trading concern. It did not trade in these assets. It only existed for their realisation. The mere fact that the buyer of a commodity sold it for a better price than he paid did not render him liable for income-tax, unless he was a trader in the commodity. The company was in the position of such a buyer, and was not a trader. That was clear from the terms of article 3 of the memorandum of association, which only gave power to realise, but not to trade in, the assets. Subsection (b) gave power to purchase, but only for the purpose of finally realising the assets; subsection (d) only applied to stocks taken over from the liquidators, and subsection (h) was merely a subsidiary power to be used incidentally for the main end of realisation. The case of the *Scottish Investment Company*,² relied on by the Crown, was distinguishable in two respects—(1) that company was entitled to "sell, exchange, or otherwise dispose of, deal with, or turn

¹ 16 R. 473.

² *Scottish Investment Trust Company, Limited, v. Inland Revenue*, Dec. 12, 1893, 21 R. 262.

³ *City of Glasgow Bank (Liquidation) Act, 1882, section 17, Articles of Association, No. 69.*

No. 106. to account" any of its assets; it was thus a trader, and in natural course its gains were entered in revenue account; (2) profits gained by the company were at once recognisable, for it was possible to ascertain these by comparing the price paid for each asset, and the price ultimately obtained for it.

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Argued for the Crown;—The Assets Company was a trader. It carried on a trade, adventure, or concern in the nature of trade, within the meaning of the statute. The object of its constitution was to make a profit on the sale of the assets taken over. Its articles of association, especially article 44, admitted that it carried on a business. It was a dealer, and the assets were its stock in trade. This was also clear from the terms of the memorandum of association, article 3. In common with other traders, it must accordingly pay income-tax on its profits, which were its income. It might be true that under the terms of its Act of Parliament sums for division were to be deemed capital, but all the same these were "gains" to acquire which the company was formed, and as such were subject to the Income-tax Acts.¹ It was also a settled principle, that although as an ordinary business practice a proportion of commercial profits were entered not as revenue, but as capital to replace the capital disbursed in achieving the profits, still the sum on which income-tax was payable was the gross amount of the profits, and not the sum left as profits after the gains were reduced to make good the capital expended.² It was also settled that when investments of capital were changed and the transaction resulted in a profit, because the investments were sold at a higher price than that at which they had been acquired, the increase so acquired was regarded as part of the profits of a trading company which carried on a "trade, adventure, or concern in the nature of trade."³ Thus the Assets Company was liable in the income-tax charged. The capital of the company was sunk in these investments, and when these were sold at a higher figure it was impossible not to regard the increase as profit in the sense of the Income-tax Acts.

At advising,—

LORD TRAYNER.—The claim for additional assessment made by the Income-Tax Commissioners, which is the subject of this case, is based upon the ground that the Assets Company has made a profit on the realisation of certain of its assets upon which tax is payable and has not been paid. The profit is said to have been derived from two sources, viz., by prices realised for investments in excess of the amount paid for such investments, and by recoveries from debtors "during the three years of average." If it were established or assumed that the company had made a gain or profit by the

¹ *Mersey Docks v. Lucas*, 1883, L. R., 8 App. Cas. 891, *per* Lord Herschell, p. 905; *Edinburgh Southern Cemetery Co. v. Surveyor of Taxes*, Nov. 29, 1889, 17 R. 154; *Sowerby v. The Harbour Commissioners of King's Lynn*, 1887, 3 T. L. R. 516.

² *Coltess Iron Co. v. Black*, Jan. 7, 1881, 8 R. 351, April 7, 1881, 8 R. (H. L.) 67; *Edinburgh Southern Cemetery Co. v. Surveyor of Taxes*, 17 R. 154.

³ *Northern Assurance Co. v. Inland Revenue*, Feb. 8, 1889, reported as a branch of *Scottish Union and National Insurance Co. v. Inland Revenue*, 16 R. 461, at p. 473; *Scottish Investment Trust Co., Limited, v. Inland Revenue*, 21 R. 262.

realisation of certain stocks or other investments which it held as part of its capital, a somewhat difficult question would arise, namely, whether, looking to the character and constitution of this company, the purpose for which it was formed, and the peculiar transaction under which the assets in question were made over to it, the present case was ruled by the decisions to which we have been referred. If that question had been to be determined I could not, according to my present opinion, concur in all the views expressed in the decided cases. But that question, as it appears to me, does not arise for decision here, because I think we cannot affirm, on the statements in the case before us, that the Assets Company has in fact made the profit in respect of which it is sought to be made liable for the additional assessment. It is impossible to say, in any view of the case, that the Assets Company has realised more for the assets sold than it paid for them without knowing what it paid for them. This important fact is not known to us. When the Assets Company took over the assets of the City of Glasgow Bank still remaining in the hands of the liquidators, the value of such assets was "estimated" by the liquidators, and that estimate we have. But the estimated value was not the price paid by the Assets Company, for, as is stated in the case, "these values did not affect the amount paid to the liquidators, which would have been the same if the book values (*i.e.*, the estimated values) had been increased or diminished to any extent." Accordingly we are not told what was the value of these assets at the time of their transference to the company, nor the price it paid for them. It is not possible, therefore, as I have said, to say whether the price received by the company, on realisation of the assets, is more or less than the price for which they were transferred, and consequently not possible to say that they have been sold at a profit. Farther, the amount of profit on which income-tax is now sought to be imposed consists partly of "recoveries from debtors." But debts recovered (although considered by the creditor not recoverable) are not gain or profit in the sense of the Income-Tax Acts. The amount recovered from debtors must therefore be deducted from the sum on which the tax is claimed. That, however, cannot be done here, because the amount of such recoveries is not given, and that precludes our affirming, as the Commissioners have done, that the whole additional assessment claimed is due and payable. I am of opinion that, on the case as presented to us, we must hold that the determination of the Commissioners is wrong.

LORD YOUNG concurred.

LORD MONCREIFF.—I am of opinion that the case presented to us does not contain materials to enable us to decide whether, during the year to 5th April 1895, and two preceding years, profits or gains were made by the Assets Company on the realisation of assets or investments. The data on which we are asked to hold that profits or gains were earned during those years are, I understand, the sums realised on the sale of investments as compared with the values at which the assets realised stood in the books of the liquidators of the City of Glasgow Bank when taken over by the Assets Company. Now, I do not think that we can take those book values as truly representing the prices paid for the assets or investments. Indeed, the case itself negatives this, because it states that "those values did not affect the amount

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No. 106. paid to the liquidators, which would have been the same if the book values had been increased or diminished to any extent."

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There may be great difficulty in obtaining any reliable basis for fixing the prices which should be held to have been paid for any particular asset, because not only was a lump sum paid, but part of the consideration was that the company undertook liabilities of indefinite amount. But whether this is practicable or not, the case does not present materials for deciding that matter.

In so holding I assume that we are bound by the cases of *The Northern Assurance Company v. Inland Revenue*,¹ and *The Scottish Investment Trust Company v. Inland Revenue*,² and that if it had been clearly shewn that profits were made by the Assets Company on realisation of its investments, there is nothing in the constitution of the Assets Company or the purposes for which it was formed to prevent such surpluses being treated on the authority of those cases as profits or gains in the sense of the Income-Tax Acts.

But assuming this, we have, as I have said, no materials for affirming that profits or gains were made on the sale of investments during the years in question.

LORD YOUNG.—I intimated my concurrence in the judgment expressed by Lord Trayner, and I also concur in what has been said by Lord Moncreiff, but I wish to give expression to the doubt which I entertain as to the cases in which a gain made by the sale of a property at a price more than was paid for it may be regarded as income. I should like to point out here a source of difficulty in the way of holding that the Crown has made out upon the facts as set forth in the case that there is an assessable income. What is stated in the case is, that the profit on which tax is claimed consists of "surpluses from such sales"—that is, sales of part of the property purchased—"and from recoveries from debtors of the bank," and so on. Now, what about recoveries from debtors? The Company took them over. I should say that I have really no doubt that any person or any company making a trade of purchasing and selling investments will be liable in income-tax upon any profit which is made by that trade. It is quite an intelligible business, just as intelligible as a trade consisting in the purchase and sale of goods in the ordinary trade of a merchant or shopkeeper. The trade is good or bad according as it is carried on profitably or not, and the profit arises from purchasing goods at the trader's price and in selling them at a retail price or wholesale price or larger price than that which was paid for them. But it is another proposition altogether, that where no trade is carried on, a gain or loss upon the purchase and re-sale of property comes within the meaning of the Income-tax Acts. Take even proper traders. If proper traders sell their old premises and buy new ones, and sell the old premises at a higher price than they paid for them, investing the price which they get in the purchase of a site and the erection of new premises, I should say it was a totally untenable proposition that anything in excess of what they had paid for the old premises perhaps twenty years before, at a better time for purchasing property, is income within the meaning of

¹ 16 R. 461, at 473.

² 21 R. 262.

the Acts. I do not think it is at all. It is no more so in the case of a trader than in the case of a private individual selling his house at more than he had paid for it, or selling his carriage or pictures at more than he paid for them. That is not income in any sense, although a dealer in pictures, like a dealer in goods or a dealer in the buying and selling of houses, who made it a trade, would come within the region of income-tax. But this company in realising more for the debts which they had purchased were not making a trade of buying and selling debts. There is nothing to indicate that. Anybody who makes a trade of buying and selling doubtful debts will be liable, upon the principle which I have indicated, in income-tax upon any gain which he makes by that trade. But it is no part of this case that that was the trade of this company. They took over all the debts of the bank and they undertook to pay them. On the other hand, they got assigned to them all the debts due to the bank by doubtful debtors, and which the bank could not immediately realise, and which it was inconvenient for them to wait on for; they bought these. Is it to be said that they were making a trade of buying and selling doubtful debts? There is nothing to indicate that in the least. The proposition that where anybody purchases a doubtful debt and realises more than he paid for it—there being only one purchase, and the purchaser not being a trader in that kind of thing—such gain is income, is, I think, a proposition which cannot be sustained. Now, I think we have nothing upon the face of this case to shew that in a trade of buying and selling there was income or gain made by this company upon which the assessment is made.

I have expressed these views as indicating generally what is in my mind in regard to this particular case. It may be that there is income from trading upon which this company has not been assessed; but if that be so, the Inland Revenue will be able to state a better case with more intelligible detail of facts, which will enable the Court to judge of it in another year. In regard to what we have here, I entirely agree with Lord Trayner and Lord Moncreiff that there is no case upon which we can with safety sustain the conclusions at which the Commissioners have arrived.

LORD JUSTICE-CLERK.—I also concur.

THE COURT reversed the determination of the Commissioners, and found the appellants entitled to expenses.

J. SMITH CLARK, S.S.C.—P. J. HAMILTON GRIERSON, Solicitor of Inland Revenue—Agents.

THE PARISH COUNCIL OF BRECHIN, Pursuers (Respondents).—

Ure—Dove Wilson.

THE PARISH COUNCIL OF THE BARONY PARISH OF GLASGOW, Defenders (Respondents).—*D.-F. Asher—Deas.*

THE PARISH COUNCIL OF PERTH, Defenders (Reclaimers).—*W. Campbell—Craigie.*

Poor—Settlement—Forisfamiliation—Pauper mentally weak.—A hawker who lived in lodging-houses in the towns through which he passed agreed with the keeper of a lodging-house that his daughter, a girl of sixteen, should be left to take care of children and assist in housework, receiving therefor her food and clothing, and that she should return to her father

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No. 107. whenever she or the lodging-house keeper desired. There was medical opinion to the effect that although not insane the girl was mentally and physically weak, and incapable of earning her own living. After a year of service she ran away, and having been found in a state of destitution on the public road, she obtained parochial relief. In an action at the instance of the relieving parish, *held* (aff. judgment of Lord Low) that the girl had not been forisfamiliated, and that the parish of her father's settlement was liable for the sums disbursed on her behalf.

2D DIVISION.
Lord Low.

THE PARISH COUNCIL OF BRECHIN raised this action for decree ordaining either the Parish Council of the Barony Parish of Glasgow or the Parish Council of Perth to pay the sum disbursed by the pursuers for the relief of a pauper, Jessie Marshall, and further to free and relieve the pursuers of future disbursements on her behalf.

The pauper was born in the Barony Parish of Glasgow on 12th July 1876. Her father, James Marshall, was born in the parish of Perth, and the pursuers maintained that he had never acquired a residential settlement.

The Parish Council of the Barony Parish of Glasgow maintained that the pauper was of weak intellect, and had never been forisfamiliated, and that she was chargeable against her father's birth settlement.

The Parish Council of Perth maintained that the pauper had been forisfamiliated, and that she was chargeable against the parish of her birth.

The Lord Ordinary (Low) allowed a proof, which disclosed the following facts:—James Marshall worked as a painter in summer, and sometimes was able to take a house of his own. In winter he travelled about the country as a hawker, and lived in lodging-houses in the various towns which he visited. In Laurencekirk he lived in the lodging-house kept by John Laing and his wife. In April 1893 Marshall left his daughter in this lodging-house under an agreement whereby she was to take care of Laing's children, and to help Mrs Laing in housework, in return for her food and clothing. It was agreed that she should return to her father whenever she or Laing desired. She remained until April 1894, when she ran away. Laing followed her to Montrose, and after vainly trying to get her admitted to the poorhouse there he took her back to Laurencekirk. A few days after she again ran away to Montrose where she was admitted to the poorhouse. She left on 31st May 1894, and stayed with her father in a lodging-house in Brechin. He left her there without providing for her, and on a report by a medical man, that, although not insane, she was mentally and physically weak and incapable of earning her own living, she was admitted to the almshouse in Brechin, where she stayed till 7th August, when she went with her stepmother to Montrose. There she worked for two months in a lodging-house, receiving in return her food and clothes. For a few months thereafter, she lived with her father, working by day for a neighbour who gave her food. In April 1895 she ran away, and was found in the model lodging-house, Brechin, along with a pedlar and his wife. On 26th April she was found on a road near Brechin in a destitute condition, and was admitted to the Brechin Almshouse on a medical certificate in terms similar to the certificate above mentioned. On 29th June 1896 she was removed by her father, and in October she returned alone to a lodging-house in Montrose, where, at the date of the case, she was working for food and clothes. It appeared that she was sometimes able to pay for her lodging in various lodging-houses.

On 3d December 1896 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that the pauper, Jessie Marshall, mentioned on record, has not been forisfamiliated, and has therefore not acquired any residential settlement in the parish of Brechin; that her settlement is in the parish of Perth, being that of her father's birth, and not in the Barony Parish of Glasgow, being that of her own birth: Therefore decerns against the defenders the Parish Council of Perth conform to the conclusions of the summons: *Quoad ultra* assoilzies the defenders the Parish Council of the Barony Parish of Glasgow from the conclusions of the summons, so far as directed against them, and decerns: Finds the pursuers and the defenders the Barony Parish entitled to their expenses against the defenders the Parish Council of Perth."*

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The defenders, the Parish Council of Perth, reclaimed, and argued;—The pauper had been forisfamiliated. This was a question of fact.¹ (1) She was sixteen years of age when left with the Laings; (2) after that time she was not resident with her father, who (3) never after that time contributed to her support. She supported herself, and was sometimes even able to pay for her lodging. But the important fact was her separation from her father's family, and this was conclusive.² The pauper was not insane, but only mentally weak, and accordingly

* "OPINION.—The sole question in this case appears to me to be whether Jessie Marshall was forisfamiliated when she received parochial relief.

"In considering whether the circumstances of a particular case amount to forisfamiliation the capacity of the child is an important element. In this case I do not think that there is any doubt as to the pauper's mental condition. She is not a lunatic, or insane, nor do I think that she could properly be described as an imbecile. She is, however, congenitally of weak mind. So far all the witnesses agree, although they vary somewhat in their estimate of her capacity. Her mental capacity appears to me to be not greater than that of a child of seven or eight years old. She can do simple household work under supervision, and she is fond of young children, and can be entrusted to look after them, but that is no more than can be said of many girls of twelve years. Further, although she can be entrusted with one message, if she is given two or three she becomes confused. In that respect she seems to be inferior to an ordinary intelligent child of seven or eight. It is therefore clear that she was not fit to leave her father's family and to lead an independent life. [His Lordship then narrated the evidence, and proceeded]:—

"I think that that evidence shews that when the girl was left with the Laings she did not pass out of her father's family and become free of his paternal control. She was left under a temporary arrangement made by her father, and considering the wandering life which he was leading, I think that it was a very prudent arrangement. It was just such an arrangement as a man in Marshall's position might have made for a child of seven or eight years old who was able to assist sufficiently in a household to be worth her board and lodgings.

"The pauper's stay with the Laings came to an end by her running away. She did so twice. The first time Laing found her, and brought her back, but she ran away again a few days afterwards, and was found wandering about the roads, and taken to the inspector of poor of Brechin.

"In these circumstances I think that it is clear that she was not forisfamiliated, and the expense of her maintenance during the time when she was in the Brechin Almshouse must therefore be borne by the parish of her father's settlement."

¹ Fraser v. Robertson, June 5, 1867, 5 Macph. 819, 39 Scot. Jur. 455.

² Heritors and Kirk-Session of Cockburnspath, June 9, 1809, F. C.

No. 107. might be forisfamiliaried.¹ A person in this condition could acquire a residential settlement even although incapable of earning his living.²

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Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK.—I think we do not require to call for any reply, and that we are in a position to decide this case upon the facts as they have been explained to us by Mr Campbell. This child did not live with her father, but in a lodging-house at Laurencekirk. She did not take up her residence there of her own accord, but she was put there by her father, who arranged that she was to return to him when either she or the lodging-house keeper desired that she should do so. In these circumstances it seems to me impossible to regard this girl as occupying an independent position, and I am of opinion that the Lord Ordinary has given the right decision in the case.

LORD YOUNG.—I am of the same opinion as the Lord Ordinary and your Lordship.

This child, when she became chargeable, was, in my opinion, still a member of her father's family. Although he was a tramp, it is possible to regard him as having a family, and as bound to provide for and maintain the members of it. He certainly put this child in a house where she got her food, clothes, and shelter, but he did not thereby sever her from his family. In the arrangement he made with the lodging-house keeper he recognised that when either he or the child ceased to desire that her service should continue, it was his duty to receive her back to his family and provide for her.

In my opinion the Lord Ordinary has properly decided this case.

LORD MONCREIFF.—I concur.

LORD TRAYNER was absent.

THE COURT adhered.

WEBSTER, WILL, & RITCHIE, S.S.C.—MACKENZIE, INNES, & LOGAN, W.S.—
MENZIES, BRUCE-LOW, & THOMSON, W.S.—Agents.

No. 108. WILLIAM JOHN MENZIES AND OTHERS (Cowan's Trustees), Petitioners (Respondents).—*Balfour—W. K. Dickson.*

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FRANCIS ADAM BRINGLOE (Ferrie's Curator Bonis), Minuter (Reclaimer).—*Johnston—Dewar.*

Judicial Factor—Curator Bonis—Investment on security of harbour rates and 48 Vict. cap. 63), sec. 3 (b), 10 and 12—Municipal Corporation.—The Trusts Amendment Act, 1884, authorised trustees (including judicial factors) to invest in loans (10) "on real or heritable securities" (12) "on debentures secured on rates or taxes levied" under statutory powers "by municipal corporations."

A curator bonis lent a sum to Greenock Harbour Trustees, a corporation consisting of the Magistrates and Council, and nine elected trustees, on a debenture, in which they assigned to the creditor "the rates, duties, and other revenues of the trust." *Held* that the investment was not on real security nor on a debenture granted by a municipal corporation in the sense of the Act. *Held* further that it was not a proper investment at common law in respect that the revenue of the trust from dues, &c., was precarious.

¹ Walker v. Russell, June 24, 1870, 8 Macph. 893, 42 Scot. Jur. 531; Greig v. Ross, Feb. 10, 1877, 4 R. 465.

² Cassels v. Somerville and Scott, June 24, 1885, 12 R. 1155.

Opinion that the harbour rates were not rates or taxes in the sense of the Act. No. 108.
Breatcliff v. Bransby's Trustees, Jan. 11, 1887, 14 R. 307; *Grainger's*
Curator, Feb. 23, 1876, 3 R. 479; and *Lloyds' Curator*, Dec. 1, 1877, 5 R. Feb. 26, 1897.
 289, *commented on.* Cowan's
 Trustees v.
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On 7th February 1855 Mr James Cowan was appointed curator bonis to Joseph M'Cormick Ferrie.

On 8th May 1895 Mr Cowan presented a petition for recall of his appointment and discharge, on the ground of advanced age. 1ST DIVISION.
 Lord Pearson.

On 8th June 1895 the Lord Ordinary (Low) recalled the appointment of Mr Cowan, and appointed Francis Adam Bringloe, C.A., to be curator bonis to the ward.

In the subsequent proceedings for Mr Cowan's discharge a question was raised by Mr Bringloe as to the competency of certain investments made by Mr Cowan with the curatorial funds, and before the question was determined Mr Cowan died, and his trustees and executors were sisted in his room and place as petitioners.

The following narrative of the circumstances giving rise to the question is taken from the Lord Ordinary's opinion:—

"The investments challenged are three in number:—(1) On 10th May 1882 Mr Cowan uplifted a sum of £300, and invested it on a four per cent mortgage with the Port-Glasgow Harbour Trust. (2) On 4th September 1882 he uplifted an additional sum of £700, which he lent to the Greenock Harbour Trustees on a four per cent mortgage or assignment. (3) On 12th May 1887 he purchased at the price of £970 a £1000 assignment of the last mentioned Trust.*

* The assignment for £700 by the Greenock Harbour Trustees, was as follows:—"By virtue of the Greenock Port and Harbours Acts, 1866, 1867, 1872, and 1880, the trustees of the port and harbours of Greenock, in consideration of the sum of £700 sterling paid to them by James Cowan . . . do hereby bind themselves to pay to the said James Cowan, as curator bonis foressaid, and to his successors in office, and his or their assigns, the principal sum of £700 at the principal office of the trustees, on the 11th day of November 1889, with a fifth part more of liquidate penalty in case of failure, together with interest on the said principal sum at the rate of four pounds per centum per annum, payable half-yearly (as per coupons or interest warrants delivered herewith), or in the option of the said James Cowan or his foressaids, the said principal sum shall thereafter, in virtue hereof, remain as a loan to the said trustees until the expiry of a further term of years to be afterwards agreed on, or the said principal sum shall be payable at the dates, and subject to the provisions contained in the said Acts in the same manner as if the said sum had been advanced on the day of payment first above specified, without any period being fixed for the repayment thereof, and subject to the provisions of the said Acts, the trustees do hereby assign and make over to the said James Cowan, as curator bonis foressaid, and to his successors in office, and his or their assigns, All and Sundry the rates, duties, and other revenues of the trust, payable to the trust in virtue of the said Acts, and all their right, title, and interest of, in, and to the same, to be held by the said assignee and his foressaids until the said sum of £700 with the interest thereof, shall be fully satisfied and paid.—In witness whereof."

The assignment for £1000 was in similar terms to the foregoing.

The mortgage of the Port-Glasgow Harbour Trust was as follows:—"By virtue of the Port-Glasgow Harbour Consolidation Act, 1864, we, the trustees of Port-Glasgow Harbour, in consideration of the sum of £300 paid to the treasurer to the said trustees by James Cowan . . . for the purposes of the said Act, do grant and assign to the said James Cowan and his

No. 108. "At Whitsunday 1887 the Greenock Harbour Trustees made default in payment of interest on their assignments. The rights of the different classes of assignment-holders having been determined in a special case (15 R. 343), an Act was passed in 1888 authorising the Greenock Harbour Trustees to issue A and B debenture stock in lieu of the existing assignments, the A debenture stock and interest being declared to have priority. Mr Cowan's investments were of the postponed class, and in September 1888 a certificate of £1700 B debenture stock was issued in his name, the market value of which is stated to be £633, 5s.

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"The Port-Glasgow Harbour Trust having also fallen into difficulties, obtained an Act in 1890, which authorised the trustees to convert their mortgage debt into debenture stock at a reduced rate of interest, and a certificate for £300 of it, bearing $3\frac{1}{4}$ per cent interest, was issued in name of Mr Cowan, which is stated to be now worth about £90.

"In and after 1888 the Accountant of Court in the annual audit drew special attention to the Greenock Harbour Trust debentures, and then passed them 'subject to all questions.'"

On 9th June 1896, Mr Bringlee lodged a minute setting forth the circumstances, and declining as curator bonis to take over the investments as representing any part of the curatory estate. He stated that the loss in principal and interest to the ward's estate was, as at the date of the petition, £1661, 13s. 10d.

The undernoted sections of the Greenock Harbour Acts were referred to by the parties.*

successors in office, and his or their assignees, such proportion of the rates, revenues, and other moneys leviable under or arising or accruing by virtue of the said Act as the said sum of £300 does or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, revenues, and moneys; and that in security of the payment of the said sum of £300 to the said James Cowan . . . with interest thereon, at the rate of four pounds per centum per annum, from the fifteenth day of May last until payment of the said principal sum on the 15th May 1887.—In witness whereof."

* The Greenock Harbour Act, 1842 (5 Vict. sess. 2, cliv.), sec. 2.—"The provost, the four bailies, the treasurer and the whole other councillors of Greenock, and their successors in office, shall be trustees for putting this Act into execution."

The Greenock Port and Harbours Act, 1866 (29 and 30 Vict. c. clvi.), sec. 6.—"The provost, the four bailies, the treasurer, and the whole other councillors of Greenock and their successors in office, and the nine persons from time to time to be elected in manner after mentioned shall be the trustees of the port and harbours of Greenock. . . . and the said trustees shall be a body corporate."

Sec. 8.—"The nine persons to be elected trustees shall be elected by the shipowners and ratepayers qualified and registered as electors in the manner hereinafter mentioned"—[i.e. in sec. 9].

Sec. 66.—"The trustees may from time to time borrow at interest on the credit of the several rates and duties by this Act granted, and the other revenues of the trust . . . and for securing the repayment of the money so borrowed with interest, the trustees . . . may assign over the said rates and duties or other revenue."

The Greenock Harbour Act, 1872 (35 and 36 Vict. c. lxxi.), sec. 34.—"The trustees may under authority of this Act borrow at interest on the security of the rates and duties, and other revenues of the trust, and of the works and property of the trust. . . ."

The Greenock Harbour Act, 1880 (43 and 44 Vict. clxx.), sec. 66,

The petitioners also founded on the Trusts Act, 1884.*

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On 23d July 1896 the Lord Ordinary (Pearson), *inter alia*, found "that the £300 debenture of the Port-Glasgow Harbour Trust and £700 debenture and £1000 debenture of the Greenock Harbour Trust acquired by the said James Cowan as curator bonis on 10th May and 4th September 1882 and 10th May 1887 respectively, were legitimate investments of curatorial funds, and that the petitioners as trustees and executors of the said James Cowan are not liable for the loss which has been incurred or may be incurred thereon."†

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empowers the trustees to borrow in terms similar to sec. 66 of the 1866 Act, quoted *supra*.

Sec. 69.—"The mortgagees of the trustees may enforce payment of the arrears of interest or principal, or principal and interest due on their mortgages by the appointment of a judicial factor, and in order to authorise the appointment of a judicial factor in respect of arrears of principal the amount owing to the mortgagees by whom the application shall be made shall not be less than £5000 in the whole."

Sec. 70.—"Every application for a judicial factor . . . shall be made to the Sheriff, and on any such application the Sheriff may . . . appoint some person to receive the whole or a competent part of the rates and duties, and other revenues of the trust, until all the arrears . . . be fully paid. Upon such appointment being made, all such rates and duties and other revenues shall be paid to and received by the person so appointed, and the money so received shall be so much money received by or to the use of the mortgagees, and so soon as the full amount . . . in arrear . . . has been so received, the power of such judicial factor shall cease. Provided always that such judicial factor shall distribute among all the mortgagees to whom interest or principal shall be in arrear, the rates and duties and other moneys which shall come into his hands, having respect in such distribution to the priorities of any of such mortgagees."

* The Trusts (Scotland) Amendment Act, 1884 (47 and 48 Vict. cap. 63), enacts, sec. 2,—"Trustee" shall include tutor, curator, and judicial factor. "Judicial factor" shall mean . . . curator bonis.

Sec. 3.—"Trustees under any trust may, unless specially prohibited by the constitution or terms of the trust, invest the trust funds. . . . (b) In loans . . . 10, on real or heritable security in Great Britain; 12, on bonds, debentures, or mortgages secured on rates or taxes levied under the authority of any Act of Parliament by municipal corporations in Great Britain authorised to borrow money on such security. . . ."

† "OPINION.—Mr James Cowan was appointed curator bonis to Joseph M'Cormick Ferrie in 1855. In 1895, on the ground of failing health, he petitioned for recall and discharge and the appointment of a new curator. While the question of his discharge was pending, Mr Cowan died on 23d November 1895, and his trustees and executors have now sisted themselves as parties to the proceedings.

"The original value of the ward's estate was between £700 and £800, but by accumulations of interest, invested from time to time, it reached a nominal value of over £2000.

"The question now arising in Mr Cowan's discharge is, whether he incurred personal liability for loss upon certain of these investments; and as the loss has not yet been ascertained, the proposal is that his executors should take over the investments and replace the amounts with interest. The parties are willing that the question should be decided now, and in this process. . . .

"The investments are now challenged on the ground that they are not within the classes of investment open to trustees and judicial factors. If the class of investments was legitimate, it is not contended that liability

No. 108. Mr Bringloe reclaimed, and argued ;—The investments in question were not legitimate investments for a factor to make either at common law or under the Trusts Acts. (1) They were not within the class already recognised by the Court. The earliest direction given appeared to be that the factor should act as prudence required,¹ and his discretion had always been strictly limited. The investment of curatorial funds was at first restricted to Government stock and heritable securities.² In *Grainger's* case,³ although an investment secured on rates was approved, the Court proceeded on the ascertained merits of the particular security, and would not have sanctioned *a priori* a security of that class. The case, therefore, was not in favour of the present factor, for he was asking the Court to condone an investment the history of which had proved its insufficiency. Railway debentures were at first excluded,⁴ though subsequently permitted.⁵ No other kind of security had been recognised at common law. (2) A further extension of the class of securities was made by

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has been incurred by reason of their being in themselves improvident or improperly selected.

"The investments are sought to be supported on three separate grounds :—(1) That they are investments on heritable or real security, and so within both the common law rule and the Trusts (Scotland) Act, 1884 ; (2) that they are analogous to investments which the Court has already recognised, and that it would be no undue extension of the rule to hold these as legitimate investments in judicial factories ; and (3) that they are mortgages secured on rates or taxes levied under Act of Parliament by municipal corporations with borrowing powers, and therefore fall within the express words of sec. 3, subsec. 12, of the Act of 1884.

"I have arrived, though with difficulty, at the conclusion that they may be supported on the first of these grounds. It is true that the terms of the assignments themselves do not expressly include the undertaking, which is largely or in great part heritable. In the Greenock Harbour assignments the trustees assign, subject to the provisions of the Acts, 'all and sundry the rates, duties, and other revenues of the trust payable to the trust in virtue of the said Acts, and all their right, title, and interest, of, in, and to the same.' And in the case of the Port-Glasgow Harbour there is assigned a proportion of the 'rates, revenues, and other moneys' leviable under the Act. In this respect these securities differ from the ordinary railway mortgage, which assigns 'the said undertaking and all the tolls and sums of money arising by virtue of the Act.' But there is here, as in the case of railways, and in terms substantially the same, a power to apply for the appointment of a judicial factor, as the prescribed mode in which the security is to be worked out, and notwithstanding the important difference in form to which I have adverted, it appears to me that in substance the security obtained is a security over the undertaking in the same sense and to the same effect as in the case of a railway. Now, railway mortgages have been expressly held, in the matter of trust investments, to fall within the expression 'investment upon real securities,' as used in an English will—*Breatcliff v. Bransby's Trustees* (1887), 14 R. 307.

"There is a peculiarity in the case of the Greenock Harbour assignments

¹ A. S., Feb. 13, 1730, sec. 6.

² Haldane, Dec. 23, 1848, 11 D. 286 ; Dalgleish, Feb. 13, 1849, 11 D. 1030.

³ *Grainger's Curator*, Feb. 23, 1876, 3 R. 479.

⁴ *Robertson*, June 29, 1854, 16 D. 1004, 26 Scot. Jur. 547.

⁵ *Lloyd's Curator*, Dec. 1, 1877, 5 R. 289.

the Trusts (Scotland) Amendment Act, 1884 (47 and 48 Vict. cap. 63), No. 108. sec. 3, and it was said that the present investments had been made on heritable or real security, and were therefore, if not within the common law rule, within the Act. That was the view taken by the Lord Ordinary, but he had misunderstood *Breatcliff's* case,¹ on which he relied. The question in that case was confined to the construction of a power in an English will, and it was held that a railway mortgage was a real security in the sense of the will. But the terms of the debenture here were essentially different from the terms of the mortgage there, for here the real property of the harbour trustees was not conveyed, whereas the railway undertaking was. It had already been held that an assignation of the Greenock Harbour Trust was not a real security.² The word "real" in the statute was the English equivalent of the Scots "heritable," and it was introduced into the Act so as to cover English securities. But a real or heritable security was something which the creditor could realise and sell. Its basis was land, and the security had to be completed by infestment; it was not enough that it was in some way connected with a real right, or even that it entitled the creditor to enter into possession. It was true that a creditor here, provided that his debt amounted to £5000, could apply for the appointment of a judicial factor, but the factor could only act as a receiver of the income of the undertaking. He had no power to sell it.³ In *Breatcliff's* case¹ the factor appointed under the Railway Companies (Scotland) Act, 1867

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which might be considered to touch this point. The report² of the special case discloses that in a certain class of the assignments,—namely, those issued in the form prescribed by the Act of 1872,—there were assigned in security not only 'the rates, duties, and other revenues of the trust,' but also the 'works and property of the trust.' The dispute there raised being between different classes of security holders, it was contended by those who held assignments in this form that they thereby got an additional security upon which real diligence could be expedite. This view was negatived, it being held that the insertion of the words 'works and property of the trust' was really 'not meant to have any practical effect at all.' Thus all were held to be on one level as regards the extent of the security, and those holding assignments in the form now in dispute were declared to be in no worse position than those who had an express assignment to the works and property. Accordingly this point is rather favourable than otherwise to the view contended for by Mr Cowan's executors.

"Looking to the substance of the thing, and having regard to the decision in the case of *Breatcliff*, I think the investments may be supported as being truly loans on real or heritable security. They were indeed a postponed class of securities, but, as I have said, no question was raised as to the propriety or judiciousness of the investments if they are otherwise admissible. It is right I should add that no separate argument was submitted as to the Port-Glasgow Harbour mortgage, it being assumed that this is in all material respects in the same case as the others.

"It becomes unnecessary for me to deal with the other two grounds on which these investments were defended. But I may say that as at present advised I could not have sustained them on either of these grounds."

¹ *Breatcliff v. Bransby's Trustees*, Jan. 11, 1887, 14 R. 307.

² *Greenock Harbour Trustees*, Jan. 31, 1888, 15 R. 343.

³ *Gardner v. London, Chatham, and Dover Railway Co.*, 1866-67, L. R. 2 Ch. Ap. 201; *Dundee Union Bank v. Dundee and Newtyle Railway Co.*, Jan. 25, 1844, 6 D. 521, 16 Scot. Jur. 237.

No. 108. (30 and 31 Vict. c. 126), was entitled to realise.¹ (3) This was not a municipal security in the sense of the Trusts Act. What the statute had in view was clearly a corporation connected solely with the civic life of the community. The Greenock Harbour Trust no doubt included the Town-council of Greenock just as the Clyde Trust did, but neither of these bodies had to do with civic life. The trust had no power of taxing, but merely a restricted right of levying harbour dues.

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Argued for the respondents ;—The Lord Ordinary was right. (1) The security was of a class analogous to those already sanctioned by the Court.² It might be a bad security of a permitted class, but that did not entail liability for loss on the factor. (2) The security was a real security in the sense of the Trusts Act. "Real" had a wider meaning than "heritable." If it were merely equivalent to "heritable," then the statutory provision was unnecessary, for heritable securities had long been recognised as competent. *Breachcliff's* case³ was directly in point. True, the word "real" there occurred in a will, but why should it have a different meaning in a statute? The decision was subsequent to the statute. The creditors of the Harbour Trust had a real right in the subject of their security, for they could take possession of it to the exclusion of everyone else. They were very much in the position of a heritable creditor in possession under a decree of mails and duties. The debentures did not merely express an obligation, they contained an assignment—a transfer of property—a transfer in perpetuity of the rates and dues. The observations of the Lord Ordinary in *Breachcliff's* case³ went too far if they meant that the factor of the railway undertaking, which was the subject of the security in that case, could dispose of or sell the undertaking at his own hand. He had no such power, but required the sanction of Parliament.⁴ The factor who might be appointed here was in the same position. There was no distinction therefore between the security held to be "real" in *Breachcliff's* case³ and the security here. (3) This was a municipal security. The harbour was originally, and indeed down to 1866, administered by the Town-council alone, and under their Acts they had expressly power to levy "rates." The fact that there had been a change in the administrative body, bringing in shipowners and others, did not make the trustees the less a municipal corporation, nor did it make any difference that it was a trust separate from the town-council. That was often the case with a water trust or gas trust.

At advising,—

LORD ADAM.—The late Mr Cowan was appointed curator bonis on the estate of Mr Ferrie. On the 8th June 1895 Mr Cowan's appointment was recalled, on the ground of age and ill-health, when Mr Bringloe was appointed curator bonis in his place.

In the course of auditing Mr Cowan's accounts, with a view to his

¹ *Haldane v. Girvan and Portpatrick Railway Co.*, March 18, 1881, 8 R. 669, and July 20, 1881, 8 R. 1003.

² *Grainger's Curator*, Feb. 23, 1876, 3 R. 479; *Lloyd's Curator*, Dec. 1, 1877, 5 R. 289.

³ *Breachcliff v. Bransby's Trustees*, Jan. 11, 1887, 14 R. 307.

⁴ *Haldane v. Rushton*, Dec. 10, 1881, 9 R. 253.

discharge, it appeared that he had, in the course of his management of the curatorial estate, invested in May 1882 a sum of £300 on a mortgage by the trustees of Port-Glasgow Harbour, and two farther sums of £700 and £970, in September 1882 and May 1887 respectively, on mortgages or assignments by the trustees of the ports and harbours of Greenock. As it appeared that a considerable loss would result to the estate on realising these investments, Mr Bringloe objected to Mr Cowan receiving credit for them, on the ground that they were not within the class of securities on which a curator bonis was, at his own hand, entitled to invest the curatorial estate.

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Mr Cowan has since died, and is now represented by his trustees, who have been sisted as petitioners in his place.

If the investments in question were within the class which Mr Cowan was entitled to take, it is not said that they are improper of their kind, or such as he should not have taken.

The sole question therefore between the parties is, whether Mr Cowan was entitled to invest the estate under his charge in securities of the class or kind in question, and I understand that both parties desire that his liability in that respect should be determined in the present proceedings.

Argument before us was confined to the assignments or mortgages by the Greenock Harbour Trustees, from which I conclude that there is no difference in effect between them and the Port-Glasgow Harbour mortgage.

By the assignment of 22d September 1882 the trustees of the Port and Harbour of Greenock, by virtue of the Greenock Port and Harbour Acts, 1866, 1867, 1872, and 1880, in consideration of £700 paid to them by Mr Cowan as curator bonis, bound themselves to pay to him as curator bonis foressaid and his successors in office, and his or their assignees, the sum of £700 on the 11th November 1889, with interest at the rate of 4 per cent (as per coupons or interest warrants delivered therewith), or in his or his foressaid's option should thereafter remain as a loan; and, subject to the provisions of the foressaid Acts, they thereby assigned and made over to him and his foressaid all and sundry the rates, duties, and other revenues of the trust payable to the trust in virtue of the said Acts, and all their right, title, and interest of, in, and to the same, to be held by the said assignee and his foressaid until the said sum of £700, with interest thereof, should be fully satisfied and paid.

The only statutory mode by which the mortgagees can enforce payment of their debts is, I think, to be found in the 69th and 70th sections of the Act of 1880.

By the 69th section it is enacted that the mortgagees may enforce payment of arrears of interest or principal, or principal and interest due on the mortgages, by the appointment of a judicial factor. In order to authorise the appointment of a judicial factor in respect of arrears of principal, it is provided, that the amount owing to the mortgagees by whom the application for a judicial factor shall be made should not be less than £5000 in the whole.

Section 70 enacts that the Sheriff may, on any such application, appoint some person to receive the whole or any competent part of the rates and

No. 108. duties and other revenues of the trust until all the arrears of interest or of principal, as the case may be, then due on the outstanding mortgages, together with all costs, including the charges of receiving the said rates and duties and other revenues, be fully paid. It is farther enacted that upon such appointment being made, all such rates, duties, and other revenues shall be paid to and received by the person so appointed, and that the money so received shall be so much money received by or to the use of the mortgagees, and that so soon as the full amount of any interest or principal in arrear and costs has been so received, the power of such judicial factor shall cease; and it is provided that such judicial factor shall distribute among all the mortgagees to whom interest or principal shall be in arrear, the rates and duties and other moneys which shall come into his hands, having respect in such distribution to the priorities, if any, of such mortgagees.

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Such is the investment or security in question taken by the judicial factor. It was maintained that it fell within the class of investments which a judicial factor was entitled to take under section 3 (b) of the Trusts (Scotland) Act, 1884, which, *inter alia*, authorises investments of trust or curatorial funds on real or heritable securities in Great Britain, and that this was a real security in the sense of the Act, or if not so, it was at anyrate a mortgage secured on rates and taxes levied under the authority of an Act of Parliament by a municipal corporation authorised to borrow money on such security, which is also permitted by the said Act.

The Lord Ordinary has arrived at the conclusion, although—as he says, with difficulty—that the competency of the investment by the curator may be sustained on the first of these grounds. I have been unable to arrive at the same conclusion. It will be observed that only one of the investments in question was taken subsequent to the Act of 1884, but if the curator would have been entitled to take such investments after the passing of the Act, it may well be maintained that he was entitled to retain them after the passing of the Act although taken before.

It will be observed that what is assigned by the mortgage in security of the debt are “all and sundry the rates, dues, and other revenues of the trust.” There is no conveyance or assignation of the undertaking itself in security of the debt. There are no means provided by the Harbour Acts by which the heritable subjects or real property of the trust can be attached or realised for payment of the creditors. As I have pointed out, the duty of any judicial factor who may be appointed under these Acts is limited to receiving and distributing the rates, dues, and other revenues of the trust. Moreover, the curator, as an individual creditor, could not put this remedy in force, because his debt is under the requisite amount of £5000.

Neither do I know of any process by which at common law the real property of the trust could be attached and applied for the payment of the creditors.

Moreover, it appears to me that when the Trusts Act authorised curators to invest in real securities, it meant securities in which the value of the real subjects pledged should be alone or primarily looked to or regarded as sufficient to secure repayment of the proposed loan. But in making a loan of the kind in question, the lender does not look to the value of the real pro-

perty as being a sufficient security for payment of his debt. What he primarily, if not solely, looks to, and in this case what he could only look to, is the amount of revenue earned by the harbour trustees as owners of a harbour,—that is, harbour dues and rates, and which are by the Acts appropriated to payment of the mortgages. I cannot think that a loan of this character is a loan on real or heritable security in the sense of the Act.

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The Court had to consider this question in the case of the *Greenock Harbour Trustees*.¹ The late Lord President there said,—“It must be observed that the securities which are granted for money advanced under this Act (1880) are not real securities in any proper sense of the term. There is nothing done by that Act to confer or make a real security.” This opinion was concurred in by the rest of the Court. I also concur in it, and think that the loan cannot be supported on the ground that it is a loan on real security.

With reference to the case of *Breachcliff*,² which seems mainly to have influenced the Lord Ordinary's opinion, that case appears to me to be essentially different from the present. In that case it was held that an English will which empowered the trustees to invest on real security authorised an investment on a railway mortgage. The ground of the judgment will be found in the Lord Ordinary (Lord Kinnear's) opinion,—“The question is,” he says, “whether a mortgage of the Girvan and Portpatrick Railway is a real security within the meaning of the power. I think it is, because it gives to the mortgagee the security of the whole undertaking,—that is, of the whole real and moveable property of the company. It is true that it is a security which cannot be made available to the creditor by the ordinary diligence of the law. But he has a different kind of diligence in his right to obtain the appointment of a judicial factor, through whose administration the undertaking may be managed or disposed of for the benefit of the company's creditors. The mortgagee has therefore the security of the real property, which is what is meant by a real security.”

In this case the mortgagee has not the security of the undertaking,—that is, the real property of the trust,—and a judicial factor would have no power to dispose of it for the benefit of the creditors.

The investment was further supported on the ground that it fell within section 3 (b), 12, of the Trust Amendment Act, as being a mortgage secured on rates or taxes levied under the authority of an Act of Parliament by a municipal corporation authorised to borrow money on such security.

The Greenock Harbour Trustees, which is the corporation granting the mortgages in question, consisted at that date of the Magistrates and Council of Greenock, and of nine persons elected by owners of or in ships to a certain extent registered in the Port of Greenock, and by certain ratepayers paying rates leviable on vessels or goods.

I am clearly of opinion that such a compound body cannot be considered a municipal corporation in the sense of the Act. I think a “municipal corporation” there means a town-council or county council, or some similar body. I also doubt whether the rates and duties which the trustees are

¹ 15 R. 343.

² 14 R. 307.

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entitled to levy, and which are payments made in return for services rendered, are of the nature of the rates or taxes referred to in the Act, which rather appear to me to be rates or taxes for payment of which the municipal corporation is entitled to assess the community.

The only question which remains is, whether the curator, in the exercise of his powers at common law, was entitled to make the investment in question.

On this part of the case, we were referred to the case of *Grainger's Curator*.¹ In that case the Court did no more than sanction the retention of certain investments which had been made by the curator. These investments were secured on rates leviable under the Aberdeen County and Municipal Buildings Act, the Sheriff Court-Houses Act, and the Aberdeenshire Road Act, and were reported by the Accountant of Court to be unexceptionable. These investments appear to be different in character from the present. There was no element of speculation in them. The sufficiency of the security depended solely on the power of assessing the community, whereas in this case the sufficiency of the security depended, as the result has shewn, on the success or nonsuccess of the harbour trustees in carrying on their business as owners of the Port and Harbour of Greenock.

In the case of *Lloyd's Curator*,² the Court held that railway debentures are not excluded from the class of investments allowed for factory funds, if the judicial factor and the Accountant thought the security a good one of its class.

I have already had occasion to point out the difference between a railway debenture and an investment like the present. I do not think that there is anything to be found in these cases to entitle the curator bonis to make the investments in question, and prior to these cases I do not think there was any law or practice entitling him to do so.

As I have said, no separate argument was addressed to us regarding the Port-Glasgow Harbour mortgage, and on the whole matter I am of opinion that the Lord Ordinary's interlocutor should be reversed.

LORD M'LAREN concurred.

LORD KINNEAR.—I am of the same opinion. I only desire to add, with reference to the case of *Breatcliff v. Bransby's Trustees*,³ that I think with Lord Adam that that case decides only that certain railway mortgages were within the class of securities authorised by a particular will. The decision rules so much as is necessary for that purpose, and nothing more. Counsel for the respondent referred to observations that were made in that case, for the purpose, as I understood the argument, of shewing that there is not really any such material difference as Lord Adam has held—and as I think rightly held—between the position of a judicial factor on a railway undertaking under the Act of 1867,⁴ and the position of a judicial factor appointed under the Acts now in question, inasmuch as the Court had ascribed to the judicial factor in the case of *Breatcliff*³ powers which he does not really possess; because it was said, and I think quite rightly, that a judicial factor cannot, at his own hand, dispose of a railway undertaking by selling it as a going concern. Now, I think the phrase on which that argument was based

¹ 3 R. 479.

² 5 R. 289.

³ 14 R. 307.

⁴ Railway Companies (Scotland) Act 1867 (30 and 31 Vict. cap. 126), sec. 4.

is not very exact; and, if it were intended, which does not seem probable, No. 108. to indicate that a judicial factor could sell a railway undertaking at his own hand, then I should think it unsound. Because it cannot be maintained Feb. 26, 1897. that the duties which Parliament has imposed and the powers which it has Cowan's Trustees v. Ferrie's Curator Bonis. conferred upon statutory corporations could be transferred in that way by an ordinary contract of purchase and sale, so as to enable the seller effectually to make over and deliver the subject of the contract to a purchaser. But then if that were a just criticism, it would only shake the authority of *Breatcliff*,¹ and would certainly afford no reason for carrying that decision further. But I see no reason to doubt that the powers of the judicial factor were quite correctly appreciated in the case of *Breatcliff*.¹ The real distinction which there is between the case of a judicial factor on the undertaking of a railway company under the statute of 1867 and the officer who may be appointed upon the application of the mortgagees in this case is very clearly brought out in the first case of *Haldane v. The Girvan and Portpatrick Railway Company*,² where the Lord President points out that by the appointment of a judicial factor under the statute then in question a new kind of diligence is given to the creditors, in place of the ordinary rights of which the Legislature had deprived them to the public benefit. And his Lordship makes it very clear what are the powers of a judicial factor, and that he actually enters into possession of the entire undertaking of the railway for the benefit of the creditors, with full powers of management for their benefit, and therefore his appointment enables the creditors, through him, to enter into possession of the subject of the security. That he may carry out his powers by ultimately disposing of the railway is made clear by the second case of *Haldane v. The Girvan and Portpatrick Railway Company*,³ because there the Court dismissed an application by the judicial factor to authorise him to receive offers for the sale of the railway, on the ground that it was superfluous, inasmuch as he had that power of necessity by his appointment, and was quite entitled and justified in making arrangements for receiving offers for a sale provisionally. But then his Lordship added, what is very obvious, that he could not carry out any contract of sale, and therefore could not make a binding contract of sale without coming to the Court for powers to apply for an Act of Parliament to carry out the contract. But the result of his position is that he is enabled to manage, and in certain circumstances to realise, the subject of the security for the benefit of the creditors.

Upon the other points of the case I agree entirely with all that Lord Adam has said.

The LORD PRESIDENT concurred.

THE COURT found that the £300 debenture of the Port-Glasgow Harbour Trust, and the £700 and £1000 debentures of the Greenock Harbour Trust, were not legitimate investments of curatorial funds, and that the petitioners, the trustees and executors of Mr James Cowan, were liable for the loss which had been incurred or might be incurred thereon, &c.

MENZIES, BLACK, & MENZIES, W.S.—CORNILLON, CRAIG, & THOMAS, S.S.C.—Agents.

No. 109. JOHN WHYTE (James Jaffray's Trustee), Pursuer (Appellant).—
Constable.

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JOHN HENDERSON MILNE, Defender (Respondent).—*W. Campbell*
—*W. Brown.*

Lease—Bankruptcy—Trust for creditors—Compensation.—By the lease of a farm, the landlord, in the event of the tenant becoming insolvent, had the option to terminate the lease, and in the event of his exercising this option he was bound to settle with the tenant as if the lease had naturally expired. Under the lease the tenant became entitled on its termination to the value of certain meliorations on buildings taken over by him from the previous tenant as the same might be fixed by arbitration, and the general regulations of the estate, which were incorporated in the lease, *inter alia* provided,—“The outgoing and incoming tenants must settle between themselves regarding the payment of crop, manure, and other things, without any responsibility on the heritor, unless the heritor choose to interfere.”

The tenant having become insolvent and having granted a trust-deed for behoof of his creditors, the landlord terminated the lease and let the farm to a new tenant. Thereafter the landlord and the trustee entered into a reference to have the value of the meliorations on buildings and of the manure, &c., fixed. Under this reference the value was fixed at £189, 1s.

The trustee having brought an action against the landlord for payment of this sum, the landlord pleaded compensation in respect of a sum of £197, 12s. 6d., being the amount of arrears of rent due by the tenant. The trustee maintained that the plea of compensation was ill founded in respect (1) that the landlord having the option under the lease of either leaving the tenant to settle with the incoming tenant for meliorations, manure, &c., or of himself settling with the tenant, the agreement under which he elected the latter course was to be regarded as constituting an obligation incurred to the trustee subsequently to the tenant's insolvency, to which (in accordance with *Taylor's Trustees v. Paul*, 15 R. 313) the doctrine of compensation was inapplicable; and in respect (2) that the landlord having (as the trustee averred) acceded to the trust, the trustee was vested in the tenant's right to the manure, &c., free of any obligation to compensate.

Held that both claims arose out of the contract of lease, and that the plea of compensation fell to be sustained.

Question (*per* Lord Moncreiff), whether, if the tenant's estates had been sequestrated, the plea of compensation would have fallen to be sustained.

Stewart v. Rose, Hume, 229, and *Dun v. Johnston*, Hume, 451, commented on.

2d DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

By lease dated 5th February 1880, John Henderson Milne, of Craigellie, Aberdeenshire, let the farm of Mosstown of Craigellie to James Jaffray for nineteen years, and crops from Whitsunday 1880, at the yearly rent of £56, 10s., upon the terms stipulated in the lease, and in the general regulations and conditions for farming of the estate of Craigellie prefixed to the lease.

In the regulations and conditions were, *inter alia*, the following:—“No. 2. In the event of the tenant's bankruptcy or public insolvency, he shall, in the option of the heritor, forfeit his lease, so far as unexpired at the time, and shall be bound to remove when required. It is also declared that, if the tenant shall fail to make payment of any of the half year's rent within six months after the term of payment, so that one year's rent shall be due and unpaid at one time, the lease shall thereupon, in the option of the heritor, become null and void, and the tenant shall be bound to remove when required. In the event of the heritor availing himself of these options, he shall be

bound to settle with the tenant as if the lease had naturally expired, No. 109. under deduction of damages, in the event of the possession being re-let by the heritor on less favourable terms. No. 10. The outgoing and incoming tenants must settle between themselves regarding the payment of crop, manure, and other things, without any responsibility on the heritor, unless the heritor choose to interfere. . . . All valuations or estimates to be by men mutually chosen, who shall have power to appoint an oversman to adjudicate upon the difference between them. . . .

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By the lease it was stipulated:—"With regard to houses, &c., the said James Jaffray binds himself to relieve the heritor of all claims of the outgoing tenant for meliorations, and, in particular, for" certain specified meliorations . . . "all as the same may be estimated by men to be mutually chosen. . . . And, at the expiry of this lease, the said James Jaffray shall be entitled to payment in like manner for the said meliorations as the same may then be valued. . . . And, if the mason work belonging to the heritor shall be deteriorated, the tenant must pay for the deterioration as the same be determined by valuation." There was also a provision prohibiting the tenant from removing the straw and dung.

On 19th July 1895 the landlord brought an action in the Sheriff Court at Peterhead against Jaffray for sequestration for a year's rent of £56, 10s., then current, for summary removing, and for payment of £215, 12s. 6d. sterling of arrears of rent.

On 6th August 1895 Jaffray granted a trust-deed for behoof of creditors in favour of John Whyte, decorator, Aberdeen.

Thereafter by joint minute between the landlord, on the one part, and Jaffray and his trustee, on the other part, it was agreed that decree should pass in the landlord's favour for £197, 12s. 6d. as the amount of the arrears of rent, that the landlord should receive payment of the rent secured under the sequestration, and that no further proceedings should be taken in the sequestration. The landlord subsequently let the farm to another tenant.

On 28th August 1895 a meeting of Jaffray's creditors was held. The minute of meeting bore that there was present, *inter alios*, "Duguid R. Milne, advocate, for the proprietor," and further bore that "a statement of the bankrupt's affairs was submitted to the meeting along with the trust-deed, and the same having been considered along with the valuation of crops, &c., the meeting instructed the trustee to realise the estate, and divide the same amongst the creditors."

In November 1895 the landlord and the tenant's trustee entered into a reference as to the value of the meliorations on buildings, and the straw, dung, &c. on the farm (the crops having been reaped by the trustee). Under this reference £125, 4s. was fixed as the value of the meliorations on buildings, and £63, 17s. as the value of the straw, dung, &c.

The trustee having brought against the landlord an action in the Sheriff Court at Aberdeen for payment of these sums, the landlord, founding on the decree in his favour for £197, 12s. 6d. of arrears of rent, pleaded—(5) This defender is entitled to set off against the sums sued for the sums due to him under the lease.

On 5th November 1896 the Sheriff-substitute (Brown) sustained this plea and assoilzied the defender.*

* "NOTE.— . . . The ultimate question in the case is a very simple one, and, in my opinion, is conclusively determined in the landlord's favour

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The pursuer appealed, and argued;—(1) It was settled that stipulations against the removal of dung, straw, &c., and obligations to hand them over to the landlord at a valuation, conferred no security or preference on the landlord as against the general creditors of the tenant; and a creditor who had executed a pouding was entitled to carry them off to the exclusion of the landlord.¹ Then the rights of the trustee under a trust for behoof of creditors were, *quoad* acceding creditors, the same as those of the trustee in a sequestration;² and the act and warrant of the trustee in a sequestration was equivalent to an executed pouding. It followed therefore that if the defender had acceded, the pursuer was *quoad* him in the position of a creditor holding an executed pouding, and was therefore vested with right to the dung, straw, &c., at least—but not, it might be admitted, to the value of the meliorations on heritable subjects—for behoof of the general creditors. There was therefore no *concursum debiti et crediti* between the defender's claim against Jaffray, the tenant, for the arrears of rent, and the pursuer's claim against the defender for the value of the dung, straw, &c. It was clear that the defender had acceded; the minute of 28th August made that plain. *Davidson's Trustees*³ relied on by the Sheriff-substitute, was not in point, because there the landlord had taken possession of the subjects of the stipulation before the tenant's bankruptcy, which was not the case here. (2) In any view, until the defender intimated his election himself to settle for the value of the meliorations on heritable subjects, dung, straw, &c., instead of leaving the settlement to the incoming tenant, there was no debt to be set off against the arrears of rent. The defender's obligation for the meliorations, dung, straw, &c., was consequently a *novum debitum* incurred by agreement with the pursuer, and such a debt could not be compensated by the defender's claim against Jaffray for the arrears of rent.⁴

Argued for the defender;—So far as the pursuer's claim was for the

by the judgment of the Court in *Davidson's Trustees v. Urquhart*, May 26th, 1892, 19 R. 808.

"The agreement was between the landlord and the outgoing tenant to ascertain their respective rights and obligations under the lease, and was nothing more.

"The trustee was in possession of the estate, no doubt, but, before he entered on that, the lease had been irritated, and he expressly admits on record that his possession was solely for the purpose of winding up the bankrupt estate; there was no agreement within the meaning of *Taylor's Trustee v. Paul*, January 24, 1888, 15 R. 313—an authority on which the pursuer laid particular stress, and there could be none such, because there was no covenant of any kind under the lease between him and the incoming tenant or between the incoming tenant and the landlord. It was urged that the landlord was barred from maintaining his present position by his actings as instructed by the minute No. 10 of process, but I cannot gather that Mr Duguid Milne, who represented him, did anything more than concur in a direction to the trustee to realise the estate. . . ."

¹ *Stewart v. Ross*, Feb. 2, 1816, Hume, 229; *Dun v. Johnston*, Jan. 28, 1818, Hume, 451; *Maclean's Trustee v. Maclean of Coll's Trustee*, Nov. 23, 1850, 18 D. 90.

² *Mill v. Paul*, Nov. 22, 1825, 4 S. 219; *Meldrum's Trustees v. Clark*, Dec. 13, 1826, 5 S. 122.

³ *Davidson's Trustees v. Urquhart*, May 26, 1892, 19 R. 808.

⁴ *Taylor's Trustee v. Paul*, Jan. 24, 1888, 15 R. 313.

value of fixtures, his case was unarguable. Fixtures were the property of the landlord, subject to the tenant's right to remove if he fulfilled the prestations of the lease, including of course payment of the rent.¹ *Quoad ultra* there was a clear case for compensation; both the claim and the counter claim arose out of the contract of lease, and nothing else.

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LORD TRAYNER.—I think the judgment of the Sheriff-substitute is well founded, and for the reasons which he very clearly states. I should have contented myself with saying so had it not been that the appellant referred to two cases which apparently were not brought under the notice of the Sheriff-substitute, and which were said to be contrary to the judgment which has been pronounced. These were the cases of *Stewart*² and *Dun*.³ In my opinion these cases are in no respect adverse to the judgment we are considering. It is a remark applicable to both of them, that no question was decided as to the right of the landlord to compensate or set off the arrears of rent due to him under the lease against sums due by him to his tenant for meliorations, or crop or dung left on the farm at the end of the lease. There was no question between landlord and tenant, or debtor and creditor, at all. The questions were between the landlord maintaining rights under the lease against creditors of the tenant, who had made their rights effectual against the tenant's estate by diligence. In the circumstances existing in these cases the creditors' diligence was held to prevail against the landlord's claim. There is no such question here. The parties are the landlord and tenant, or the tenant's trustee under a voluntary trust, which is the same thing in effect. Between these two parties there are mutual claims equally liquid, and arising out of the same contract. That being so, I can see no ground for refusing the landlord his right to plead compensation as he does. I think the appeal should be refused.

LORD MONCREIFF.—I am of the same opinion, and have little to add. The pursuer's claim against the landlord in respect of meliorations presents no difficulty, because the subjects on which they are said to have been made are *partes soli*, the fixed property of the landlord, and the bankrupt's claim can only be made good through the lease. The case is therefore ruled by *Smith v. Harrison*.¹

As regards the dung, straw, &c., the question is more difficult, because they are just the personal property of the tenant, over which the landlord has no security for his rent. A poinding creditor could have attached them—*Stewart*² and *Dun*³—and perhaps if sequestration had taken place the trustee, in virtue of his act and warrant, would have been in as good a position as a poinding creditor. On this, however, it is not necessary to express an opinion, because here there was only a voluntary trust for creditors, and I do not think it is satisfactorily established that the landlord acceded to it. If so, the trustee, the pursuer, is in no better position than the bankrupt, and the landlord is entitled to set off his counter claim.

¹ *Smith v. Harrison & Co.'s Trustee*, Dec. 22, 1893, 21 R. 330.

² *Hume*, 229.

³ *Hume*, 451.

No. 109. With these remarks I concur in Lord Trayner's opinion, and with the judgment proposed.

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The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

THE COURT dismissed the appeal, and affirmed the interlocutor of the Sheriff-substitute.

SIMPSON & MARWICK, W.S.—MORTON, SMART, & MACDONALD, W.S.—Agents.

No. 110. REV. WILLIAM RAINIE, Pursuer (Respondent).—*Jameson—W. Campbell.*

Feb. 26, 1897.
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Newton-on-Ayr.

MAGISTRATES OF NEWTON-ON-AYR, Defenders (Reclaimers).—*C. J. Guthrie—Hunter.*

Church—Stipend—Competent and legal stipend—Amount.—The magistrates, councillors, and freemen of a burgh were bound by decree of disjunction and erection of a parish to provide the minister serving the cure with a legal and competent stipend, in addition to a manse, cow's grass, and allowance for Communion expenses. In an action by the minister the Court (*aff. judgment of Lord Stormonth-Darling*), having regard to the number of the population, the duties entailed on the minister by the character of the parish, and the emoluments of neighbouring charges, fixed £300 as the amount of the stipend to be provided by the magistrates, councillors, and freemen.

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Darling.

(ANTE, vol. 22, p. 633.)

This was an action at the instance of the Reverend William Rainie, minister of the parish of Newton-on-Ayr, against the Magistrates, Councillors, and Freemen of the burgh of Newton-on-Ayr, and also against the Presbytery of Ayr for any interest they might have, concluding (1) for declarator that the defenders were bound to provide the pursuer, as minister of the parish of Newton-on-Ayr, with a competent and legal stipend suited to the circumstances of the time and position and duties of the benefice, and (2) for payment to the pursuer of £400 for each year, from Whitsunday 1892 to Whitsunday 1894, and for £400 a year thereafter "as a competent and legal stipend, . . . or of such other sum, less or more, as in the circumstances shall appear to our said Lords to be a competent and legal stipend, during the lifetime of the pursuer and his serving the cure."

Down to the year 1779 the parish of Newton-on-Ayr had formed part of the parish of Monkton and Prestwick, but in that year it was disjoined and erected into a separate parish by decree of the Lords Commissioners of Teinds. The decree provided, *inter alia*, that the magistrates, council, and freemen of the burgh should be bound to provide the minister with a competent and legal stipend not under £60 yearly, as also to pay him the rent of a house until a house should be built proper for his accommodation, which should be done as soon as convenient, and likewise to give him the liberty of a cow's grass to be herded with the town's cows on the common belonging to the community, and in like manner to furnish him with Communion elements, and an allowance for Communion expenses.

The pursuer was inducted to the charge of the church and parish in July 1881, and down to Whitsunday 1892 he received, in addition to the stipend of £60, a sum varying from £80 to £100 by way of gratuity, but the magistrates and council refused thereafter to pay

him more than £60, with the result that he raised this action in No. 110. 1894.

On 9th January 1895 the Lord Ordinary (Stormonth-Darling) found ^{Feb. 26, 1897.} "that on a just construction of the decree of disjunction and erection ^{Rainie v. Magistrates of Newton-on-Ayr.} the defenders were bound to provide the pursuer and his successors in office with a competent and legal stipend suited to the circumstances of the time, and the position and duties of the benefice, and therefore" decerned in terms of the declaratory conclusions of the summons, and appointed the cause to be enrolled that parties might be heard on the petitory conclusions. The defenders having reclaimed against this interlocutor, the First Division adhered on 6th June 1895.

Thereafter the pursuer lodged a minute containing a statement of the facts and circumstances on which he relied in support of his claim for a stipend of £400 per annum, and answers were lodged by the defenders.

The pursuer's minute contained statements to the following effect:—*Present Stipend and Emoluments.*—From 1882 to 1891 the annual payments received by the pursuer from every source (excluding the annual value of the manse) amounted on the average to £297, 3s. 10d. Since 1892 the average had fallen to £200, 4s. 10d. These payments included an Exchequer grant of £90, allowance for Communion elements, £8; cow's grass, £5; cowfauld's bond (representing the price of a part of the glebe which had been sold), £9, 10s.; glebe rent, £7; and Wood Bequest, about £18. The annual value of the manse, estimated at £36, and the allowances for Communion elements and cow's grass, should not be taken into account in fixing the amount of the stipend to be provided by the defenders, for under the decree of disjunction the burden of providing the minister with a manse, cow's grass, and an allowance for Communion elements, was separate from that of providing a competent stipend. The Wood Bequest Fund was settled by William Wood in 1876. By the terms of the settlement the income was to be paid to the minister of Newton-on-Ayr, to be applied by him "to his own uses and purposes, and that in addition to any sums that may have been or may hereafter be secured to him by way of stipend or otherwise."

Character of Parish.—The parish lay entirely within the parliamentary burgh of Ayr. In 1779 the population did not exceed 1600. In 1881 it had risen to 6511, and in 1891 to 8564. The population was mostly working class, with a considerable number of poor, and it fluctuated considerably, thus increasing the labours of the minister. The membership of the church at the last revision of the communion roll in 1895 amounted to 919. The pursuer's duties comprised two services every Sunday, the charge of a Sunday school attended by over 400 scholars, the conduct of two Bible classes, senior and junior, of which the former continued for the six winter months, and the latter for ten months in the year, the usual classes for intending communicants for four weeks twice a year previous to the half-yearly Communion. Besides his purely congregational work, a large amount of labour fell upon the pursuer as minister of the parish, such as visiting the sick and infirm, officiating at baptisms, marriages, and funerals, in families not connected with the congregation, and attending to the necessities of the poor. The average number of baptisms, marriages, and funerals, at which the pursuer officiated amounted respectively to 100, 36, and 54. These figures represented respectively 12, 20, and 10 per cent of the total number of baptisms, marriages, and funerals registered in the burgh and parish of Ayr, and as there were twenty

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churches belonging to different Christian denominations in the burgh of Ayr, it was obvious that a large proportion of these services in the burgh were performed by the pursuer. As nearly all the marriages, and a large proportion of the baptisms and funeral services, took place in private houses, the call on the pursuer's time was very considerable.

Comparison with other Parochial Benefices.—The pursuer gave particulars of a number of the other parishes in the presbytery of Ayr, with the object of shewing that his claim was reasonable.

Manse.—The glebe could not be feued without injuring the amenity of the manse.

The defenders' answers were to the following effect:—*Present Stipend and Emoluments.*—The gratuity was only withdrawn temporarily to meet the expense of repairing the manse. Taking into account the annual value of the manse, and the average amount of the gratuity, the average income of the pursuer from all sources was £323, 10s., which the defenders maintained to be more than a competent and legal stipend. All sums received by the minister, including the Exchequer grant, the value of the glebe, the proceeds of the cow-fauld's bond and Wood Bequest, the allowances for Communion elements and cow's grass, and the annual value of the manse, should be computed as part of the stipend which the defenders were under obligation to provide. Communion elements had always been supplied in addition to the allowance of £8. The cow's grass was originally furnished because there was no glebe, but a glebe having been provided the obligation to provide cow's grass was discharged.

Character of the Parish.—Although there were about 900 communicants on the roll of the pursuer's church, about one-third came from other parishes. In extent the parish of Newton-on-Ayr, which covered an area of 696 acres, was by far the smallest parish in the county, the next smallest being 3736 acres.

Comparison with other Parochial Benefices.—The defenders referred to the circumstances and emoluments of other charges in the Presbytery of Ayr in support of their case.

Manse.—The pursuer's glebe was valuable feuing ground, and if feued would yield a large revenue immediately.

On 6th November 1895 the Lord Ordinary pronounced the following interlocutor:—"Having considered the cause, finds that the pursuer, as minister serving the cure of the parish of Newton-on-Ayr, was and is entitled to receive from the defenders, the Magistrates, Councillors, and Freemen of the burgh of Newton-on-Ayr, for themselves, and as representing the whole body of the community of the said burgh, and their successors in office, stipend at the rate of £300 a year as a competent and legal stipend, from and after the term of Whitsunday 1894, so long as he shall serve the said cure, and that in addition to the Communion allowance, allowance for cow's grass, and interest payable under cowfauld's bond; and decerns and ordains the said defenders to make payment to the pursuer, as minister foresaid, of the sum of £300 sterling per annum, as a competent and legal stipend, and that at two terms in the year, Martinmas and Whitsunday, by equal portions, beginning the first half-yearly payment as at the term of Martinmas 1894, and so forth half-yearly and termly during the period of his serving the said cure. . . ."

* "OPINION.—I have carefully considered the circumstances of this benefice as set out in the minute and answers on which the arguments of counsel

The defenders reclaimed, and argued ;—The sum fixed by the Lord Ordinary was more than a competent and legal stipend. The result of his decision was that the pursuer would receive emoluments annually amounting, if the annual value of the manse were included, to £383, while the burden laid upon the small community of defenders, who had no power to tax anyone to defray it, would be increased from £60 to £300. The Lord Ordinary's decision was not justified by a consideration either of the circumstances of the cure or of the emoluments of neighbouring charges. At all events, in fixing the amount of stipend to be provided by the defenders, the other emoluments of the benefice should be taken into account; at least the annual value of the glebe and the proceeds of the cowfauld's bond should, for the defenders were placed under no obligation by the decree of disjunction to furnish the pursuer with a glebe.¹

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Argued for the pursuer ;—The discretion of the Lord Ordinary had been reasonably exercised, having regard to the circumstances of the case, and should not be interfered with. It was well settled that the value of the glebe could not be taken into account in fixing the amount of a minister's stipend.

LORD PRESIDENT.—At this stage of the case the question to determine is, what is a competent and legal stipend computed upon the footing that the minister is, as the decree bears, to have over and above it a house and a cow's grass and Communion elements. Now, that is a question to be determined with reference to the circumstances of the incumbency, and light, doubtless, is to be derived from similar or nearly similar cases, especially in the neighbourhood, and from what may be called the general payment in the profession. Now, the Lord Ordinary who has decided the case

proceeded. In particular, I have had regard to the allowances made down to 1892, by a committee representing the defenders, in supplement of the regular stipend. These allowances were made in the knowledge that owing to the fixed stipend being only £60, the minister received a grant of £90 from Exchequer, which will now, of course, be discontinued, and that his average receipts from all sources for ten years prior to 1892 were thus brought up to close on £300 a year. I have accordingly taken that sum as a fair estimate of what his regular stipend ought to be, but he will also be entitled to receive from the defenders the Communion allowance and the allowance for cow's grass, which form separate obligations in the decree of erection, and likewise a sum of £9, 10s., arising from a sale of part of the glebe. The return from the glebe itself is small, and would hardly affect the result, even if, contrary to the practice of the Teind Court, it were taken into account in fixing the amount of a competent stipend. The income of the Wood Bequest cannot, of course, be taken into account as a means of diminishing the burden resting on the defenders (late Lord President in *Kilmalcolm* case, 3 R. 32).

"I was urged by the pursuer's counsel, on the precedent afforded by the case of *Peters*, to draw back the award to Whitsunday 1892, when the defenders first refused to make any allowance in supplement of the stipend. But in this case it seems to me inadmissible to go further back than the date of citation. Till then there was no judicial demand for an increase of the competent and legal stipend. The arrears in *Peters*' case were awarded not at the rate fixed by the Court for the future, but at a rate which the Court held the defenders had themselves liquidated as the proper amount of stipend for the time being. There was nothing of that kind here."

¹ *Stewart v. Glenlyon*, May 20, 1835, 13 S. 787.

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happens to have had considerable experience in determining, I will not say the same question, but the similar question which arises when augmentations are asked for in the Court of Teinds, and though he has specifically mentioned a set of considerations as to the previous practice in this parish which perhaps have less bearing, his primary proposition is that he has carefully considered the circumstances of this benefice as set out in the appendix containing the minute and answers. Now, the minute and answers carefully go over the whole range of considerations which seem to be relevant to the determination of this question. I shall only say that looking to the population of this place, to the duties which the local circumstances seem to give rise to, to the character of the population, and having regard also to the emoluments of neighbouring ministers, it seems to me that the Lord Ordinary's figure is a very fair one.

I should perhaps consider it legitimate in the present case to take into account the existence of the glebe. As I have already mentioned, the manse and the cow's grass are expressly declared in the decree to be over and above the stipend, and therefore they cannot be taken into account. But suppose you do take into account the fact that this benefice has the advantage of a glebe, that would not substantially displace the legitimacy of the Lord Ordinary's conclusion, and I say that having regard to the other and similar cases noted in the various papers. Doubtless this is a question which might strike different minds differently, but upon the whole I am satisfied with the Lord Ordinary's decision.

LORD ADAM.—So am I. I think the true question is, whether this is a competent and legal stipend, giving effect to the considerations your Lordship has mentioned. I think the most material considerations to look to are the circumstances of the benefice itself, and what is the sort of average stipend in the surrounding and neighbouring parishes. Looking at the statements here, I do not think that the sum fixed by the Lord Ordinary is anything else than a competent stipend.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT adhered.

BOYD, JAMESON, & KELLY, W.S.—JOHN MACMILLAN, S.S.C.—Agents.

No. 111.

Feb. 27, 1897.
 M'Carthy v.
 Emery.

PATRICK M'CARTHY, Pursuer (Appellant).—*Guy*.

JOHN EMERY, Defender (Respondent).—*Orr*.

Process—Decree by default—Appeal—Reponing—Expenses.—No appearance being made for the pursuer of an action in a Sheriff Court at a diet of debate, the Sheriff-substitute assolized the defender. The pursuer appealed. *Held* that, as a condition of being allowed to proceed with the action, the pursuer must pay the whole expenses of the defender in both Courts.

THIS was an action raised in the Sheriff Court at Paisley by Patrick M'Carthy against John Emery for payment of £100 as damages for personal injury.

Defences were lodged on 20th November 1896, and, after the adjustment had been four times continued, on the motion of the pursuer, the record was closed on 24th December. On 12th January 1897

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 Sheriff of Ren-
 frew and Dute.

the Sheriff-substitute (Cowan) having heard parties' procurators No. 111. appointed the case to the roll of next Court for further procedure. On 19th January the Sheriff-substitute, "on the defender's motion," Feb. 27, 1897. because of the absence of the pursuer's agent, *McCarthy v. Emery.* continued the case to the roll of next Court. On 26th January the Sheriff-substitute, "in absence of the pursuer," assoilzied the defender, with expenses.

The pursuer appealed to the Court of Session and craved to be reponed.¹ He stated that the failure of the pursuer's agent to appear had been entirely owing to a misunderstanding.

The defender objected to the pursuer being reponed, and argued ;— The case had been repeatedly delayed on the pursuer's motion, and his agent had twice failed to appear at a diet of debate. He had been leniently treated, as the Sheriff might have pronounced decree of absolvitor on the first occasion on which no appearance was made for him.² Reponing was a matter in the discretion of the Court, and that discretion was only exercised on special cause shewn.³ None was shewn here.

LORD PRESIDENT.—The Court consider that, upon payment of all the expenses of process up to the present date, this absolvitor may stand aside and the case be proceeded with. The proper form seems to be to recall the interlocutor *hoc statu*, and allow the pursuer, as a condition of further procedure, to make payment of the whole expenses of process. If he does that, we shall send the case to the Sheriff Court ; if he does not, we shall of new assoilzie and dismiss the appeal.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT recalled the interlocutor of the Sheriff-substitute of 26th January 1897, and allowed the pursuer, as a condition of being allowed to proceed with the cause, to make payment of the whole expenses of the defender in both Courts.

PATRICK & JAMES, S.S.C.—INGLIS & ORR, S.S.C.—Agents.

MRS JANET JOHNSTON AND ANOTHER (Johnston's Executrices), No. 112.

Pursuers (Appellants).—*W. Campbell—Cullen.*

JOHN JOHNSTON, Defender (Respondent).—*A. S. D. Thomson—Abel.* Mar. 3, 1897.

Johnston's Executrices v. Johnston.
Lease—Quinquennial Prescription—Removal from the lands—Tenant becoming proprietor—Mora—Act 1669, c. 9.—The Act 1669, c. 9, enacts that "maills and duties of tennents not being pursued within five years after the tennents shall remove from the lands . . . shall prescribe in all time coming." The tenant of a farm having become its proprietor did not leave the farm but continued to occupy it as proprietor. More than five years thereafter he was sued for rent effeiring to the period of his occupancy as tenant. He pleaded the Act 1669, c. 9. *Held* that the Act did not apply, in respect that the defender had not removed from the lands.

Observations (per Lord Adam) on the plea of mora.

WILLIAM JOHNSTON, in 1856, purchased the lands of Blackfaulds or Easter Cardowan, taking the title in name of himself and his wife, ^{1st DIVISION.} Sheriff of Lanarkshire.

¹ *Hamilton v. Hamilton*, Nov. 13, 1824, 3 S. 283 ; *Leslie v. Edie*, March 1, 1828, 6 S. 674.

² *Sheriff Courts (Scotland) Act*, 1876 (39 and 40 Vict. c. 70), sec. 20.

³ *Morrison v. Smith*, Oct. 18, 1876, 4 R. 9.

No. 112. Mrs Marion Waddell or Johnston, in liferent, and his son, John Johnston, in fee.

Mar. 3, 1897.
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Johnston.

Mr William Johnston died on 23d July 1867. His widow died on 3d May 1884.

In 1896 an action was raised in the Sheriff Court of Lanarkshire, at Glasgow, by Mrs Janet Johnston and Miss Margaret Johnston, as executrices-nominate of Mrs Marion Johnston, against John Johnston, concluding for payment of £402, 14s. 10d.

The pursuers averred that, by trust-disposition dated 12th January 1858, Mr William Johnston and his wife, as liferenters, and the defender, as fiar, of the lands of Easter Cardowan or Blackfaulds, conveyed these lands to trustees for, *inter alia*, the following purposes (1) to allow Mr William Johnston and his spouse, and the survivor of them, the liferent of the lands; and (2) after their death to allow the defender the alimentary liferent of the lands.

In June 1876 the then acting trustees let to John Johnston, the defender, the lands of Easter Cardowan or Blackfaulds for seven years at the rent of £127, and the defender possessed the lands, under the lease and by tacit relocation, down to the date of Mrs Marion Johnston's death, but he failed to pay the rent.

The pursuers further averred that the rent, after deducting each year a sum of £50, to which the defender had been found entitled as equitable compensation,¹ which remained unpaid, amounted with interest to the sum sued for.

The pursuers produced an assignation by the trustees to the rents in question.

The defender stated, *inter alia*, that since the date of the termination of the lease he had been in possession of the lands as liferenter, that Mrs Marion Johnston had refused to take proceedings against him for the alleged rent,* and that the pursuers had made no claim therefor until they had pleaded it in compensation of a claim made by the defender against them in an action in 1893.

The defender pleaded, *inter alia*;—(1) The sums sued for are prescribed, and the action should be dismissed, with expenses. (2) In respect of *mora* the action should be dismissed, with expenses. (7) Pursuers or their mother having agreed to hold the sums sued for as discharged, the defender should be assoilzied.

On 9th December the Sheriff-substitute (Erskine Murray) sustained the defender's seventh plea in law, and assoilzied the defender.

The pursuers appealed, and argued;—The letter of 11th December 1878, on which the Sheriff based his judgment, was at most an indemnity to the trustees. It was not addressed to the defender, and

¹ Johnston v. Johnston, July 20, 1875, 2 R. 986.

* The defender referred to and founded on a letter, dated 11th December 1878, from Mrs Marion Johnston to the trustees, in the following terms:—“With reference to the arrears of rent of Cardowan due by my son John Johnston, your co-trustee, and to the correspondence which has passed between your agents and mine on the subject, I hereby acknowledge that owing to his inability to make payment it is not my desire to have same enforced, and I oblige myself, and my heirs, executors, and successors, to hold you skaitless (1) in respect of your not enforcing payment by action of said arrears; and (2) in respect of your not enforcing payment of the rents yet to become due by my said son, so long as I do not instruct you to enforce payment of the same.—In witness whereof, &c.” The letter was tested but not stamped.

was in no sense a discharge in his favour. The quinquennial prescription did not apply. The *terminus a quo* the five years commenced to run was the tenant's removal from the lands, not the termination of the lease.¹ The tenant here had not removed from the lands. Accordingly, the letter of the Act did not fit his case. Nor did the ratio, which was to protect tenants against the hazard of losing their discharges when removing from the lands.

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The respondent argued;—Even though the letter did not amount to an express discharge the defender was entitled to found on it as instructing an abandonment of the claim.² Many years had elapsed since the rent in question became payable, and the pursuers were barred by *mora*. The Act 1669, c. 9, applied. The defender, no doubt, was still in the occupation of the lands, but he had ceased to be tenant. It was not the physical personal removal of the tenant, but the termination of his occupancy *qua* tenant—when rent ceased to be exigible from him—that marked the period from which the years of prescription were to run. The cases cited by the pursuers were not in point. In *Murray*¹ the defender never was a tenant in the sense of the Act 1669. In *Strahorn*¹ the defender had not ceased to be a tenant, although he had come to have a new landlord.

LORD PRESIDENT.—We have two questions at least to consider.

The first is whether this claim, being one for rent, is struck at by the Act 1669, c. 9. Now, the terms of that Act, so far as it applies to claims of rent, are these:—"And likewise malls and duties of tennents not being pursued within five years after the tennents shall remove from the lands for which the malls and duties are craved shall prescribe in all time coming." This statute, of course, has the effect of cutting off what would otherwise be a good and legal claim. That being so, it seems to me that it is not legitimate to extend its terms beyond the case to which it is expressly applied. Now, it postulates the case of a tenant having removed from lands. What is the case of the defender in this action? He has not removed from the lands; on the contrary, he has stayed on them. It is quite true that he has lost the character of tenant, and stays on in the higher quality of proprietor, but the fact that he has acquired that higher right, and parted with the lower, does not bring about the event which is described in the statute, and that is, his removal from the lands. It appears to me that those words are so clear that they cannot be applied to a case where the tenant does not remove from the lands, but, on the contrary, ceasing to be a tenant, stays on the lands. On that ground I think we are in a position now to repel the plea, because technically put there is no case of removal from the lands stated on record; on the contrary, it appears from the record that there is a case of staying on the lands.

The second question is whether the Sheriff-substitute's ground of judgment can stand; and I am of opinion that it cannot. The Sheriff-substitute, dealing with a case, which, as stated on record, is a case of abandonment by the creditor in a claim for rent, has picked out of the productions a letter addressed not to the debtor but to the trustees of the creditor,

¹ Murray, 1709, M. 11,054; Strahorn, 1739, M. 11,059.

² Hewats v. Roberton, Nov. 30, 1881, 9 R. 175.

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in which she says that she binds herself to keep them skaitless from any claim arising from their not demanding the rent. I do not think that it is possible to treat that as a writ instructing a discharge of this claim. It may have a place in the case, once the facts are ascertained, and may support or corroborate the other averments made by the defender. But it seems to me—and indeed I think it was only faintly argued to the contrary—that the Sheriff-substitute has been premature in treating this as a conclusive ground of judgment.

What I have said leads to the first plea being repelled. As regards the second plea, I should like to make this remark. Scientifically speaking, I do not think it is supported by any averment, and I should be inclined to go further and say that the plea is bad in itself. But at the same time I think it would be safer not, *hoc statu*, to repel it, because that might be misconstrued into meaning that the element of delay should be eliminated from the consideration of the Judge in the Court below, to which I propose that the case should revert. Therefore it is perhaps more expedient not now formally to repel the plea, and the considerations which it is intended to embody may have their legitimate weight in combination with the other facts of the case.

LORD ADAM.—The first question in the rent case is whether the quinquennial prescription provided by the 1669 Act applies. I agree that it does not, because the point of time specified by the Act for the prescription beginning to run is the date when the tenant removes from the land.

I think that to bring a case under the Act, a defender must aver that he is a tenant who has *de facto* removed from the land, and that five years have elapsed since then. There is no such averment on record here, but the tenant is still on the land. It is true that the character in which he is there is different, because formerly he held as a tenant and now he does so as proprietor; but that is not the question under the Act, which is, whether or not in fact the tenant has removed. As he has not done so, I am of opinion that the Act has no application. I may observe that it appears from the arguments urged in all cases on this point that one of the reasons for this rule was the liability of a removing tenant to lose his documents of debt after his removal, which consideration does not apply to a tenant who never has removed; but this is not material, since the question of fact in the Act is quite clear.

As regards the judgment of the Sheriff-substitute, it was somewhat faintly supported, but it was suggested that the letter was a link in a chain of circumstances; but if this be so, what are the circumstances, and when were they proved?

In point of fact they are neither admitted nor proved, and accordingly I agree with your Lordships that there is no apparent foundation for the summary dismissal of the action. As to the remaining pleas, I think the plea of *mora* might have been dismissed had we been dealing strictly with the case. As I understand, prescription depends merely on the efflux of time, but *mora* not merely on this, which would make it equivalent to prescription; but the party founding on *mora* must shew that his position was prejudiced by the delay. But I should have been unwilling to repel the

plea, because, while it was admitted by Mr Thomson that he was not prejudiced by the delay, it may become an important element hereafter in connection with the subsequent proceedings in the case. No. 112.

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LORD M'LAREN and LORD KINNENR concurred.

THE COURT, *inter alia*, recalled the Sheriff-substitute's interlocutor, repelled the first plea in law for the defender, and remitted to the Sheriff to proceed.

WEBSTER, WILL, & RITCHIE, S.S.C.—W. & J. L. OFFICER, W.S.—Agents.

JOHN FERRIS, Pursuer.—*Comrie Thomson—M'Clure*. No. 113.
COWDENBEATH COAL COMPANY, LIMITED, Defenders.—*Salvesen—Deas*.

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Reparation—Master and Servant—Mines and Minerals—Defect in ways
—*Manholes—Employers Liability Act, 1880 (43 and 44 Vict. cap. 42), sec. 1, subsec. 1, and sec. 2, subsec. 1—Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58), sec. 49—General Regulations 14 and 16.*—Manholes constructed on the side of a roadway in a coal mine in terms of the Coal Mines Regulation Act, 1887, are part of the ways of the mine in the sense of the Employers Liability Act, 1880, and if a manhole in a mine is obstructed by rubbish in such a way as to justify a miner employed in the mine in believing that the manhole cannot be used, and he is injured in consequence of not using it, his employer will be liable to him in damages under the Employers Liability Act, 1880, provided that the obstruction arose, or had not been discovered or remedied, owing to the negligence of the employer or of some person in his service entrusted by him with the duty of seeing that the ways were in proper condition.

JOHN FERRIS, labourer, Cowdenbeath, raised an action in the 2D DIVISION. Sheriff Court at Dunfermline against the Cowdenbeath Coal Company, Sheriff of Fife. Limited, praying for £150 as damages under the Employers Liability Act, 1880.*

* The Employers Liability Act, 1880 (43 and 44 Vict. cap. 42), sec. 1, enacts,—“Where after the commencement of this Act personal injury is caused to a workman (1) by means of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer . . . the workman, or in case the injury results in death the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer, as if the workman had not been a workman of nor in the service of the employer nor engaged in his work.”

Sec. 2 enacts,—“A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say, (1) under subsection 1 of section 1, unless the defects therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.”

The Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58), sec. 49, enacts,—

General Rule 14,—“Every underground plane on which persons travel which is self-acting or worked by an engine, windlass, or gin, shall be provided (if exceeding 30 yards in length) with some proper means of communicating distinct and definite signals between the stopping-places and the ends of the plane, and shall be provided in every case with sufficient manholes for places of refuge, at intervals of not more than 20 yards, or

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The pursuer having appealed for jury trial, the cause was tried before the Lord Justice-Clerk and a jury on 18th December 1896.

The evidence was to the following effect:—At the time of the accident the pursuer was employed by the defenders as an oncost man at one of their pits, and had been ordered by Laird, a foreman and roadsman in the employment of the defenders, to clear a wheel-brae in the pit, on which hutches were worked by means of an endless chain. This wheel-brae was about 200 yards long, and at the side of the incline were manholes as required by the Coal Mines Regulation Act, 1887. The men got notice of the approach of hutches by the movement of the chain. In order to escape certain hutches which were approaching, the pursuer went to the nearest manhole, but finding it obstructed by rubbish, he did not enter, and was knocked down and injured by the hutches. There was a conflict of evidence as to the amount of rubbish in this manhole: the pursuer and another workman gave it as about $\frac{3}{4}$ of a ton, other workmen stated it at less. There was evidence to the effect that the rubbish had been put there by orders of Laird some days before. The manhole in its normal condition was about 4 feet 10 inches in height and 5 feet broad. Laird was dead at the date of the trial. Cochrane, the underground manager, gave this evidence:—“Laird and I responsible for state of brae. When I was not there, Laird responsible. The men had to obey his instructions. If I had seen the stuff, I would have ordered it to be removed. It was a breach of the rules. . . . I cannot account for four men taking a day to clear the road and manholes after the accident. Laird wrong in having stuff there.”

The jury returned a unanimous verdict for the pursuer, and assessed the damages at £50.

The defenders moved for a rule to shew cause why a new trial should not be granted.

Argued for the defenders;—There was here no defect in “the condition of the ways.” The word “condition” must be supposed to have some significance; “defect in the ways” was something different from “defect in the condition of the ways.” The former included defects whether temporary or permanent; the latter was confined to defects of a permanent character—defects of construction.¹ Here there was nothing more than a temporary obstruction, and further, a manhole was not part of the ways.

The Court intimated that they would take time to consider as to calling on the pursuer.

At advising,—

LORD JUSTICE-CLERK.—The pursuer's case before the jury was, that having been instructed to clear a wheel-brae, he, on the approach of a train of trucks or hutches, did what it was his duty to do in ordinary circumstances, viz., to make for the nearest manhole, which is a recess at the side of the

there is not room for a person to stand between the side of a tub and the side of the plane, then (unless the tubs are moved by an endless chain or rope) at intervals of not more than 10 yards.”

General Rule 16,—“Every manhole and every place of refuge shall be constantly kept clear, and no person shall place anything in any such manhole or place of refuge.”

¹ M'Quade v. William Dixon, Limited, July 19, 1887, 14 R. 1039; M'Giffen v. Palmer's Shipbuilding and Iron Co., Limited, 1882, L. R., 10 Q. B. Div. 5; Willetts v. Watt & Co. [1892] 2 Q. B. 92; Pegram v. Dixon, 1886, 55 L. J. Q. B. 447.

road intended as a place of safety when a train of trucks is passing. The nearest manhole that he came upon was one obstructed by stuff which had been placed on the bottom of it, and finding it in this condition he did not attempt to enter it. Whether there was enough of stuff in the manhole to prevent him from getting in or not, is not, I think, of very much consequence, because in the dim light, if he found the manhole obstructed, it was quite natural for him to think that it was not safe for him to make the attempt, and to consider some other expedient. Therefore, I do not think any blame attaches to him in what he did in that state of matters.

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The owners of the pit had constructed a good road and made manholes, and there is therefore no objection to the way in which the road was constructed—the condition of the roadway when it was constructed was satisfactory, the owners having done all that was necessary to be done. The question comes to be, whether a certain interference with that roadway took place in such a way, or whether the roadway was allowed to remain in such a condition, that the jury were justified in finding that the pursuer was entitled to a verdict.

Now, there is a great deal of conflicting evidence upon that subject—conflicting evidence as to the quantity of stuff that had been thrown into this manhole; and I think it is quite plain, and the impression I formed at the time was, that there was a good deal of exaggeration on the part of several of the witnesses in regard to that matter, but there is no doubt that before this accident happened a quantity of stuff had been put on the bottom of one of the manholes. Unless it was done by some person in a position of authority, however, the mere fact would not make the master responsible, because it was not an interference with the condition of any of the ways due to the master, and if done by some person for whom he was not responsible at the time at which it was done, there could not be any blame attached to the master. But it is quite plain that if such a state of matters was allowed to continue in the knowledge of the master, or was allowed to continue by someone for whom the master was responsible under the Act of Parliament, then it might become a defective condition of the way, because if it was left in that state it practically resulted in this, that instead of a manhole of sufficient height with the floor level with the rails being there, the manhole was not level with the rails, and was not of sufficient height.

Now, whatever impression I might form myself upon the evidence upon that matter, having seen and heard the witnesses, the real question is, whether the jury, upon the evidence which they had before them, rightly came to the conclusion that this state of matters was allowed to continue by the person who was responsible to see that the ways and plant and all these matters connected with the pit were in proper order—that it was allowed to remain by him so as to constitute a condition of the ways for which the master would be responsible. Having considered the notes of evidence, I have come to the conclusion that we have no grounds for holding that the jury were not justified, if they considered that to be the sound view of the evidence, in coming to that conclusion. There are one or two points in the evidence which are pretty strong in that direction. One is that the manager of the pit himself admits that such a state of things was wrong. He cannot

No. 113. account for the work of clearing it out afterwards taking the time it did, if it was only transferring a small quantity of stuff that was upon the floor of that manhole, and therefore there presumably was a considerable quantity of stuff; and if there was a considerable quantity of stuff, then it must have been, or ought to have been, seen by the roadsman, who was the person responsible by Act of Parliament for seeing that the ways were kept in proper order.

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Therefore, as I think there was material evidence here upon which the jury might return the verdict complained of, I have come to the conclusion that a new trial ought not to be granted.

LORD YOUNG.—I agree.

LORD TRAYNER.—The case presented to us as the ground on which a new trial ought to be granted is, as I understand, rather a question of law than a question of fact. I understood Mr Salvesen to argue to us that there could be no liability here, because in the proper legal sense there was no defect in the ways in this pit in respect of which the master should be made liable to the pursuer in the damages claimed. Now, the pursuer's right is based on the Employers Liability Act, which provides that a master shall be liable for damage done to his servant from any defect in the condition of the ways. But then it qualifies that by saying that the master shall not be liable unless the defect arose, or had not been discovered or remedied, owing to the negligence of the master, or some person in his employment to whom he had entrusted the duty of seeing that the ways were in proper condition. It was said that in this case the way—the underground plane—by which the workmen travelled was in itself complete; that there was no defect; and I do not think that that is disputed. There could not therefore be any liability for damages on that account under the section of the Act to which I have just referred. But the Mines Regulation Act prescribes that not only shall there be a free unencumbered way along which the men may travel, but that in all these ways there shall be what are called manholes into which persons travelling along can find a safe resort in the event of hutches passing along the way by which they are travelling. These manholes are as essentially part of the way as the plane on which the traveller walks. Therefore if there was any defect in the manholes, there was a defect in the way which the employer is required to keep clear and in good condition. The evidence shews that the manhole to which the pursuer resorted when he was in danger was filled with rubbish—I do not mean absolutely full, but to some extent filled with rubbish which certainly should not have been there, because the statutory requirement is, that these manholes or places of refuge shall always be kept clear. There is a positive enactment to the effect that "Every manhole and every place of refuge shall be constantly kept clear, and no person shall place anything in any such manhole or place of refuge." Now, that statutory obligation on the part of the masters was disregarded, and they will be responsible for that under section 1 of the Employers Liability Act, unless it can be shewn that they fall within the exception of subsection 1 of section 2, which I have referred to. It appears from the proof upon this matter that the duty of keeping the ways clear was entrusted to a man named Laird, and I

think there is evidence to shew that Laird neglected his duty, and that it was in consequence of that neglect on his part to keep clear these manholes that the accident occurred. That being so, I have no difficulty in arriving at the conclusion that there was, both in law and in fact, good ground here for the verdict, and therefore, like your Lordship, I am not disposed to grant a new trial.

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LORD YOUNG.—I wish to say that I concur with what Lord Trayner has said as to the law of the matter. I think that the master is liable in law and in fact.

LORD MONCREIFF.—I am of the same opinion as the rest of your Lordships. I think the manhole was part of the ways, and that it was so obstructed as not to be able to be used, and that that was a defect in the ways. I think there was evidence to justify the jury in coming to the conclusion that this manhole was obstructed, not in a casual or temporary manner, but in such a manner as to prevent the pursuer, the man who was injured, from taking refuge in it, and that that was due to the fault of the person Laird who was entrusted with seeing that the ways were in a proper condition.

In these circumstances I think the verdict should be sustained.

THE COURT refused the motion.

FRANK M. H. YOUNG, S.S.C.—W. G. L. WINCHESTER, W.S.—Agents.

JOHN YOUNG AND OTHERS (Turner's Trustees), First Parties.—
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GEORGE TURNER, Second Party.—*Balfour—Clyde.*

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MRS AGNES YOUNG, Third Party.—*Balfour—Clyde.*

AGNES TURNER AND OTHERS (Joseph Turner's Children), Fourth Parties.—*Balfour—Clyde.*

MRS M'CONNELL AND OTHERS (William Turner's Grandchildren), Fifth Parties.—*Johnston—Lyon Mackenzie.*

Succession—Testament—"Issue."—Held that a destination to a person's "issue" in the ordinary case includes not children only but direct descendants of every degree, *per stirpes*.

A testator directed his trustees to hold the residue of his estate for behoof of his children in liferent and "of the respective issue of my said children" in fee, and with a destination over in favour of the surviving children in the event of any child dying without leaving issue.

Held that a child of the testator who died leaving grandchildren but no children had not died without leaving issue in the sense of the deed.

Young's Trustees v. M'Nab, July 13, 1883, 10 R. 1165, *commented on*.

JAMES TURNER died on 2d April 1861, leaving a trust-disposition and settlement by which he conveyed his whole estate to trustees for certain purposes.

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The residuary purpose was as follows:—"I direct my said trustees to hold the residue and remainder of my means and estate in equal proportions, share and share alike, for behoof of the children already born or who may yet be born to me (exclusive always of the foresaid James Turner, whom I hereby debar from any share or interest in said residue), and the survivors and survivor of them, but in liferent only for their respective liferent use thereof allanarly, and for behoof

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of the respective issue of my said children *per stirpes* in fee: But I hereby provide and declare that in the event of any of my said children predeceasing me (excluding always the foresaid James Turner) leaving issue of his or her body, such issue, if surviving at the time of my death, shall succeed to the share of said residue which would have fallen to the parent in *liferent* and his or her issue in fee had such parent survived me; and in the event of the death of any of my said children, whether the same shall happen before or after my own death, without leaving issue, the share of such deceasing child or children shall go and belong in equal proportions to my surviving children, excluding always the said James Turner, the families of a deceased child or children representing the parent and succeeding to the share that would have fallen to such parent if in life."

The testator was survived by several children. One of these, William Turner, died in 1895, leaving no children, but survived by three grandchildren, Mrs Mc'Connell and Mrs Russell, the children of his daughter Isabella, and Catherine Turner, the only child of his son James.

The question then arose, whether these grandchildren of William Turner were entitled to his share.

A special case was presented, in which the foregoing facts were narrated:—

The trustees of the testator were the first parties; George Turner and Mrs Agnes Turner or Young, the testator's surviving children, the second and third parties; the children of Joseph Turner, a son of the testator who had died, fourth parties; and William Turner's grandchildren the fifth parties.

The following were the questions submitted to the Court:—

"(1) Does the income of the residue of the late James Turner's estate, so long as such residue remains in the hands of the trustees, fall to be divided equally between the second, third, and fourth parties *per stirpes*? Or (2) Does it fall to be divided equally between the second, third, fourth, and fifth parties *per stirpes*? (3) Have the fifth parties now a vested right in the fee of the share of residue of which their grandfather, William Turner, possessed the *liferent*?"

Argued for the first, second, third, and fourth parties;—The question came to be this, were William's grandchildren "issue" of William? The word issue had no technical meaning in the law of Scotland as in England,¹ but in a popular sense it was exclusive of grandchildren.² The case of *Macdonald v. Hall*³ was concerned with a marriage-contract, and it was held that grandchildren were within the contemplation of the marriage-contract, and not strangers to it. The use of the word "families" shewed that issue must be restricted to children.

The fifth parties argued;—"Issue" in ordinary popular phraseology included direct descendants of every degree. *Young's*² case so far as it was an authority to the contrary had been overruled by *Macdonald v. Hall*.³ The use of the word families was quite in accord with the ordinary meaning of issue.⁴

¹ *Ralph v. Carrick*, 1879, L. R., 11 Ch. Div. 873, James, L. J. at p. 883.

² *Young's Trustees v. M'Nab*, July 13, 1883, 10 R. 1165.

³ *Macdonald v. Hall*, July 24, 1893, 20 R. (H. L.) 88; 2 M'Laren's Wills and Succession, 770.

⁴ *Irvine v. Irvine*, July 9, 1873, 11 Macph. 892, 45 Scot. Jur. 546.

At advising,—

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LORD KINNEAR.—The question in this case is whether certain great-grandchildren of the testator are entitled to share with his grandchildren *per stirpes* in the residue of his estate. By his trust-disposition and settlement the deceased James Turner directed his trustees—[His Lordship quoted the residuary clause].

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The testator died on the 2d April 1861 survived by seven children, six of whom were entitled to participate in the liferent of the residue. Of these the second and third parties, George Turner, and Mrs Young, are the only survivors. The others died without issue, except Joseph, who died on the 24th of January 1867 leaving five children, who are the fourth parties to this case, and William, who died on the 1st July 1895 predeceased by two children, Mrs Wylie and James Turner, the former of whom left two children and the latter one child. These three grandchildren of William Turner are the fifth parties, and the question is whether they are entitled to participate in the residue. This may be stated in two forms, whether the testator's great-grandchildren can take under the gift in favour of the respective issue of his children, and whether the gift over in the event of the death of any of the children without leaving issue takes effect in a case where the child has left grandchildren by children who had died before him. In either form the question seems to me to be one and the same, and to depend on the construction which ought to be given to the word issue. It was decided in *Young's Trustees v. M'Nab*,¹ that in the law of Scotland the term issue has no technical meaning. The Lord President says,—“I think ‘issue’ and ‘lawful issue’ are merely words of popular signification, and that we must take them to mean just what we can gather to be the meaning intended to be attached to them by the testator so far as we can apprehend it in the ordinary way by examining the whole terms of his settlement.” Now, if the term is not technical, the general rule for construing the will is that stated by Lord Blackburn in the *Caledonian Railway Company v. The North British Railway Company*.² “There is not much doubt about the general principle. Lord Wensleydale used to enunciate (I have heard him many and many a time), that which he called the golden rule for construing written instruments. I find that he stated it very clearly and accurately in *Grey v. Pearson*,³ in the following terms:—‘I have been long and deeply impressed with the wisdom of the rule now I believe universally adopted, at least in the Courts of law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of words is to be adhered to, unless that would lead to some absurdity, or some repugnancy, or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further.’” Now, it appears to me that in the ordinary sense the word issue includes direct descendants of every degree, and therefore that a gift to the issue of the testator's children will take effect

¹ 10 R. 1165.² 8 R. (H. L.) 23, L. R., 6 App. Cas. 114.³ 6 H. L. Cas. at p. 106.

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in favour of their grandchildren, and that a gift over in the event of a child leaving no issue will not take effect if the child dies leaving grandchildren, although their parents, his immediate children, have died before the succession opens.

The question is this, whether, according to the ordinary use of language, a man who has died leaving grandchildren surviving him can be said to have died without issue. I think not, and that would be enough for the decision, were it not for the difficulty which arises from the observations of Lord Shand in the case of *Young's Trustees v. M'Nab*,¹ where his Lordship quotes as decisive the opinion of Lord Justice James in the case of *Ralph v. Carrick*.² "The word issue is an ambiguous word. In the ordinary parlance of laymen, it means children, and only children. When you talk of what issue a man has, or what issue there has been of a marriage, you mean children, not grandchildren or great-grandchildren. But in the language of lawyers, and only in that language, it means descendants." His Lordship therefore holds that the word has a technical meaning in the law of England which is different from its ordinary meaning, and in this view we should be bound in construing a Scotch will to give the word a different meaning from that which it would bear in an English will, inasmuch as we must hold that it has no technical meaning in the law of Scotland. In construing words of ordinary language, I should be disposed to defer to the authority of an English Judge of the eminence of Lord Justice James. But his Lordship's construction does not appear to me to be altogether in accordance with other authorities. It is not consistent with the definition of Dr Johnson, which is of the highest authority upon a question as to the ordinary meaning of English words. And what is more important, it appears to me to be inconsistent with the decision of the House of Lords in the case of *Macdonald v. Hall*,³ where it was held that a conveyance to the issue of children of a marriage conferred a protected right of succession on a grandchild. The Lord Chancellor quotes the following passage from Erskine:—"The father lies under no degree of restraint in favour of the substitutes who are called by the marriage-contract after the issue of the marriage, and who acquire no right by such substitution." And he adds,— "Now, it seems to me that in the natural meaning of the words 'issue of the marriage,' the grandchildren are included as much as the children. I do not accede to the argument that the primary meaning of 'issue' is children only, and that it is departing from the primary meaning if in 'issue of the marriage' you include the children of children." I do not understand his Lordship in this passage to be giving the technical meaning of the word in English law. He is construing the language of a Scotch institutional writer for the purpose of ascertaining the true meaning of a Scotch marriage-contract. I think his Lordship's construction is binding upon us, and that we are therefore relieved of the difficulty which might otherwise have been created by the opinions to which I have referred in *Young's Trustees v. M'Nab*¹ and in *Ralph v. Carrick*.²

Now, if the word "issue" in its primary meaning includes the children of children, and not the immediate children only, I think there is nothing

¹ 10 R. 1165.

² L. R., 11 Ch. Div. 873.

³ 20 R. (H. L.) 88.

in the context which requires us to depart from the ordinary meaning and to give the word a more restricted signification. No. 114.

On the contrary, if we are to gather the meaning which the testator intended to attach to his language by examining the whole terms of his settlement, we should in my opinion be forcing upon the words a meaning for which there is no justification if we were to hold that in the event which has happened he intended to cut out the grandchildren of his son William from all share in the succession. Mar. 4, 1897. *Turner's Trustees v. Turner.*

I am therefore of opinion that we should answer the first question in the negative and the second and third questions in the affirmative.

LORD M'LAREN.—I have endeavoured to keep an open mind to the arguments which have been addressed to us in favour of the more limited construction of the word "issue," especially when I find a difference of opinion existing amongst Judges of high authority as to the meaning of the word in ordinary parlance. I must candidly admit that I had formed an opinion before hearing the argument, an opinion, however, which I was quite prepared to abandon if convinced. There are some points on which a Judge must have a formed opinion, *e.g.*, as to whether a destination to "issue" or "heirs of body" would carry estate to collaterals. This being premised, it is natural to go on and consider whether "issue" applies to other descendants than children. Accordingly, in a work published by me as a private individual¹ for the guidance of practitioners, I expressed an opinion—and it has been confirmed by the very satisfactory discussion which we have heard—in accordance with the judgment proposed by Lord Kinnear. I have only to mention, in addition to the cases referred to by his Lordship, a case of historical interest, viz., that in the Act settling the Crown upon William and Mary and their royal successors, the expressions "issue" and "heirs of the body" are used interchangeably, so as to convey the impression that they are words of identical meaning. In the different branches of succession the crown is settled on an individual and the "heirs of his body," and then the Act goes on to say that on the failure of "issue" the other branch is to come in. This may be good authority for the technical meaning given to the word by Lord Justice James, but I think it is also good authority for the ordinary meaning, because the question determined by the Act is one interesting all the subjects of the empire, and the Act is not to be regarded as a purely English Act of Parliament.

I agree with Lord Kinnear that if it is determined that "issue" comprehends descendants of all degrees, the answers to be given to the questions in the case present no difficulty.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT answered the first question in the negative and the second and third questions in the affirmative.

WEBSTER, WILL, & RITCHIE, S.S.C.—MILL, BONAR, & HUNTER, W.S.—Agents.

No. 115. THE BRITISH WORKMAN'S AND GENERAL ASSURANCE COMPANY, LIMITED,
Pursuers.—*D.-F. Asher—Sol.-Gen. Dickson—Christie.*

Mar. 4, 1897. JAMES STEWART, Defender.—*Balfour—C. J. Guthrie—W. Campbell.*
British Workman's and General Assurance Co. v. Stewart.

Slander—Veritas—Counter Issue.—In an action of damages by an insurance company for slander, in respect of statements alleged to be contained in a speech delivered by the defender, the pursuers obtained an issue "whether the said statements falsely and calumniously represent that the accounts issued by the pursuers had been falsified, and that their financial position was at the date of the speech unsound." The defender pleaded *veritas*, and proposed as counter issues—" (1) Whether the pursuers knowingly deposited with the Board of Trade accounts and valuations which were calculated and intended to mislead the public? (2) Whether the pursuers' financial position is unsound?"

The Court *disallowed* the counter issues, on the ground that they did not meet the pursuers' issue.

Process—Jury Trial—Motion for postponement of Trial.—Circumstances in which the Court *refused* a motion for the postponement of a jury trial.

1ST DIVISION. ON 18th May 1896 the British Workman's and General Assurance Company, Limited, Birmingham, raised an action against James Stewart, managing treasurer of the City of Glasgow Friendly Society, 6 and 8 Richmond Street, Glasgow, for £2000 as damages for slander.

The pursuers alleged that they and the City of Glasgow Society were competitors in business, and in 1895 that society, in pursuance of a scheme for filching away the pursuers' business and transferring it to themselves, had published and circulated in various towns in Scotland an injurious circular, and had also, through its agents, circulated verbally slanderous statements to policy-holders and others regarding the pursuers, and that the proceedings were instigated by the defender.

Cond. 4. "On 7th March 1896 a meeting of members of said society resident in Kilsyth and neighbourhood was held in the New Masons' Lodge, Market Place, Kilsyth. This meeting was addressed by the defender, who, after giving statistics as to his own society, went on to attack pursuers in the following terms:—'Personally, I am satisfied that if the rival institutions which are represented in your town were subjected to the severe test which, of our own accord, we determined should be applied to the City of Glasgow Friendly Society, the majority would shew as large if not a larger sum as deficiencies than we show as surpluses. I fear that with many of these institutions the determination arrived at before the work of valuation is fairly begun is that by hook or crook a surplus must be brought out. Such a result may have on the surface a satisfactory look, but if the methods are known by which the surplus is obtained, would the public feel satisfied in putting their trust in such offices? Better far to have a deficiency wrought out on honest lines than a surplus obtained by calculations which no actuary worthy of the name would justify. I have heard that rather peculiar means were resorted to by one of these institutions to obtain a surplus and so to quiet the poor policy-holder. The actuary of the British Workman Company in a circular states that, by special resolution of the directors, he was authorised to make a valuation assuming the rate of interest at 3½ per cent, but the results of this valuation were of so unpleasing a character that the manager instructed the valuer to take the 4 per cent tables. After doing so, a deficiency of £69,360 was shewn.

Thereafter the directors decided to deposit accounts with the Board of Trade, setting forth a surplus of £21,577 instead of the actual deficiency of £69,360, and the valuer was instructed to prepare those accounts. The valuer, with commendable honesty, refused to have anything to do with the making up and publication of valuation accounts calculated to deceive anyone not acquainted with the subjects. The directors thereafter wrote their valuer that, as he had declined to act upon the instructions of the board, his services were no longer required. The public will not, I feel sure, consider that a valuation with a surplus obtained by the mere demand of the directors is worth the paper it is written on. It is to be hoped that few institutions are in such a pitiable plight as that to which I have just referred, but it must be admitted on the other hand that the City of Glasgow stands well in the fore-front in the matter of industrial insurance, and with the growing intelligence of the working-classes of the community I am sure that its superiority will be increasingly appreciated.' The said speech was delivered by defender in the presence and hearing of, *inter alios*, . . . The statements in said speech of and concerning the pursuers were false and calumnious. Said speech represents, and was intended to represent, that the accounts of pursuers had been deliberately and dishonestly falsified or manipulated, and that their financial position was at the date of the speech unsound. The said speech is of and concerning pursuers, and is false and calumnious, and is to the loss, injury, and damage of the pursuers in their legitimate business as an insurance company, and was maliciously made by the defender for the purpose of injuring the pursuers' business."

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The pursuers also averred that a report of this speech had been inserted in the *Kilsyth Chronicle* of 14th March 1896 with the approval and authority, and at the instigation of the defender.

The defender, *inter alia*, pleaded;—*Veritas*.

After various procedure, the following issues were on 3d November 1896 adjusted in the Inner-House for the trial of the cause:—

"(1) Whether, on or about the 7th day of March 1896, at a meeting of members of the City of Glasgow Friendly Society, held in the New Masons' Lodge, Market Place, Kilsyth, the defender, in the presence and hearing of James Good, chairman, William Fyfe, secretary, Russell, one of the board of management, and A Breton, agent, all of said society, and of others, falsely and calumniously made the statements set forth in the first schedule appended hereto,* or statements of similar import and effect, of and concerning the pursuers, and whether the said statements falsely and calumniously represent that the accounts issued by the pursuers had been falsified, and that their financial position was at the date of the speech unsound, to the loss, injury, and damage of the pursuers? Damages laid at £400. (2) Whether the defender caused a report containing the statements set forth in the first schedule appended hereto to be published in the issue of the *Kilsyth Chronicle* of 14th March 1896, and whether the said statements are of and concerning pursuers, and falsely and calumniously represent that the accounts issued by the pursuers had been falsified, and that their financial position was at the date of their publication unsound, to the loss, injury, and damage of pursuers? Damages laid at £400."

* The schedule referred to contained the speech quoted in cond. 4.

No. 115. The following counter issues were proposed by the defender :—“(1) Whether the pursuers knowingly deposited with the Board of Trade accounts and valuations which were calculated and intended to mislead the public? (2). Whether the pursuers’ financial position is unsound?”

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On 19th January 1897 the pursuers objected to these counter issues, and argued ;—The charge of falsifying accounts was a serious one, and the counter issues did not come up to it.

Argued for the defenders ;—They were entitled to take a separate and material part of the averments, if it was separable, and justify it, and here they were dealing with the substantive part.¹

LORD PRESIDENT.—It seems to me to be perfectly impossible to grant these counter issues as they stand. The theory of them seems to be that as an answer to the first issue they would be entitled to prove as a separate proposition their first counter issue, and then try their hand at the second counter issue. Now, it is quite plain that at the very best they could only get counter issues of this kind if the two were consolidated,—that is to say, they would require to prove both the intention to mislead the public and also the fact of financial unsoundness before they could succeed. But it seems to me that the first counter issue does not come up to the issue to which it is opposed.

It has been said that there is authority for holding that a part of a libel may be justified, but that is quite a different question from what arises once the issues are adjusted for the pursuer, because nobody ever heard of a counter issue being lodged which only justified part of the issue to which it is an answer. I am for refusing the counter issues.

LORD M’LAREN.—I am of the same opinion. I think the negative of the charge made in the principal issue would be that the company, knowing their financial position to be unsound, had represented that they were solvent. But it is not proposed that we should grant an issue in these terms.

LORD ADAM and LORD KINNEAR concurred.

THE COURT refused the counter issues, and opened up the record ; allowed an amendment contained in a minute for the defenders, and allowed an answer for the pursuers to the amendment to be received.

On 5th February 1897 the Court allowed the pursuers to amend their record in terms of the answers lodged by them to the defenders’ minute of amendment, of new closed the record, and appointed the trial to take place on 5th March 1897.

On 19th February the pursuers moved the Court for a special jury. This motion was granted.

On 4th March the pursuers applied for a postponement of the trial.

The pursuers argued ;—The matter was one for the discretion of the Court, and there were grounds for that discretion being exercised in pursuers’ favour. The amendment which the defenders had been allowed to make challenged the pursuers’ financial position subsequent

¹ M’Neill v. Rorison, Nov. 12, 1847, 10 D. 15, *per* Lord Moncreiff, p. 25, 19 Scot. Jur. 662.

to the decennial examination of their accounts made in 1892, in accordance with the Board of Trade regulations. That involved an investigation into an enormous number of current policies, and the experts whose aid had been required had not been able to overtake the work. Further, the pursuers' manager was too ill to attend the trial, and he was an absolutely essential witness in an inquiry of this magnitude. No prejudice would be suffered by the defenders if the trial were postponed. On the other hand, the only alternative which the pursuers had was to abandon the action. It was unnecessary, and would be therefore unjust, to force them to do so.

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The defenders argued;—The action having been raised in May 1896, there had been ample time for the pursuers—who must be taken to have known their own case—to prepare their evidence. *Sibi imputent* if they did not commence their preparations in time. There was no precedent for a trial being postponed in order to allow of expert evidence being obtained. The pursuers had waited until the defenders had put in their documents eight days before the trial, and it was too late after that to make the application. Further, it was not said that the manager was too ill to be examined, but only that he was too ill to attend the trial. He might be examined on commission. Delay would be most prejudicial, for there was a keen competition going on between the companies, and the action was being used as an instrument to damage the defenders.

LORD PRESIDENT.—This application has been made at a very late stage of the proceedings, and it is necessary to scrutinise carefully the grounds on which it is made. Now, the issues which ultimately determined what were the questions between the parties were adjusted and settled on 19th January 1897, and that allowed to the 5th March an interval of more than six weeks. The parties proceeded apparently in preparation for the trial on the issues so settled, and on the 19th February,—that is some time ago,—the pursuers, having apparently considered what the nature of the case was, proposed that a special jury should be summoned, and I should take that as evidence that they had seen the nature of the material which they were to place before the jury, and on that ground proposed a special jury. That, I think, is important, as shewing to the other party that the trial was to go on. Then there came next, and there passed, what in a case like this was a very critical stage, viz, the time (eight days before the trial) when documents had to be produced. The defenders duly tabled their states. Now, this is a case where manifestly, on the statement of the Dean of Faculty, a great deal might turn upon an examination of states and figures, and I own to a very strong reluctance to postpone the trial—a trial of this nature—when the pursuers of the action having taken their precautionary measures for having a proper trial allow the defenders to put in what is really a sketch of their case. The pursuers now apparently take fright at the defenders' case, and consider that they have underestimated the difficulties of their own case. Now, I think it would be barely fair to the defenders, after the pursuers have drawn their hand as it were, now to give them some indefinite delay for the purpose of building up the case, which I think ought to have been prepared long ago, and therefore I feel constrained to say that an insufficient case has been made for this application. It really comes to no more than this, that the pursuers having originally appreci-

No. 115. stated the nature of their case, and the time it would take to prepare, now that they see the defenders' case more fully developed, think better of it. I cannot say that I think the question is of very great importance, for this reason, that the alternative is between postponing the trial and abandonment, but, at the same time, I think that we are bound to regard the duties of litigants in relation to one another at the various stages of a jury trial, and for my part I cannot bring myself to think that sufficient ground has been given under the first head of the application.

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As regards the second, the Dean of Faculty was very frank in saying that it was of subsidiary importance in their view, and I do not think it would have afforded adequate ground for this application if it had stood by itself. It does not fit in with any precision as affording any corroboration of the first ground.

On the whole matter, I think the motion should be refused.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT refused the motion.

CLARK & MACDONALD, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

No. 116. THE GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED, Pursuers
(Respondents).—*Balfour—W. Campbell.*
Mar. 4, 1897. THE CORPORATION OF THE CITY OF GLASGOW, Defenders (Reclaimers).—
Glasgow *D.-F. Asher—Salvesen.*
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Limited, v.
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Lease—Relief—Public Burdens—Tramway—Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. c. 91), sec. 6.—By a contract bearing to be a "lease" the Corporation of Glasgow "let" to a tramway company the sole right to use carriages with flange wheels on the whole tramways authorised to be formed by the Glasgow Street Tramways Act, 1870, for the space of twenty-three years, on condition (1) that the company should pay interest on the sum expended by the Corporation in making the tramways and certain other annual payments during the lease; and (2) that the company should pay to the Corporation "the expense of borrowing, management, &c. [*sic*], and this provision shall be so construed as to keep the Corporation free from all expenses whatever in connection with the said tramways."

As the lease extended beyond twenty-one years the company were entered in the Valuation-roll as owners of the tramways at their annual value, and assessed accordingly.

In defence to an action by the Tramway Company against the Corporation for relief of such part of the assessment as corresponded to the rent paid by the company, in terms of section 6 of the Valuation Act, 1854, the defenders maintained (1) that the contract was not truly a lease, but merely a licence to use carriages with flanged wheels on certain streets; and (2) that assuming the contract to be a lease, the pursuers were, by the contract, bound to keep the defenders free of this expense.

Held (aff. judgment of Lord Kyllachy) (1) that the contract was a lease of a heritable subject, and (2) that the obligation to free the Corporation of all expenses in connection with the tramways did not apply to assessments for which the Corporation was liable as owners of the tramways.

Lease—Relief—Public Burdens—Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. c. 91), sec. 6.—Section 6 of the Valuation Act of 1854 provides that if lands or heritages (other than minerals) are let upon a lease for a period of more than twenty-one years, the rent payable under such lease shall not necessarily be assessed as the annual value of such lands

or heritages, but such yearly value shall be ascertained in terms of the Act irrespective of the amount of rent payable under the lease, and the lessee under such lease shall be deemed to be the proprietor in the sense of the Act, "but shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor of such proportion of all assessments upon the valuations of such lands and heritages" as corresponds to the rent payable by such lessee to the actual proprietor.

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Held (aff. judgment of Lord Kyllachy) that the right of relief conferred by the section could be made effectual otherwise than by deduction from the rent, and that a tenant who had paid rent without deduction had a good claim against the proprietor for repayment of his proportion of rates and taxes.

Acquiescence—Mora—Landlord and Tenant—Public Burdens—Abandonment of claim of relief.—Tenants under a lease for a period of twenty-three years intimated to their landlord a claim to be relieved of the owner's proportion of rates and taxes. The landlord repudiated the claim. In a letter subsequently written to their landlord with reference to another matter the tenants said,—“It is understood that . . . our case for landlords' taxes is in no way prejudiced.” After the date of this letter the tenants continued to pay rent for twelve years without making any further allusion to their claim.

Held (aff. judgment of Lord Kyllachy) that the tenants were entitled to insist in the claim, there being no special circumstances from which abandonment was to be inferred.

In a contract bearing to be a “lease” dated in November 1871, the Corporation of the city of Glasgow “set and in tack and assedation let” to the Glasgow Tramway and Omnibus Company, “the sole right to use, for the sole purposes of ‘The Glasgow Street Tramways Act, 1870,’ carriages with flange wheels or other wheels specially adapted to run on a grooved rail on the whole tramways authorised to be formed by the said Act,” for the space of twenty-three years from July 1871, under the following conditions:—“First, the Corporation shall make the said tramways out of moneys to be raised or borrowed by them . . .” “Second, The company shall pay half-yearly, at Whitsunday and Martinmas, to the Corporation the amount of the interest actually paid or payable by them on (1) the total money from time to time borrowed by them and expended on the tramways and in connection therewith on capital account; and (2) on the expenses of ‘The Glasgow Street Tramways Act, 1870,’ and the expenses incurred by the Corporation and the board of police of Glasgow in reference thereto, and others foresaid or incident to the execution of these presents, which sums shall also be held as expenditure on capital account, declaring the amount on which such interest shall be payable shall not be affected by any payment made to the Corporation through the operation of the sinking fund hereinafter provided for; and the company shall also pay to the Corporation the expenses of borrowing, management, &c.; and this provision shall be so construed as to keep the Corporation free from all expenses whatever in connection with the said tramways. . . .” Third, The company to pay the Corporation half-yearly three per cent per annum on the gross sum from time to time expended by the Corporation on capital account as aforesaid, which three per cent should be accumulated as a sinking fund to be applied by the Corporation ultimately towards the reduction or extinction of the cost of constructing the tramways. “Fifth, The company shall maintain, repair, and, so far as

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No. 116. necessary, renew the roadway between and within the tramways, and so much of the roadway as extends eighteen inches beyond the outside of the rails; and they shall also maintain, repair, and, so far as necessary, renew the tramways during the lease, and shall hand over the same to the Corporation at the end of this lease in as good working condition as when given over to them. . . .” “Ninth, In addition to the foresaid sums, the company shall pay to the Corporation a sum equal to the sum of £150 sterling per annum for every mile of street in which the tramways shall have been opened for traffic. . . .” Tenth, The company to pay annually a percentage of four per cent on the money expended by the Corporation in constructing the tramways, which should be set aside and expended in the renewal of the tramways and roadway; the interest accruing on the fund to be paid to the company, and on the expiry of the lease so much of the fund as should remain and not be required for renewal to belong to the company.

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In 1895, after the expiration of the lease, the tramway company brought an action against the Corporation for payment (1) of £14,246, 5s. 0½d. as the proportion of the landlords' assessments, rates, and taxes, local and imperial, paid by them during the currency of the lease, in respect of the tramways leased by them, of which the Corporation was bound to relieve them.

The pursuers averred that they had paid these assessments, rates, and taxes, in terms of section 6 of the Valuation Act, 1854,* and had repeatedly demanded repayment without success.

The defenders admitted that the pursuers had paid the landlords' rates and taxes in question, but denied that they were liable in repayment, or that the amount sued for was the proportion corresponding to the rent paid by the pursuers. They further admitted that the pursuers had advanced a claim for repayment, but averred that they had subsequently abandoned it.

The pursuers pleaded;—(1) The defenders being bound to free and relieve the pursuers of the proportion of the landlords' taxes paid by them in respect of the defenders' tramways which corresponds to the rent paid by the pursuers, the pursuers are entitled to decree in terms of the first conclusion of the summons, with expenses.

* Section 6 of the Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. c. 91), enacts “that in estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might, in their actual state, be reasonably expected to let from year to year. . . . Provided always that if such lands and heritages be let upon a lease, the stipulated duration of which is more than twenty-one years from the date of entry under the same . . . the rent payable under such lease shall not necessarily be assessed as the yearly rent or value of such lands and heritages, but such yearly rent or value shall be ascertained in terms of this Act irrespective of the amount of rent payable under such lease, and the lessee under such lease shall be deemed and taken to be also the proprietor of such lands and heritages in the sense of this Act, but shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor, of such proportion of all assessments laid on upon the valuations of such lands and heritages made under this Act, and payable by such lessee as proprietor in the sense of this Act, as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation.”

The defenders pleaded ;—(1) The pursuers' averments are irrelevant, No. 116. and insufficient to support the conclusions of the action. (2) The pursuers are barred from insisting in the present action by *mora*, and acquiescence, and by the actings of parties, and in respect the whole payments were made by them in full knowledge of the facts.

Proof was allowed. In regard to the defenders' plea of bar, the evidence shewed that the pursuers' claim of relief was first made prior to 1879, and was renewed in that year. The claim was repudiated by the Corporation. For the settlement of the dispute, the parties attempted to adjust a special case, but the attempt to settle the dispute in this way failed, for the reason set forth in the following minute of meeting of the committee of the Corporation on tramways held on 24th November 1881 :—"The town-clerk reported that it having been found impossible to adjust with the tramway company a statement of the information desired by the Court of Session in connection with the special case for them and the Corporation in reference to the liability for landlords' taxes, the case had been withdrawn. He also reported that the company had suggested that the question at issue might be decided under a reference. After some conversation, consideration of the matter was delayed."

On 18th April 1882 Mr Duncan, manager of the tramway company, wrote to Mr Nicol, the city chamberlain, a letter, dealing with various matters, which contained this passage,—“It is understood that, although we pay the sinking fund without deducting income-tax, our case for landlords' taxes is in no way prejudiced thereby,” and in a letter written four days later to the town-clerk, Dr Marwick, Mr Duncan, after referring to a compromise arranged between the parties as to another matter, concluded,—“It is also understood that our rights in connection with landlords' taxes are in no way prejudiced.” No evidence was adduced by the defenders to shew that they had repudiated this understanding.

From 1882 to the end of the lease in 1894 no communications were made by either of the parties to the other in regard to the pursuers' claim of relief, and during this period the company continued to pay the whole rates and taxes in respect of the tramways. During the same period the Corporation made certain additions to the tramway system, and in 1882, 1885, and 1886 negotiations (which resulted in agreements) in reference to the working of these additional lines took place between the parties. In 1889 also negotiations (which proved abortive) took place with regard to a renewal of the principal lease. In draft “conditions of let” prepared by the Corporation at this time there was an express stipulation that the tenants should pay the landlords' rates and taxes, including those exigible in respect of ownership.

It was admitted by Mr Duncan, the manager of the tramway company,* that during these various negotiations the company inten-

* In cross-examination Mr Duncan deposed,—“The letter of April 1882 shews that we protested against the payments being made, and that the claim was undoubtedly an outstanding one. I was present at the meetings of the directors, and was fully acquainted with the views and intentions of the company in regard to this matter, and the directors never for a moment intended that the claim should be abandoned. (Q.) What did you intend the Corporation to understand? (A.) That we would raise an action against them if they did not pay. (Q.) What communication did you make to them which was calculated to lead them to think that? (A.) The letters

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tionally abstained from pressing their claim of relief from the fear that the Corporation might make it a condition of the leases which were the subject of negotiation that the company should abandon their claim. In reference to this matter Sir James Marwick, who had been town-clerk since 1873, gave it as his opinion that the company would not have got such good terms as they did in the agreements of 1882, 1885, and 1886, if it had not been the understanding of the Corporation that the claim of relief was abandoned.*

On 2d December 1896 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"With respect to the first conclusion in the action at the instance of the tramway company, finds (1) that the defenders are bound to relieve the pursuers of the landlord's or owner's assessments, rates, and taxes, whether local or imperial, paid by the pursuers in respect of the tramways leased by the defenders to the pursuers during the period from 1st July 1871 to 1st July 1894, being the period of the currency of the lease between the parties, No. 7 of process; but that only to the extent of such proportion of the said assessments, rates, and taxes as corresponds to the rent payable by the pursuers to the defenders in respect of the said tramways, as compared with the amount of the valuation of the said tramways under the Valuation Acts; (2) that the rent payable to the defenders in the sense of the Valuation Acts, and particularly the 6th section of the

that I wrote in 1882. (Q.) If you intended the Corporation to understand that, why did you delay pressing the claim? (A.) Because we are afraid that the Corporation might include these landlord's taxes in any negotiations we might have in connection with leasing the lines in 1884 and 1886, and make it a part of the condition that we should abandon them. (Q.) Was it of set purpose that the Company abstained from renewing the claim between 1882 and the end of the lease? (A.) Well, we did not renew it. (Q.) Did you intentionally abstain from renewing it? (A.) Yes, we did. (Q.) And for the purpose of affecting the Corporation's mind in business communications between you and them during that period? (A.) We did not intend to affect the Corporation's mind one way or another. The prospective business negotiations with the Corporation which we thought might be affected were in connection with the Central Tramways Extension in 1884, the Springburn Extension in 1886, and the renewal of our lease in 1889. We desired that the negotiations in connection with these matters should not be complicated with this landlords' taxes question at all, which was a thing entirely apart from them."

* In cross-examination Sir James Marwick deponed,—“(Q.) Do you say that that claim so standing, made in April 1882, was treated by you as abandoned in negotiating the agreement which was signed in July 1882? (A.) In all the subsequent negotiations I have no hesitation in saying the Corporation treated this as not intended to be insisted upon. I say so because if they had understood it was to be pressed, the whole aspect of the negotiations would have been changed; the tramway company were given certain terms which they would not have got if this claim had been standing. I have no doubt whatever that if there had been any intimation made in the course of the negotiations for subsequent extensions of lines of a reservation of this claim, the company would not have got the extensions, or it would have been made a specific condition that the claim should be withdrawn. (Q.) Is not that merely a problematical opinion? (A.) It is an opinion which, as being conversant with the whole negotiations, I have no hesitation in expressing. By the Court.—(Q.) How soon after the letter of 22d April 1882 did you assume that the claim had been abandoned? (A.) I cannot answer that question just now; it is impossible to say.”

Valuation (Scotland) Act of 1854, and therefore the rent to be considered for the purposes of the preceding finding, includes the whole payments made by the pursuers to the defenders as the consideration for the use of the said tramways, and in particular includes the whole payments embraced in the several columns of the state No. 68 of process,* excepting the column headed 'Renewal of lines and streets, actual expenditure'; (3) finds, with respect to the payments in said column, that the parties are at issue as to how far the said payments include repairs as distinguished from renewals, and are agreed that further inquiry is therefore necessary: Therefore, as regards the said first conclusion, appoints the cause to be enrolled for further procedure," &c.†

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* These payments were stated under the headings (1) interest of capital borrowed by the Corporation for the construction of the tramways; (2) interest at 3 per cent on amount expended on construction to be accumulated as a sinking fund; (3) mileage rate; (4) sums paid to officials of Corporation for secretarial and accounting work and inspection of lines; and (5) "renewal of lines and streets—actual expenditure."

† "OPINION.—This is an action in which the Glasgow Tramways Company are pursuers and the Corporation of Glasgow are defenders, and it is brought to settle certain outstanding questions between the company and the Corporation, arising out of the lease of the tramways by the Corporation to the company which was granted in 1871 and expired in July 1894.

"The first question relates to the landlords' or owners' taxes or assessments payable in respect of the tramways during the currency of the lease. These taxes were levied upon and paid by the company as being—by reason of the length of their lease—owners of the tramways system for the purposes of the Valuation Acts, and the question is whether—and how far—the company can now claim relief from the Corporation under the 6th section of the Valuation Act of 1854, which in effect provides that when a lessee is assessed as owner by reason of the length of his lease he shall be entitled to relief from the actual owner, and to a deduction from the rent payable by him to such actual owner of such proportion of the assessments paid by him as shall correspond to the rent payable by him to such actual owner.

"The defenders' case is (1) that the lease of 1871, although so titled and called, was not really a lease, but a nondescript agreement, under which there was no rent in the proper sense, and no constitution in the proper sense of the relation of landlord and tenant—lessor and lessee; (2) that, supposing this to be otherwise, the statutory right of relief was excluded by a stipulation in the lease that the tramway company should pay to the Corporation 'the expenses of borrowing, management, &c.,' and that this provision should 'be so construed as to keep the Corporation free from all expenses whatever in connection with said tramways'; (3) that in any event the claim now made is barred, because the sum claimed ought to have been deducted annually from the rent paid to the Corporation. What I have to decide is, whether any and which of those defences is well founded.

"(1) I am of opinion that the contract of 1871 was not only in name but in reality a contract of lease, and that the relation which it constituted between the parties was truly and properly the relation of landlord and tenant. I do not, I confess, see why this should be doubted. The subject of the contract was a heritable structure built into and forming part of the streets of Glasgow, and specially adapted for a certain valuable use. The Corporation were owners of this structure, and for payment annually of certain sums of money they conferred on the tramway company the sole right to use the structure,—that is to say, the sole right to use it in the only way in which such use was valuable. The right thus conferred was, moreover, for a definite term of years; and the annual payments (which were

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The defenders reclaimed, and argued;—1. The pursuers could not take advantage of the provisions of section 6 of the Valuation Act. (1) The Act did not apply, because the pursuers were not in the position of lessees. The right conferred upon them was not an exclusive right of occupation, but only an exclusive licence—a right created by statute—to use carriages with flange-wheels on lines which were run over by the ordinary traffic of the city. This right was not a lettable subject, but in its nature resembled a right of servitude, and was analogous to a grant of running powers, which had been held not to be an assessable subject.¹ Further, the *reddendo* stipulated for was not a fair return for the use of the subject “let,” but amounted to repayment of the cost of creating the subject. (2) The meaning of the second article of the “lease” was that the Corporation should have no outlay in connection with the tramways. Fairly construed, the “expenses” of which the Corporation were to be kept free must be held to include rates and taxes. (3) The right of relief given by section 6 could only be made good by way of deduction from the rent of each year.² 2. If the pursuers ever had a right of relief, they had

all, if not of specified, yet of ascertainable amount) were none the less rent because not called by that name, or because broken up into several portions, earmarked as applicable to different purposes of the lessors. Altogether I am unable to doubt that, if the arrangement had been for less than twenty-one years, the tramway company must have appeared in the Valuation-roll as tenants and occupiers and the Corporation as owners, and also that the annual value of the subject must have been taken as the sum of the different annual payments, which sum must have been held to be, for the purposes of the Valuation Acts, the stipulated rent.

“(2) In the next place, I am of opinion that the pursuers’ claim as lessees to relief of owners’ taxes is not excluded by the stipulation in the lease on which the defenders found. The taxes—local or imperial—paid by the owner of property in respect of his ownership are not, I think, identical or *ejusdem generis* with expenses of borrowing or expenses of management. They are not properly expenses in connection with the owner’s property, although the income from that property may form their measure. They are rather personal burdens imposed upon the owner as a citizen, the amount of which is estimated in a particular way. If a tenant taking a house binds himself in general terms to keep his landlord free of ‘all expenses connected with it,’ he would not, I think, be held to undertake to pay the property or income-tax which the landlord has to pay in respect of his rent. Still less would he be held to do so if the general obligation was subjoined to an obligation with reference to specific expenses of a quite different character. In the present case the question would, I suppose, have been the same had the lease of the tramways been a short instead of a long lease, and had the owners’ assessments been laid on the owner direct. I do not say that even in such a case an obligation of the kind suggested might not be lawfully undertaken, but it would, at least in my opinion, require very special and unequivocal words to impose upon a tenant liability to pay his landlord’s taxes, whether imperial or local.

“(3) Lastly, with respect to the non-deduction of the taxes from each

¹ *Midland Railway Co. v. Overseers of the Parish of Badsworth*, 1864, 34 L. J. Mag. Cas. 25.

² *Denby v. Moore*, 1817, 1 Barn and Ald. 123, 18 Rev. Rep. 444; *Andrew v. Hancock*, 1819, 3 Moore, 278, 21 Rev. Rep. 569; *Spragg v. Hammond*, 1820, 4 Moore, 431; *Cumming v. Bedborough*, 1846, 15 M. and W. 438.

lost it. Having voluntarily paid rent without making a deduction to which they were entitled, they could have no claim for repetition.¹ Their last communications on the subject in 1882 did not amount to a proper reservation of their right, and as they had deliberately abstained from pressing the claim during the remaining twelve years of the lease, in order to avoid prejudicing their chance of obtaining favourable terms in their various negotiations with the Corporation, and agreements had been entered into by the Corporation in the faith that it had been abandoned, they were barred from now reviving it. 3. Details of Claim.—Assuming that the pursuers had a right to relief, they were not entitled in computing their claim to treat any payments made under the lease as rent in the sense of section 6, except such as were the consideration for the use of the subject let. The only payment which could fairly be considered as rent in this sense was the mileage rate.

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Argued for the pursuers ;—1. The pursuers were entitled to claim relief under the 6th section of the Valuation Act. (1) They held under an instrument which bore to be a lease, and had all the essentials

year's rent as it fell due, it is certainly unfortunate that this and other disputed questions under the lease were not brought to an issue when they first arose. They appear to have formed the subject of a special case presented to the Court in 1880 ; but that case having been partly heard and allowed to stand over for some amendment, a reference appears to have been then proposed, and then, as appears from the Corporation minutes of the 24th November 1881 (the last on the subject), 'consideration of the matter was delayed.' And certainly the delay thus initiated has extended over a long period. It cannot, however, be said that anything then or afterwards passed between the parties which can be construed into a discharge or abandonment by the company of the present claim. It may be that that claim is of a nature which did not admit of being effectually reserved. I shall consider that immediately. But that it was in fact reserved is, I think, sufficiently apparent from the terms of the minute I have just quoted, and from the letters by the company's secretary to the city chamberlain and town-clerk of 18th and 22d April 1882. In the absence of any repudiation by the defenders of the understanding therein expressed, it is, I think, difficult to hold otherwise than that they (the defenders) acquiesced in the reservation.

"But the question remains, whether the pursuers' claim—depending as it does on the words of the Valuation Statute—admitted of being made good otherwise than by way of deduction from the rent of each year. The argument of the defenders is that, but for the express provision contained in the 6th section, no claim of relief would have existed ; and that it was an express condition of the right of relief conferred by the statute that it should be made good in a particular way, viz., by deducting and retaining from each year's rent the statutory proportion of the landlord's taxes paid by the tenant for the particular year. That is the argument, and it was supported by reference to certain English cases, and particularly the case of *Denby v. Moore*, 1 B. and A. 123, 18 R. R. 444 ; *Andrew v. Hancock*, 3 Moore, 278, 21 R. R. 569 ; *Spragg*, 4 Moore, 431 ; *Cumming*, 15 M. and W. 438. See also *Dowell* on Income-Tax, notes, page 67, 4th ed.

"Now, had the language of the statute here to be construed been identical with or similar to the language of the Acts (viz., the Property and Income-Tax and Land-Tax Acts) which were under construction in those English

¹ *Dalmellington Iron Co., Limited, v. Glasgow and South-Western Railway Co.*, Feb. 26, 1889, 16 R. 523.

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of a lease. The subject let was the exclusive right to use carriages with flange-wheels on the tramways. This right was not the less a lettable subject because it was a private right—created by statute—carved out of public property, and the money payments which the pursuers were under obligation to make were not the less rent for the use of the subject let because they were calculated at a rate which would reimburse the defenders for their capital outlay. The right conferred upon the pursuers was not the same as a grant of running powers, for a running power company had not exclusive possession of the line over which the powers were exercised. The ground of decision in the *Midland Railway Company's*¹ case was simply that two railways could not be rated for the same subject. Tramways laid on

cases, there would, I think, have been force in this part of the defenders' case. It is perhaps difficult to say how far the decisions referred to proceeded on the peculiarities of the old system of English pleading. But, unless explained on that ground, they do seem to affirm what seems in itself a quite reasonable proposition, viz., that when a tenant is charged under a Revenue Statute—say with property-tax—and the statute provides that he may and shall deduct the tax so paid from his rent, that means that he shall deduct it from the rent of the year, and does not mean that the payments made may be set off against subsequent rents, or may be recovered in a subsequent action, brought as for repetition of rent overpaid, on the principle (as we should put it) of *condictio indebiti*. Had, therefore, the pursuers here been confined to the remedy of deduction from the rent, there would, as I have said, have been strong grounds for holding that the principle of those English cases applied. The only question would then have been whether the reservation expressed by the pursuers in 1882 had been so accepted by the defenders as to constitute in effect an agreement between the parties that the claim in question should remain open for after adjustment.

"But I am not able to read the 6th section of the Valuation Act as the defenders read it. It certainly does not—like, e.g., the Property-Tax Acts—require the deduction to be made from the rent,—a requirement no doubt designed to prevent agreements between landlord and tenant involving practically under-statement of the true rent. But, apart from that, the scheme of the enactment seems to me to be this. There is first provided in quite absolute terms a right of relief, and then there is superadded a further and special right (not necessarily implied in the other) to retain the amount due from the rent payable under the lease. That is, I think, the fair reading of the enactment. Nor can it, I think, be said that this superadded right was meaningless or unnecessary. It is not, as we know, every claim which can be set off against rent; and it may very well have been desired to exclude difficulties of that description with reference to these claims of relief—claims not necessarily or always liquid, but quite possibly involving (as in the present case) points of controversy, or points requiring adjustment. In any case the statute does not say in words what the defenders suggest, and I should have expected it to do so if it were so meant. It would, for example, have been easy to say,—‘The lessee shall be entitled to relief from the actual proprietor by way of deduction from the rent payable to such actual proprietor of such proportion, &c. of the assessments which he (the lessee) has paid.’ But that is not what the statute says.

"On the whole, therefore, I am of opinion that, as regards this first head of their claim, the pursuers are entitled to decree in terms of the summons."

¹ *Midland Railway Co. v. Overseers of the Parish of Badsworth*, 1864, 34 L. J. Mag. Cas. 25.

public streets were an assessable subject,¹ just as water-pipes laid under public streets.² (2) The general word "expenses" in the second article of the lease could only be held to cover expenses *ejusmodi generis* as those previously enumerated, and could not be held to cover taxation. It was not to be lightly assumed that the incidence of taxation had been altered by agreement. (3) The Valuation Act conferred upon the tenant a right of relief, and in addition a right to operate this relief by way of deduction from the rent, but it did not confine the tenant to the remedy of reduction. A similar double right—to recover from the landlord or retain from the rent—had been given in the Poor-Law Act of 1845,³ and the provision conferring right to deduct from the rent was probably necessary to enable a tenant to set off expenditure on rates and taxes against rent. The English cases in regard to property and income-tax and land-tax did not apply, for the Acts⁴ dealing with these taxes required the right of relief to be operated by way of deduction. 2. The right of relief had never been abandoned. The last communication on the subject in 1882 was a clear intimation that it was reserved. Short of the known prescriptions, a gratuitous quittance of a just claim was not to be easily presumed, and would not be presumed unless one party misled the other into the belief that the claim had been abandoned, and so induced him to alter his position for the worse. Here the pursuers did nothing to induce such an erroneous belief on the part of the defenders, and as matter of fact the defenders never entertained such a belief, as was shewn by the fact that the draft conditions of let prepared by them in 1889 contained an express provision that the pursuers should have no right of relief. The cases of game and other damage were not in point. In such cases the evidence was of a fugitive character, and injustice might easily result if a claim of which notice was not given at the time were allowed afterwards to be insisted in. Here notice was given of the claim, and the defenders were in no way prejudiced by the delay in enforcing it. 3. The whole annual payments which the pursuers were bound to make by the lease must be computed as rent.

At advising,—

LORD PRESIDENT.—Although each of the several questions involved in this case has been very carefully argued before us, I am not only satisfied of the soundness of the Lord Ordinary's judgment, but I think his Lordship's opinion contains a remarkably complete statement of the true result of the argument. What I shall add is intended to be in confirmation of, and not at all in substitution for, the views there explained.

(1) The right enjoyed by a company or individual entitled to the sole use for a term of years, by tramway cars, of a tramway line under the Tramway Acts, is a singular one, and it is not surprising that the return rendered by the occupant to the owner should also be calculated on unusual lines.

¹ Craig v. Edinburgh Street Tramways Co., May 27, 1874, 1 R. 947; Pimlico Tramways Co. v. Greenwich Union, 1873, L. R., 9 Q. B. 9.

² Hay v. Edinburgh Water Co., July 13, 1850, 12 D. 1240, 22 Scot. Jur. 562.

³ 8 and 9 Vict. cap. 83.

⁴ 46 Geo. III. cap. 65, Schedule A, No. 4, Rule 9; 38 Geo. III. cap. 5, sec. 17.

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No. 116. These peculiarities have, not unnaturally, given rise to the argument that the contract is not a lease at all, but they are not sufficiently essential to support it.

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The company have the sole right to use, in the appropriate way, a structure with which certain of the streets are fitted. They occupy the tramway, and the fact that other people use in a different way the road on which the tramway is fitted, and actually pass over the tramway, does not make the company's use of the tramway the less a mode of occupation peculiar to themselves.

On the other hand, the right of occupation being for a term of years, and there being a yearly return in money rendered by the company, it seems to me that the mode or principle according to which the amount of that return is calculated does not make it the less rent.

(2) In my opinion the word "expenses" in the agreement cannot be held to cover the liability of the Corporation to relieve the company of the landlords' share of taxes. In the first place, the Corporation have not in fact expended anything. By the statute the whole taxes are paid by the tenant. But even when the nature of the ultimate liability of the Corporation is considered, it is seen how remote it is from that of expenses in the sense of the agreement. A landlord is charged with taxes by reason of his property in heritage, and as a contribution to the revenue of the state, in respect of his ostensible wealth. I agree with the Lord Ordinary in thinking that reading the word "expenses" in the context in which it stands, those taxes are outside its scope.

(3) The next question is whether a tenant is limited to deduction as the only mode of effectuating his right of relief. On this point, again, I entirely adopt the Lord Ordinary's reasoning. The statute gives the right of relief in general terms, *plus* this, and as a mode, but not the only mode, of making it good—the tenant gets the right at his own hand to deduct the taxes from the rent.

(4) If, then, the tenant, by abstaining from making the deduction, did not, under the statute, *eo ipso* lose his right of relief, has he deprived himself of it? Now, without going into details, it is enough to say that the right of relief was asserted, never withdrawn, and on more occasions than one expressly mentioned as being reserved. This being so, it does not seem to me that the periodical payment of rent imported an abandonment of this claim. The case is distinguished by the nature of the claim from the cases in which claims of damages as between landlord and tenant have been held to be waived by the payment of rent. This is not a claim of damages, but a claim of debt created by statute, and of precisely ascertained amount. It does not depend on circumstances, nor is it dependent on evidence of a fugitive character, as is the case with most of the claims between landlord and tenant. Accordingly, it is in the region of claims of debt which fall under the negative prescription only, unless in circumstances in which by special conduct a direct implication of abandonment is raised.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

WEBSTER, WILL, & RITCHIE, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

CHARLES SEWELL AND OTHERS (Dixon's Trustees), Petitioners

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(Respondents).—*C. K. Mackenzie—Macphail.*JOHN WHYTE, Respondent (Appellant).—*Lees—Maclaren.*

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Burgh—Dean of Guild—Jurisdiction—Police—Public Street—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.) secs. 286 and 290.—The Glasgow Police Act, 1866, enacts, sec. 286,—“The Master of Works, by direction of the board jointly with the proprietor of any land or heritage adjoining to and having a right of access by any private street or court . . . may apply at any time to the Dean of Guild to declare the said street or court, or any part thereof, to be a public street, and the Dean of Guild . . . shall inquire into and decide the question raised in such application, and may direct the registrar to enter such private street or court in the register of public streets. . . .”

Sec. 290.—“Every proprietor who intends to lay out or to form any street shall make application to the Dean of Guild for a warrant to do so . . . and the proprietor shall state in his application whether such street is intended to be a public street or a private street . . . and the Dean of Guild shall cause the Master of Works, and any other person whom he considers interested, to be cited, and allow them time to examine the said plans and sections, and lodge answers, or be heard with respect to the application. Provided that where any proprietor shall satisfy the Board as to the level and the suitability for drainage of any such street, it shall be lawful for the Board if such street is not less than forty feet in width to dispense with an application to the Dean of Guild, and if such street be intended to be a public street . . . to issue a warrant . . . endorsed by such proprietor as concurring therein declaring such street to be a public street. . . .”

A proprietor of vacant ground in Glasgow presented a petition to the Dean of Guild for the lining of a street, stating that he intended to form a public street. After the Master of Works had been cited, the petitioner obtained a warrant from the Dean of Guild to form the intended street “as a public street.” When the street was formed he presented a petition to the Dean of Guild craving him to declare the street a public street. The petition, which was opposed by the Master of Works as incompetent, was granted. The Master of Works having appealed, the Court *dismissed* the petition as incompetent, *holding* that the Dean of Guild had no jurisdiction under sec. 290 to declare a street a public street, but only under sec. 286, on a joint application by the proprietor and the Master of Works.

ON 15th February 1896 Lieutenant-Colonel Sewell and others, the 1st Division, testamentary trustees of William Smith Dixon of Govanhill, and as Dean of Guild Court, Glasgow, such trustees proprietors of a vacant area of ground bounded, *inter alia*, on the north by Aitkenhead Road, and on the east by Batson Street, presented a petition to the Dean of Guild in Glasgow craving the Court to appoint a copy of the petition, and of the deliverance thereon, to be served upon the Master of Works for the public interest and certain other persons, and upon advising the petition “to line the street after mentioned.”

The petitioners stated that they proposed “to form and lay off a public street from Aitkenhead Road to Batson Street on said area of ground as shewn on the plan produced. Said proposed street is 60 feet wide . . .”

The Dean of Guild granted warrant to cite the Master of Works and other persons.

On 20th February 1896 the Dean of Guild granted warrant “to the petitioners to form the intended street . . . as a public street of 60 feet in width; lines the boundaries of the same . . .”

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Thereafter the trustees, having formed the street, presented a petition to the Dean of Guild craving the Court to appoint service of the petition upon John Whyte, Master of Works for the city of Glasgow, and "to declare that the street laid off by the petitioners leading southward from Aitkenhead Road 112 yards or thereby (now known as Robson Street), conform to warrant of your Lordship's Court dated 20th February 1896, is a public street, and to direct the Registrar of Public Streets to enter said street in the Register of Public Streets."

Answers were lodged by the Master of Works, who stated—and this was admitted by the petitioners—that on 14th August 1896 the trustees made application to the Corporation of Glasgow to have the street taken over as public, and the Corporation, for the reasons that the street was neither fenced nor lighted, declined to entertain the application.

The respondent further stated;—"The street at the present date is a private one. Under section 290 of the Glasgow Police Act, 1866, the Dean of Guild is authorised to grant authority for the forming and laying off a street which may be intended to be a public or a private street. That authority was exercised by the Dean of Guild by the said warrant of date 20th February last. Further, under that section it is provided that the Corporation, if satisfied as to the level and the suitability for drainage and the width of the street, may dispense with an application to the Dean of Guild, and may declare the street to be a public street, and may direct the same to be entered in the register, subject to such conditions, if any, as may be agreed on.

"In this case the Corporation were prepared, if provision were made for lighting and fencing, to direct that the street be taken over as public, but these conditions were not agreed to by the petitioners, and therefore the only remaining provision for having the street declared public is under section 286 of the 1866 Act, and that section provides as a condition precedent that the Master of Works, by direction of the Corporation, jointly with the proprietors, shall make application to the Dean of Guild to have the street declared a public one.

"In this case no such direction was given by the Corporation, and the Master of Works has not made a joint application with the proprietors; accordingly there is no competent petition before the Court, and the petition should be dismissed, with expenses."

The parties referred to the sections of the Glasgow Police Act, 1866, noted below.*

* Section 4.—" 'Public street' shall mean any road, street, . . . or other place within the city . . . which has been maintained by the Police and Statute Labour Committee, or which is by this Act or shall hereafter in pursuance thereof, be declared to be a public street. 'Private street' shall mean any such road, street, . . . which has not been maintained by the Police and Statute Labour Committee, and is not by this Act, or shall not hereafter be in pursuance thereof, declared a public street."

Section 282.—"It shall be the duty of the registrar from time to time to enter in the Register of Public Streets . . . any street which is declared by the Dean of Guild . . . to be a public street . . . and the entry . . . in the said register . . . shall be conclusive evidence of what are public streets . . ."

Section 286.—"The Master of Works, by direction of the board jointly

On 22d December 1896 the Dean of Guild found that the petition No. 117. was competent, "declares Robson Street, as delineated on the plan lodged with the original application, to be a public street, and directs

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with the proprietor of any land or heritage adjoining to and having a right of access by any private street or court of which the *solum* does not belong to the Trustees of the Clyde Navigation or any canal company, may apply at any time to the Dean of Guild to declare the said street or court, or any part thereof, to be a public street; and the Dean of Guild shall thereupon grant warrant to cite the remaining proprietor or proprietors of lands and heritages adjoining to and having a similar right of access by such street or court, and shall inquire into and decide the question raised in such application, and may direct the registrar to enter such private street or court in the Register of Public Streets, and may award expenses to or against any of the parties; but no private street shall be declared to be a public street unless it appears in the course of the said inquiry, and be found by the Dean of Guild, that the proprietor or proprietors who make the said application, or who subsequently enter appearance in the case, and by a minute formally approve of the said application, possess lands and heritages which have a greater frontage to the said street or court, and are valued in the last completed Valuation-roll at the date of the application at a greater annual amount, than the lands and heritages of any dissenting or non-concurring proprietor or proprietors."

Section 290.—"Every proprietor who intends to lay out or to form any street shall make application to the Dean of Guild for a warrant to do so, and every proprietor who has already laid out or formed any street on which no building has been erected shall make application to the Dean of Guild for a warrant to sanction such street, and in either case the proprietor shall state in his application whether such street is intended to be a public street or a private street, and what is the maximum height above its level of the buildings intended to be erected, and shall produce along with such application a plan and longitudinal section of such street, and a plan, with cross sections at right angles to such street, of the lands adjoining the same: And the Dean of Guild shall cause the Master of Works and any other persons whom he considers interested to be cited, and allow them time to examine the said plans and sections, and lodge answers, or be heard with respect to the application: Provided that where any proprietor shall satisfy the board as to the level and the suitability for drainage of any such street, it shall be lawful for the board, if such street is not less than forty feet in width, to dispense with an application to the Dean of Guild, and if such street be intended to be a public street and will lead from a turnpike road or public street to either a turnpike road or public street, to issue a warrant under their common seal, indorsed by such proprietor as concurring therein, declaring such street to be a public street, and directing the registrar to enter the same in the Register of Public Streets, subject to such conditions, if any, as may be agreed on; but it shall not be lawful for the proprietor of any land or heritage adjoining any street which is laid out or formed without an application to the Dean of Guild to erect thereon any dwelling-house the front walls of which shall exceed in height the width of such street, nor, without the express authority of the Dean of Guild, to erect thereon any other building, the front walls of which shall exceed in height the width of such street by more than one-fourth part thereof."

Section 291.—"If the application to the Dean of Guild relates to an intended public street, and is granted by him . . . the proprietor making such application shall acquiesce in and fulfil any conditions which he may impose with reference to the following matters"—width of street, height of buildings, and causewaying.

The Glasgow Buildings Regulation Act, 1892 (55 and 56 Vict. cap.

No. 117. the Registrar to enter the same in the Register of Public Streets, in terms of the Glasgow Police Act, 1866." *

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The Master of Works appealed, and argued;—The petition was under no section of the Act, and was incompetent. It was not disputed that the Dean of Guild might declare a street a public street, but he could only do so under section 286, on the joint application of the Corporation and the proprietor. The fallacy underlying the Dean of Guild's judgment was this: He thought that no street could be a

ccxxxix.), sec. 14, enacts,—“The powers conferred upon the Dean of Guild by section 291 of the Act of 1866, with reference to intended public streets shall also belong to and be exercised by him with reference to intended private streets.”

* “NOTE.—On 20th February 1896, it is admitted that the petitioners obtained warrant from the Dean of Guild to form a street (now known as Robson Street) as a public street 60 feet in width. The street has now been formed, and in this petition they ask the Dean of Guild to declare it a public street, and to direct the Registrar of Public Streets to enter it in the register. The Master of Works objects that the street at present is a private street (by which he means that as yet it has not been declared public, nor entered in the register as a public street), and that it can only be declared public by the Dean of Guild in an application presented under sec. 286 of the Glasgow Police Act, 1866, by the Master of Works by direction of the Commissioners jointly with the petitioners. This is certainly a startling contention, for it comes to this, that under secs. 290 and 291 of the statute a proprietor can never get a street which the Dean of Guild has sanctioned as a public street entered on the Register of Public Streets without the concurrence of the Commissioners, who may make what conditions they please. According to this view an application to the Dean of Guild to sanction a street as a public street under sec. 290 must necessarily result in its first being sanctioned as a private street, though such sanction, as in this case, has neither been asked nor granted, and then, if the Police Commissioners so direct, an application may be presented by the Master of Works to have the private street declared public under sec. 286. The Dean of Guild thinks this contention untenable, and thinks that an application under sec. 286 would have been quite incompetent in the present case, even if the petitioners could have obtained the necessary concurrence, because Robson Street has never been sanctioned by the Dean of Guild as a private street, and without such sanction it cannot be a private street, and therefore cannot be the subject of an application under sec. 286. The real difference between the Master of Works and the Commissioners, on the one hand, and the petitioners, on the other, relates apparently to the burden of lighting and fencing the street, and the Dean of Guild expresses no opinion on the merits of this dispute. The only question raised before the Dean of Guild was whether the Commissioners alone have the power of declaring a street public and putting it on the register, making what conditions they please on giving their warrant under sec. 290, or otherwise, whether the application must originate with them under sec. 286. The Dean of Guild thinks, on the contrary, that any proprietor proposing to form a public street may apply to the Dean of Guild, under sec. 290, to sanction it, and that not only the Dean of Guild may give authority to form the street, but also after its formation may declare it public, and direct it to be entered on the register.

. . . No doubt the petitioners applied to the Corporation to have this street declared public, but this error on their part—as the Dean of Guild considers it—cannot prejudice them in now applying to the Dean of Guild. The original petition might fittingly have contained also the prayer of the present petition, and, indeed, that is the more appropriate procedure, and would have made this mistake impossible.”

private street unless he had sanctioned its formation as such, and, on the other hand, that if he granted a warrant for the formation of a street which was declared to be intended for a public street, that street whenever formed *ipso facto* became a public street. That, however, was directly in the teeth of the statute, which said that every street remained a private street until declared a public street. The mere expression therefore of an intention to construct a street as a public street did not make it any the less a private street prior to its being declared a public street. The reason why an applicant had to declare whether the street was intended to be a public or private street was because, under sections 291 and 292, the Dean of Guild was entitled to impose conditions in the case of a public street. That also explained why the Master of Works required to be cited. The necessity for the declaration had now flown off because of the provisions of the Glasgow Building Regulations Act, 1892, and accordingly the ground of the petitioner's argument was removed. In this particular case, if the Dean of Guild had the jurisdiction claimed for him, the public interest would clearly suffer, for the fencing and lighting of this public street would be left unprovided for. The interlocutor of 20th February 1896 was *ultra vires*, in so far as it sanctioned the formation of a "public" street. All that could be, and all that was, asked in the original petition was a lining of a "street," and accordingly the warrant then granted was exhausted when the street was formed. The street remained a private street until declared a public street, either by the Corporation under agreement with the proprietor, or by the Dean of Guild upon the joint application of the proprietor and the Master of Works under section 286.

Argued for the petitioners;—The Dean of Guild was right. The present petition was merely in continuation of the original application, which might and should have contained a prayer to have the street, when formed, declared a public street. So to declare it was evidently within the competency of the Dean of Guild under section 290. It was true the power was not conferred in so many words, but neither was power to dispose in any way of the application to him. And yet it was not disputed that he had power to line a street. The jurisdiction of the Dean of Guild to declare a street a public street, the formation of which as such he had already sanctioned, was a necessary inference from the whole provisions of the section. If the Corporation were otherwise satisfied, they could dispense with the application to the Dean of Guild, and at once declare the street a public street; if they were not satisfied, then application had to be made to the Dean of Guild, obviously that he might, after hearing parties, if so advised, declare the street a public street. The public interests were completely safeguarded, for the Master of Works required to be cited, and then was his opportunity to see that due provision was made for such matters as drainage, fencing, and lighting. Accordingly, the original application to the Dean of Guild being for a lining of a public street, his warrant of 20th February was in quite a competent and appropriate form, and the character of the street was once for all determined. Section 286 only applied to the case of a street originally formed as a private street, not to a street which from the very outset was destined to be a public street. The proposed transformation from a private to a public street naturally made it necessary that the Corporation should be parties to the application. Here there was no such necessity.

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LORD PRESIDENT.—I think the judgment of the Dean of Guild is wrong. I think that this is not a competent proceeding under the 290th section of the Glasgow Police Act of 1866. The application craves the Dean of Guild to declare that the street in question is a public street, and to direct the Registrar of Public Streets to enter the street in the Register of Public Streets.

Now, the question is whether section 290 warrants that application. There is this to be observed, in the first place, that the words of the prayer seeking for a declaration that the street is a public street, and to have it entered in the register, are manifestly intended to apply to section 282, because the register therein provided is to contain those streets which have been declared by the Dean of Guild to be public streets. The real question in this case is, whether a declaration in that sense is obtainable under section 290, or whether it is only obtainable under section 286. Now, I think that the argument in support of the judgment proceeds upon this mistake,—it assumes that the jurisdiction of the Dean of Guild, under section 290, is a jurisdiction, first, to authorise the construction of something as a public street, and then, on that being done, to declare it a public street. To my thinking, section 290 has the much more limited effect which is contended for by the Corporation of Glasgow. The main and substantial enactment in section 290 is, that anybody who intends to lay out or form a new street shall not be entitled to do so within the town of Glasgow until he gets the authority of the Dean of Guild for that physical operation. And accordingly, disregarding in the meantime the additional or parenthetical parts of the section, the case purported to be dealt with is a case of someone who, having vacant ground, intends to make a street on it. He cannot do that within burgh unless he gets the authority of the Dean of Guild. But, then, quite incidentally to that, the Act says, or, rather, said—because all this turns out to be abandoned and superseded by subsequent legislation—“You must in your petition say whether such street is intended to be a public street or a private street.” It does not carry that out by saying that the Dean of Guild shall authorise a public street, or a private street, as the case may be, but it merely says,—“We mention that in order to enable the Dean of Guild, even at this early stage—even at the initial stage—of physically forming a street, to require in the one case that there shall be one set of conditions, and in the other another set of conditions.” Now, as I have said, that is done away with by the subsequent Buildings Act of 1892, because the same conditions are applicable to the one case as to the other. But it is not the less clear what is the reason for the introduction of the subject of public or private streets. It is to save the useless expenditure of money in the case of what is contemplated as ultimately destined for use as a public street, and to prevent the complications which might arise from proprietors expending their money on less effective streets, so to speak, than would ultimately be accepted by the town.

But those conditions, which may have a very substantial convenience, cannot at all affect the enacting words of the section, which only authorise an application to the Dean of Guild for the purpose of authorising any street to be formed. It is sought, however, to rear up the jurisdiction now

invoked by saying, but then why have the Master of Works sisted a party in these proceedings, if this has no effect on the ultimate question of a private or a public street? The answer seems to be very simple. The Master of Works is the proper official to consider questions of public safety and convenience which are equally applicable to private and to public streets. Therefore it is well that he should be there in order to see, whether it is going to be ultimately a private or a public street, that it is a safe street, and a convenient street. And it must be remembered that the town, whether it be a private or a public street, has an interest in the construction of any street, because it is the police who look after the street, although the town does not, in the case of a private street, maintain it. But then this leads one to consider what is the relation of section 290 to section 286. It seems to me that section 290 stops short with the mere warrant to construct a street. Then comes the question who is, in the end, to maintain it? Now, section 286 is the only section in the Act which, in terms, authorises the Dean of Guild to pronounce a declaration such as will warrant the registrar to proceed under section 282. And the only objection to the application of section 286 to the case in hand is that this street was authorised *ab ante* as a public street, and therefore cannot be a private street. Now, if my view of the limited operation of section 290 be correct, it involves this, that I think the Dean of Guild in the original proceeding went too far when he in his interlocutor granted warrant to form the intended street as a public street. I do not think that was within his province. I think his duty was merely to authorise the street to be constructed. He might well take note of the fact that, as it had been offered to him as intended to be a public street, he had had regard to the conditions applicable to intended public streets. But then when we turn to the definition clause we find that "private street" has so wide and exhaustive a construction put upon it that it includes everything which has not been declared a public street in the sense of the Act. And if I am right in saying that section 290 does not warrant the Dean of Guild in declaring a street a public street, then it follows that a street authorised under section 290 when it comes to be constructed is a private street in the sense of section 286. Upon these grounds I hold that no declaration that a street is a public street can be competent, except on the conditions and at the instance set out in section 286.

I am of opinion therefore that the judgment of the Dean of Guild must be recalled, and that the petition should be dismissed.

LORD ADAM.—I am of the same opinion. If the judgment of the Dean of Guild is right, the Act would seem to put the duty, as far as certain streets are concerned, upon him to declare that they should be maintained by the community, and not by the private individual. I should not have thought that that was a duty likely to be confided to the Dean of Guild in such matters, because it is obviously more a duty lying upon the magistrates of the city to say which of the streets of the city shall be maintained at the public expense, and which shall be maintained at private expense. It does not look like a duty which is likely to be imposed on or given to the Dean of Guild, or any officer of that kind, who has more to do with buildings.

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No. 117. But, no doubt, if this interlocutor or judgment is right, then, in the case of all new streets, it would be in the power of the Dean of Guild to declare, as he has done in this case, that they shall be public streets, and be maintained by the community,—a very large power to give. But with your Lordship I do not think that that was really intended. In section 290, under which this application is made, power is given to any proprietor, who intends to lay out a street, to make application to the Dean of Guild for a warrant to do so. And that proprietor may make application to the Dean of Guild for a warrant to sanction such street ; and in that application he shall state whether it is intended to be a public street or a private street, and the height of the houses, and so on. That is all he has power to arrange. Now, it is clear to me that that has reference more to the locality of the street than to anything else. It is an intended street. It is not in fact a street as yet. I can quite understand that in the laying out of an estate it is right that the whole thoroughfares, or intended thoroughfares, shall be laid out at the direction and under the instructions of the Dean of Guild, and accordingly I think this is a regulation for that purpose. It authorises a proprietor to go to the Dean of Guild, and to say,—“I am going to form a street here ; I intend that it shall be a public street ; give me authority and warrant to lay out the street.” Power is given to the Dean of Guild to do that, but there it stops. I see no authority given to the Dean of Guild except to grant a warrant to lay out or form a street in a particular line. He, no doubt, is entitled to lay down conditions under which that street shall be formed, and during its formation to act as your Lordship has said, because the formation of a street may occupy a very considerable time. During that time it may be partially open to the public. Accordingly provision is made for that state of matters by the Dean of Guild laying down certain conditions, and authority is given to the Master of Works to enforce these conditions. Authority is also given to the Dean to make conditions as to the interim maintenance of a street by the proprietor. Now, what does interim maintenance of a street mean ? Until the street is in a condition of formation to be declared to be a public or a private street. If it is a private street no application would be necessary, but if it is meant to be a public street then after all that has been done, after all those conditions are complied with, the maker of the street is in a condition to go to the Dean of Guild, with the consent of the magistrates, and ask to have this street declared to be a public street ; and the magistrates, being parties to that application, no doubt it would be granted, and the street would be declared public. But I do not think that, under this section 290, the Dean of Guild had power to do anything else than grant warrant to form a street under certain conditions. Having done that, I think his powers ceased, and therefore I agree with your Lordship.

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LORD M'LAREN.—I must confess that I began the hearing of this case with an impression very favourable to the interlocutor under review, but my opinion has been completely changed, partly by the very clear and able argument addressed to us by Mr Lees, and partly by some considerations depending on the peculiarity of the construction of local Acts of Parliament as distinguished from public Acts. I do not refer, of course, to the

want of symmetry which is sometimes apparent in the clauses of local bills, No. 117.
but I mean this, that local Acts of Parliament are largely concerned with questions of property and private right, while public Acts deal rather with those relations of the citizen to the state which are independent of proprietary right. Now, in an Act of Parliament dealing with rights of property, as those Burgh Police Acts do to a large extent, one has to consider what are the rights of the parties independently of statute, and how far it is evident on the face of the Act, or probable, that such rights were intended to be interfered with. I am not sure that it has ever been directly determined what is the nature of the right which the public has in a private street, and I should not wish to express more than a provisional view on the subject for the purposes of the present case. But it seems to me that when a landowner forms a private street through his property, then, apart from the effect of statutes, he would not lose his right to that street, or give the public a perpetual right of way over it, unless by actual dedication or appropriation to public uses, or by suffering the public for time immemorial to use the street. Slight evidence of dedication might be sufficient in the case of a street in a town which was open without restriction to every one, and which had no gates or marks of private property annexed to it. But in the absence of any such dedication, and in the absence of prescriptive use by the public—or as I should say “immemorial” use—then the proprietor retains the property of the street. He may pull down the adjacent buildings and cover the area of the street with buildings upon a new design. It would therefore seem to be proper that before a private street is declared public the matter should be brought under the cognisance of some judicial authority, the Dean of Guild being obviously a very suitable judge in a question of that kind. It does appear to me that in such a case one would expect either the consent of both parties or a reference to a local judge. But again a private owner may attach very little importance to the right which he has in the *solum* of a street, and which he perhaps never intends to alter; and it may be an object to him to throw the burden of maintaining the street upon the public. Therefore it seems quite proper that the assent of the representatives of the community should also be required, or failing joint consent, that the matter should be determined by some neutral authority. Now, I am unable to sustain the view that under section 290 we are to read into the section by implication an interference with the powers of the Corporation in regard to the streets, or an authority to the Dean of Guild to compel them to maintain a given street as a public street independently of agreement. That might be done by Act of Parliament without shocking our sense of propriety; but unless the power were expressly given I should not assume it from the mere fact that, in the authority to present an application for a different purpose, it is said that the petition shall state whether the street is intended to be a public or a private street. I think those words are satisfied, as your Lordship has pointed out, by the necessity of stating the proprietor's intention in regard to the future, so that the Dean of Guild shall see that the street was properly made and the drains properly arranged, and everything done upon the system which had been established for the regulation of public streets. It by no means follows that a street is to be declared a public street in such an application.

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No. 117. On the contrary, we are referred to a different section, 286, where that may be done with different safeguards, and under different conditions.

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I agree with your Lordships who have spoken, in holding that the Dean of Guild was in error in sustaining the application by a proprietor not assented to by the Master of Works on the part of the Corporation.

LORD KINNAR.—I agree with your Lordship. I think that the 290th section of the statute empowers the Dean of Guild to sanction the construction of a street. But it does not in terms empower him to declare that the street so made shall be a public street. After the street has been constructed according to certain conditions, the question is, under what authority can it be declared to be a public street in terms of the statute, with the result of throwing upon the community obligations which had previously been laid upon the proprietor of the lands? The only section to which we have been referred as directly authorising such an application to be made is the 286th, and I agree with your Lordships that that is inapplicable to the present case. It is said that it is not inapplicable because the street now in question was not a private street, because the Dean of Guild in giving his original sanction to its construction sanctioned it as a public street. In adding these words the Dean of Guild went beyond the precise terms of the prayer of the petition before him. But still he was called upon by the statute to consider, and no doubt very properly considered, whether the street was intended to be public or private, and gave his sanction upon the hypothesis that it was to be a public street. That was necessary for the exercise of his jurisdiction under the 290th section, because the statute requires that the applicant for such sanction shall state in his application whether he intends the street to be public or private. And then it goes on to authorise the Dean of Guild to impose conditions in the event of its being intended to be a public street, but it does not enable him to impose conditions if it is to be a private street.

We are informed that by a later statute the conditions which he might impose only in the case of the intention to construct a public street under the Act of 1866 belong to him now, and are constantly exercised by him with reference to the construction of private streets also, under the Glasgow Building Regulations Act of 1892. But although he may exercise the same powers in the one case as in the other, I presume it is still of importance that he should know whether it is the intention of the applicant to make his street public or private, because the conditions may be applicable in one degree or another, according as the future condition of the street is to be private or public. But while he has to take into account the future destiny of the street—the design of the applicant in making it a public or a private street—there is still nothing in the section which enables him to do more than to sanction its construction. Now, when it has been constructed the question is, whether it is enough to make it a public street that the Dean of Guild has authorised its construction in that view—because that is really the theory upon which the judgment is based—that the question is settled once for all by the Dean sanctioning the construction of the street with a view to its becoming public. But then that sends us to the definition clause of the statute to see what a public street is, and that makes

it perfectly clear that something further remains to be done, because a public street is "any road or street within the city which has been maintained by the Police and Statute Labour Committee, or which is by this Act, or shall hereafter in pursuance thereof be, declared to be a public street." Therefore the declaration has still to be made which will make this a public street. Well then, if that be so, is it not a private street? It is constructed; it is a street; and it has been constructed by a private proprietor who must make application to have it declared a public street if this declaration is to be given. But in the meantime the statute says, as your Lordship has pointed out, that "private street" means a street which has not been maintained by the Police and Statute Labour Committee, and is not by this Act declared to be a public street. That appears to me therefore to be the predicament in which this street now stands. It is therefore a street under section 286, which determines the conditions upon which it may be declared public, and the applicant upon whose prayer that may be done. I therefore agree with your Lordship.

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THE COURT recalled the interlocutor of the Dean of Guild, and dismissed the petition.

MELVILLE & LINDESAY, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

WILLIAM LAWSON, Pursuer (Respondent).—*D. Dundas—Cook.* No. 118.
GEORGE WILKIE, Defender (Reclaimer).—*C. J. Guthrie—Salvesen.*

Property—Servitude—Building Restriction—Prohibition against building on vacant ground used as a back-green—Whether prohibition affected portion of back-green occupied at date of disposition by a small building not separately conveyed.—By a disposition dated 1866 there was conveyed to A, (first) a tenement of four storeys "with the cellars and outhouses attached, and belonging to the said tenement . . . and the area of ground on which the said tenement, cellars, and outhouses stand," and (second) "the vacant ground situated to the north of the said area of ground . . . which vacant ground is at present occupied by" William Thorburn "as a 'back-green,' but under the following restriction, which was declared to be a real burden affecting the subjects disposed,—"that the said William Thorburn and his foresaids shall not have power to build on the vacant ground or back-green . . . nearer to the north face of the wall forming the south boundary of said vacant ground or back-green than ten feet."

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The vacant ground occupied by William Thorburn as a back-green was a well-defined space surrounded on all sides by walls, but at the south-east corner of it and within ten feet of the south boundary wall there were at the date of the disposition two little buildings, each about five feet square and ten feet high. The back-green was on a higher level than the tenement first disposed, and access was had to it from the ground on which the tenement stood by a flight of steps, and by a door in the south wall. The little buildings were removed shortly after 1866.

In 1896 A was proceeding to build on a portion of the back-green which had been occupied by one of the buildings, when B, the proprietor of an adjoining property on the south, who under his title, derived from A's author, was entitled to enforce the restriction in A's title, raised an action to have him interdicted from building on the ground that the proposed building was within ten feet of the south boundary wall.

A maintained that the building restriction affected only the vacant ground conveyed to him, and that the ground occupied at the date of his disposi-

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After a proof the Court (*aff. judgment of Lord Low*) granted interdict, *holding* (1) that the buildings were not outhouses belonging to the tenement, but were adjuncts to the back-green; (2) that being nowhere else dealt with in the disposition they were carried by the conveyance to A of the vacant ground occupied as a back-green, and therefore (3) that the building restriction being commensurate with the subjects so conveyed affected that part of the back-green occupied by the buildings.

1ST DIVISION.
Lord Low.

IN 1866 George Lindesay of Feddinch disposed to William Thorburn, baker in Leith, *inter alia*, "All and Whole that tenement of four storeys, . . . 46 Constitution Street, Leith, with the cellars and outhouses attached and belonging to the said tenement, all as presently occupied by Messrs Cochrane, Paterson, & Company, corn-merchants, and the said William Thorburn, and the area of ground on which the said tenement, cellars, and outhouses stand, and also the vacant ground situated to the north of the said area of ground, and partly behind the same and partly behind the area of ground on which the tenement No. 44 Constitution Street stands, which vacant ground is at present occupied by the said William Thorburn as a back-green, bounded the said subjects . . . on the south . . . partly by the said subjects presently occupied by the said Messrs James Lindesay & Sons. . . But declaring that the subjects hereby disposed are disposed with and under the restrictions and others underwritten, which are hereby declared to be real burdens affecting the said subjects hereby disposed,—that is to say, the said William Thorburn and his foresaids shall not have power to build on the vacant ground or back-green forming part of the subjects hereby disposed nearer to the north face of the wall forming the south boundary of said vacant ground or back-green than ten feet."

At the same time Mr Lindesay disposed to Francis Lindesay the "subjects presently occupied by James Lindesay & Sons," bounded on the north partly by the vacant ground sold to William Thorburn, declaring that Francis Lindesay and his heirs and assignees should be entitled to enforce, *inter alia*, the building restriction declared to be a real burden on Mr Thorburn's property.

On 22d April 1896 William Lawson, who had come to be proprietor of the subjects disposed to Francis Lindesay, raised an action against George Wilkie, who was in right of the subjects disposed to William Thorburn, concluding, *inter alia*, (2) for declarator that the defender, in virtue of the provisions contained in the above-mentioned dispositions in favour of William Thorburn and Francis Lindesay, "is debarred from building on the vacant ground or back-green forming part of the subjects disposed by said George Lindesay to the said William Thorburn nearer to the north face of the wall forming the south boundary of said vacant ground or back-green than ten feet, and that a brick wall of twelve feet or thereby in height, forming part of the buildings recently erected by the defender at the back of the premises belonging to him, facing Constitution Street, Leith, is built to the extent of five feet or thereby in length, and of twenty inches or thereby in depth, upon the said vacant ground, and within ten feet from the north face of the wall forming the south boundary of the said vacant ground, or within ten feet of the line occupied by the said north face prior to the recent partial removal by the defender of said wall, and thus constitutes a breach of the provisions contained in

the said dispositions"; (3) for interdict against the defender erecting any further buildings on the vacant ground nearer than ten feet from the north face of the south wall; (4) for removal of the buildings already erected; and (5) for damages.

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The pursuer averred that the defender had recently commenced extensive building operations on the property belonging to him, and had, *inter alia*, begun to erect a brick wall upon the vacant ground or back-green within ten feet of the north face of the south boundary wall.

The defender admitted that he had begun to erect a brick wall on part of his property, but denied that he was making any encroachment in doing so. "The ground upon which the brick wall complained of is erected was never vacant ground within the meaning of the clause in the disposition in question. Further, at the time when said disposition was granted, there had been erected, *ex adverso* of the gate at the end of the mutual wall, and within 8½ feet or thereby of part of the north face of the wall, a tool-house, which belonged to the defender's authors. It was not intended by said disposition to affect the right to maintain the said building, or to erect future buildings on the space occupied by said tool-house, or upon any space to the south and east of said tool-house, the sole object of the servitude being to preserve light and air for the yard belonging to the pursuer on the south of the division wall in question."

The pursuer pleaded;—(2) The defender being restricted in the use of the piece of vacant ground specified in the second declaratory conclusion of the summons, to the effect specified in the second declaratory conclusion, and the defender having committed a breach of the said restriction, as condescended on, the pursuer is entitled to decree of declarator, interdict, and removal, in terms of the second, third, and fourth conclusions of the summons.

Proof was led. It appeared from the proof that the vacant ground occupied by William Thorburn as a back-green was a well-defined space surrounded on all sides by walls, but at the south-east corner of it and within ten feet of the south boundary wall there were at the date of the disposition two little buildings, each about five feet square and ten feet high. The back-green was on a higher level than the tenement first disposed, and access was had to it from the ground on which the tenement stood by a flight of steps, and by a door in the south wall. The little buildings were removed shortly after 1866. There was also evidence that the small buildings on the back-green were used in connection with it, and were not outhouses connected with the tenement first described in the disposition to Thorburn.

On 4th December 1896 the Lord Ordinary (Low), *inter alia*, found "(1) That the defender is by his titles prohibited from erecting any buildings upon the vacant space or back-green therein mentioned nearer the north face of the wall forming the southern boundary of said vacant space or back-green than ten feet; (2) that the prohibition extended to the portion of the wall at the south-east corner of the said vacant space or back-green in which, prior to the recent operations of the defender, there was a door which gave entrance to the said vacant space or back-green from the premises belonging to the defender fronting Constitution Street, Leith; and (3) that a portion of the brick wall mentioned in the summons, erected by the defender, is nearer the line of the north face of the said wall at the foresaid south-east corner of the said vacant space or back-green than

No. 118. ten feet: Therefore, to the extent and effect of the above findings, finds, decerns, and declares in terms of the second conclusion of the summons," granted interdict against further building, and ordained the removal of the brick wall so far as it was nearer the north face of the south wall than ten feet, and assoilzied the defender from the fifth conclusion of the summons.*

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* "OPINION.— . . . The defender's property is described as consisting of two parts, first, a tenement of four storeys, 'with the cellars and outhouses attached and belonging to the said tenement . . . and the area of ground on which the said tenement, cellars, and outhouses stand': And, secondly, 'the vacant ground situated to the north of the said area of ground,' and partly behind it and partly behind another property, 'which vacant ground is at present occupied by the said William Thorburn as a back-green.'

"Looking at the plans which have been produced, there does not at first sight appear to be much doubt as to what the subjects are which are referred to in the two branches of the description. Take plan No. 46 of process, which is admitted to be a correct representation of the properties before the defender commenced to build. The vacant space or back-green is there shewn as a perfectly well-defined space, surrounded on all sides by walls, and it answers the description of being partly behind the area of ground described in the first place in the disposition, and partly behind the other property there referred to. It is further not disputed that it is the ground which was occupied by Mr Thorburn as a back-green.

"The clause in the disposition on which the pursuer founds is in the following terms:—'Declaring that the said William Thorburn and his fore-saids shall not have power to build on the vacant ground or back-green forming part of the subjects hereby disposed nearer to the north face of the wall forming the south boundary of said vacant ground or back-green than ten feet, and any building that may be erected on said vacant ground shall not exceed, as regards the south elevation thereof, 18 feet in height from the surface of the ground.'

"Here, again, if the plan only is considered, the area over which the prohibition to build extends does not appear to be doubtful. There is a wall which forms the south boundary of the back-green, and *prima facie* the continuity of the wall as the boundary is not broken by the fact that there is a door through it at the east end. Nor does the fact that, at the east end, there is a small piece of the defender's ground on the south side of the wall render the wall at that place the less the boundary of the back-green.

"But then the defender says that at the date of the dispositions there were two small buildings in the south-east corner of what is shewn upon the plan (No. 46) as a back-green, and that these buildings did not form part of the back-green, but were outhouses 'belonging to the tenement,' and were among the subjects included in the first branch of the description.

"These two little buildings were spoken to by the witnesses Robert and James Thorburn, who are sons of Mr Thorburn, to whom the defender's property was disposed in 1866. Mr Thorburn was tenant of the property for six years before he bought it, and his sons say that for some years after they went there the houses in the back-green were in existence. The elder brother Robert, although he was only eleven years old when his father bought the property, has a distinct recollection of the houses, and gives a clear, and, I have no doubt, an accurate description of them. They were two little houses standing side by side, about 4 or 5 feet square, and about 10 feet high, built of stone and with a flat stone roof. The door to which I have referred, in the south-east end of the boundary wall of the

The defender reclaimed.

The arguments sufficiently appear from the opinions of the Court and Lord Low.

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LORD M'LAREN.—This is an action of declarator, interdict, and damages, founded on the fact that the defender, who is proprietor of two buildings on adjacent areas of his property, is in course of making a communication or covered way from the one block to the other, contrary, as is alleged, to a restriction against building constituted in favour of the pursuer.

The case is not free from difficulty, but after giving my best consideration to the defender's argument, I am satisfied of the soundness of the views expressed in the Lord Ordinary's judgment. The Lord Ordinary has very fully discussed the questions arising on the title-deeds and the evidence, and

back-green, gave entrance directly into one of the houses. At what date the houses were removed is not definitely ascertained. Both the Messrs Thorburn think that they were removed soon after their father bought the property, and when he was making some alterations upon the dwelling-house. I think that that was probably the case, but I cannot hold it to be a proved fact in the case that the houses were not removed until after the disposition to Mr Thorburn. In the view which I take of the case, however, that is not material, and I shall assume that the houses were standing at the date of the disposition. Even upon that assumption, however, I cannot regard them as being 'outhouses attached and belonging to the tenement,' and therefore as falling within the first branch of the description and not included in the back-green.

"The little buildings might, no doubt, be described correctly enough as outhouses, but they are not attached to the tenement, nor do I think that they could be properly described as belonging to the tenement, even assuming (what is doubtful) that it is competent to read the words 'attached and belonging,' as if they had been 'attached or belonging.'

"The back-green is not only described in the titles as a separate subject from the tenement, but it is physically a separate subject. The tenement has certain outhouses attached to it, and also an open area or courtyard. The back-green in question is on a higher level than the ground upon which the tenement, with its outhouses and courtyard stands, and access is had to it by a flight of steps which lead from the courtyard to the door in the wall to which I have referred. Further, it is difficult to imagine any purpose connected with the tenement which the little buildings could be intended to serve. When or by whom or for what purpose they were erected cannot be ascertained, but the description given of them by Mr Robert Thorburn, and their situation, suggest that they had been designed to serve some purpose (such, for example, as tool-houses) in connection with the back-green and not with the tenement. If it had been desired to describe the buildings as belonging to any subject, I think that they would have been described as belonging to the back-green.

"But then the defender argued that if the buildings were on the back-green in 1866, it could not be described as an open space, and that therefore the open space referred to must have been the portion of the back-green on which there were no buildings. Now, no doubt if the buildings were in existence, it was not strictly accurate to describe the whole back-green as vacant ground, although as the back-green was of considerable extent and the buildings were very small, and of no value, the inaccuracy of the description was not serious. But further, the subjects are not only described as vacant ground but as vacant ground which 'is at present occupied by the said William Thorburn as a back-green.' Now, what was occupied by Mr

No. 118. I do not propose to elaborate my opinion at the same length, as I should only be repeating what has already been most clearly explained, but I shall indicate my view on what I think is the critical point in the case.

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The subjects owned by the pursuer and the defender were, until the year 1866, one individual estate, and in that year they were disposed in separate parcels to the pursuer's author, Lindesay, and the defender's author, Thorburn. The defender's property is described as consisting of two parts—first, a tenement of four storeys, “with the cellars and outhouses attached and belonging to the said tenement . . . and the area of ground on which the said tenement, cellars, and outhouses stand”; and secondly, “the vacant ground situated to the north of the said area of ground . . . which vacant ground is at present occupied by the said William Thorburn as a back-green.” The building restriction on which the pursuer founds is in these terms :—“Declaring that the said William Thorburn and his forebears

Thorburn as a back-green was the whole ground, including the little buildings which, if used by him at all, were used as adjuncts to the back-green and not as offices in connection with the tenement. Further, in other parts of the disposition the ground is referred to as ‘said vacant ground or back-green.’ I therefore do not think that the criticism upon the wording of the description is of much weight, and I cannot doubt that the buildings were included in the subjects described in the second place in the disposition.

“I think that the question is to be determined, not by speculations as to the history of the wall, but by the words of the disposition. I have already pointed out that the description of the wall in the clause prohibiting building differs from the description in the clause declaring part of the wall to be mutual. There must have been some reason for that difference, and it is explained, as I have said, by assuming that the wall was to be mutual only as far east as the return wall, but that the prohibition against building extended also to the part of the wall in which the door was. That assumption is entirely consistent with the language used in the clause, and no other assumption appears to me to be so. Further, if I am right in thinking that the description—‘the vacant ground’—refers to the whole back-green, including the part upon which the little buildings stood, then the wall forming the southern boundary of the vacant ground, presumably runs the whole length of the ground. . . .

“I am therefore of opinion that the prohibition extends to the south-east corner of the back-green. The defender has infringed that prohibition by the wall which he has erected. No doubt the infringement is so far very small, but it is admitted that the wall which has been erected is only one side of a proposed porch, which would constitute a substantial infringement of the prohibition. I am therefore of opinion that the pursuer is entitled to decree so far as regards the infringement. . . .

“The pursuer further concludes for damages. He has put in certain accounts which seem to represent extrajudicial expenses which he has incurred in certain litigations in regard to the properties which he has had with the defender. It is clear that he cannot claim the amount of these accounts as damages in this action. The pursuer further claims damages for the trouble to which he has been put in defending his rights. I never heard of such a claim, which is one which might be put forward by almost every successful litigant. The rule is that everyone is entitled to maintain and defend what he believes to be his legal rights, and unless in the case of an action being brought maliciously and without probable cause, an unsuccessful litigant is liable in no further damages than the expenses of process.”

shall not have power to build on the vacant ground or back-green forming part of the subjects hereby disposed nearer to the north face of the wall forming the south boundary of said vacant ground or back-green than ten feet." There is also a restriction as to the height of the building which may be erected on the back-green, with which we are not directly concerned.

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Whatever may be the true interpretation of the clause of restriction, I think that the expressions "vacant ground" and "back-green" which are used in the dispositive clause, and also in the clause of restriction, must apply to one and the same physical subject. It is, I think, a safe and universally applicable rule of construction that descriptive words must be taken to have the same meaning wherever they are used without qualification in different parts of the same deed. Now, I think there is not much difficulty in ascertaining what was the subject conveyed under the name of "vacant ground" occupied by Thorburn as a back-green. The Lord Ordinary, referring to the plan No. 46 of process, which is admitted to be a correct representation of the properties, observes:—"The vacant space or back-green is there shewn as a perfectly well-defined space, surrounded on all sides by walls, and it answers the description of being partly behind the area of ground described in the first place in the disposition, and partly behind the other property there referred to. It is further not disputed that it is the ground which was occupied by Mr Thorburn as a back-green." I do not understand that this statement of the Lord Ordinary is disputed. In any case it seems to be perfectly clear that the property conveyed is the entire space enclosed by the walls surrounding the back-green. That being so, I must hold that the prohibition against building within ten feet of the north face of the wall forming the south boundary of the vacant ground also applies to the whole contained area. The argument for the defender on this part of the case depends on the fact that at the date of the disposition there were two small buildings in the south-east corner of the back-green, and that the area occupied by these buildings cannot be properly described as vacant ground. It is suggested that these buildings are covered by the words of the first description, which conveys, *inter alia*, outhouses "belonging to the tenement," and in any case it is said that the area occupied by these buildings is not "vacant ground," and that their site ought to be taken to be excepted from the building restriction.

Now, it may be that if there was no better title to the land occupied by the two small buildings, these might be covered by the expression "outhouses belonging to the tenement." But this observation does not carry very far. The buildings are undoubtedly within the area described as the vacant ground in use as a back-green, and the small buildings are not excepted from the conveyance of the back-green.

The argument, then, comes to this, that in so far as a fractional part of the back-green is occupied by such buildings, it is not correctly described as vacant ground. But when so put the argument does not impress me, because it only amounts to this, that the description, although sufficient for the purposes of identification, is not strictly accurate. But it is not easy to frame a description of heritable subjects which is not open to criticism from the point of view of strict accuracy, and accordingly it has been recognised that a description of lands is sufficient if it identifies the

No. 118. property as a whole, although there may be features which are not noticed in it. Supposing that the subjects first and second described in Mr Thorburn's title had been sold to separate purchasers, can it be doubted that a conveyance of the vacant ground occupied as a back-green would carry any buildings upon it which were not of sufficient importance to be treated as separate tenements? This consideration, in my opinion, suffices for the disposal of the case so far as the argument depends on the use of the words "vacant ground." Because when it is once ascertained that the words of conveyance include the small buildings, it follows that the building restriction must receive an equivalent interpretation. The descriptive words are the same and the motive is the same, because I cannot conceive of any reason for a restriction of the right of building which should not apply to the whole length of the proposed building line.

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A separate argument was maintained regarding the use of the word "wall" in the building restriction, viz., that "wall" does not include door. I shall not repeat the Lord Ordinary's answer, which to my mind is perfectly convincing, and to which I have really nothing to add.

On both points, I would observe that while in theory restrictions on the use of property are subject to a strict interpretation, this rule, like all sensible rules of law or criticism, has relation to substance rather than to form. For example, a prohibition against erecting shops or warehouses would not be extended so as to apply to dwelling-houses. But when we consider the meaning of descriptive words, these, I think, must receive a true and reasonable interpretation according to the ordinary use of language, whether the description is contained in a disposition or grant, or in a clause qualifying the grant or restricting the use of the subject. I move your Lordships to adhere to the Lord Ordinary's interlocutor.

LORD ADAM and LORD KINNAR concurred.

LORD PRESIDENT.—I am satisfied with Lord M'Laren's judgment.

The difficulty which had presented itself very strongly to my mind was this: The title in imposing this prohibition seems to make a direct appeal to the state of possession by William Thorburn in 1866, and to apply this prohibition solely to what, according to William Thorburn's occupation, was vacant ground or back-green. Now, in point of fact, in 1866, I think it is proved that this was not vacant ground, because it was covered by a building of stone not of a temporary character, and the same reason makes it extremely difficult for me, as it does for Lord M'Laren, to apply the words vacant ground or back-green to the inside of a stone building. But Lord M'Laren has, I think, satisfactorily met that difficulty by reasoning in which your Lordships concur, and I accordingly consent to the judgment proposed.

THE COURT refused the reclaiming note.

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—BOYD, JAMESON, & KELLY, W.S.—Agents.

THE COUNTY COUNCIL OF THE COUNTY OF ROXBURGH, First Parties.— No. 119.

John Wilson.

THE MELROSE DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF ROXBURGH, Second Parties.—*A. J. Young.*

Mar. 5, 1897.
County Council of County of Roxburgh v. Melrose District Committee.

Process—Special Case—Competency.—A special case was presented by a County Council, as first parties, and a District Committee of the County Council, as second parties, to determine the question whether an assessment should be levied from the whole county or only from the district. The Court, *ex proprio motu*, dismissed the case as incompetent, in respect that the District Committee, not being concerned with the payment of rates, had no interest or title to appear.

BY a resolution of the County Council of Roxburgh passed in 1ST DIVISION. October 1894, it was determined that any assessment for the rebuilding of certain bridges within the county, of which Melrose Bridge was one, should be levied from the whole county.

The side walls of Melrose Bridge having shewn signs of weakness, the Melrose District Committee employed Mr Westland, C.E., to examine the bridge, and report.

Mr Westland thereafter reported that to put the bridge into a satisfactory state very considerable works would require to be executed upon it.

Thereafter the County Council found that the works recommended by Mr Westland did not amount to rebuilding the bridge. As the result of this finding would have been to throw upon the Melrose district the cost of repairing the bridge, the Melrose District Committee declined to acquiesce in this finding, and maintained that the work that was necessary would amount to rebuilding the bridge.

In order to settle the question, a special case was presented by the County Council of the county of Roxburgh, of the first part, and the Melrose District Committee, of the second part.

After a narrative of the foregoing facts, the following questions were submitted for the opinion and judgment of the Court:—“(1) Do the operations set forth by Mr Westland in his said reports amount to a ‘rebuilding’ of Melrose Bridge, within the meaning of section 58 of the Roads and Bridges Act, 1878, and section 3 of the Roads and Bridges Amendment Act, 1892,* to be provided for by an assessment under the said sections of the said statutes? (2) Are the said operations to be regarded as of the nature of ‘maintenance’ or ‘repair’ of the said bridge, within the meaning of the said statutes, and as such to be provided for by an assessment under section 52 of the Roads and Bridges Act, 1878?”

At the hearing a doubt was expressed by the Court as to the title of the District Committee to appear.

Counsel for the parties argued that it had a title; that the question really was whether the action of the County Council was *ultra vires*, and that the District Committee was entitled to be heard to plead that it was.

LORD PRESIDENT.—I do not think that the special case will do.

The District Committee has administrative duties, but it is not a contri-

* The Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. cap. 51), sec. 58; the Roads and Bridges (Scotland) Amendment Act, 1892 (55 and 56 Vict. cap. 12), sec. 3.

No. 119. butory to the rate which it maintains ought not to be levied, and accordingly it has no concern with or interest in the question from what rateable area the money has to be found to pay for the bridge.

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It is no part of our duty to suggest other people who might competently raise the question, but the statements of the case would point to the rate-payers.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR.—I agree that there may be persons with a good title and interest to raise this question, but it has not been shewn that the District Committee have any. Accordingly, we can no more entertain a special case between that committee and the other party than we could hear an action raised at the instance of a party who has no title to sue.

THE COURT dismissed the case.

WILLIAM BOYD, W.S.—ALEX. O. CURLE, W.S.—Agents.

No. 120. THE ARIZONA COPPER COMPANY, LIMITED, First Parties.—*D.-F. Asher—Clyde.*

Mar. 5, 1897. THE LONDON SCOTTISH AMERICAN TRUST, LIMITED, Second Parties.—*Lorimer—John Wilson.*

Mar. 5, 1897.
Arizona Copper Co., Limited, v. London Scottish American Trust, Limited.

Interest—Agreement to pay share of profits to trustee as a sinking fund to secure debentures—Interest of sinking fund.—A company by an agreement entered into with a trustee for future debenture-holders became bound each year "to accumulate as a sinking fund in the hands of" the trustee a proportion of its free annual profits for securing and paying the debentures, the trustee being authorised to invest the trust funds in his hands from time to time. *Held* that the interest derived from the funds so invested by the trustee did not fall to be credited to the company as part of its annual profits, but that the trustee was bound to accumulate it with the funds forming the sinking fund.

1ST DIVISION. ON 1st October 1894 an assignment, agreement, and declarator of trust was entered into between the Arizona Copper Company, Limited, of the first part, and the London Scottish American Trust, Limited, of the second part.

The agreement proceeded on the narrative that the Arizona Company contemplated raising money by the issue of (1) terminable debentures to the amount of £100,000; (2) A debenture stock to the amount of £135,000; and (3) B debenture stock, to the amount of £181,300, these securities to be charges in their order upon the property and assets conveyed to the Trust Company.

The agreement, *inter alia*, provided,—“(Fourth) For the better securing of the debts and obligations hereinafter set out, the first party hereby undertakes, each year after the year ending on 30th September 1894, to accumulate as a sinking fund in the hands of the second party 25 per cent of its free annual profits remaining, after satisfaction of the interests called for in terms of the several obligations set out in article fifth hereof . . . And it is hereby provided and declared that the first party may either pay the said accumulations in cash or by delivery to the second party of its terminable debentures of the class hereby secured, which, having been issued by the first party for cash, have been duly paid to and discharged by the holders thereof, accompanied by a certificate and affidavit by the first party's

secretary that the same have been *bona fide* met and paid by the company, and that no others have been issued in lieu and place thereof. The second party shall be bound to apply any sums of cash coming into its hands in terms of this article, in redeeming any terminable debentures of the first party which may for the time being be past due (it being in contemplation to issue debentures payable at different dates), but it shall not be competent to the second party to apply the funds coming into its hands in terms of this section in payment of interest on debentures, but only in payment of the principal sum thereof . . . (Fifth) It is hereby declared that the second party holds the said securities and sinking fund, subject to the trusts at present affecting the same until such trusts are validly discharged, in trust for the following purposes: *Primo loco*, for securing and paying all debts, claims, and expenses which may be incurred by it in executing the office of trustee . . . *secundo loco* . . . for securing and paying to the holders thereof the whole of the terminable debentures of the first party . . . with the interest from time to time due thereon at dates when the same becomes due . . . *tertio loco* . . . for securing and paying to the parties for the time being in right of the obligations of the first party undertaken in respect of the A debenture stock of the first party sums not exceeding in all £135,000, with interest thereon . . . *quarto loco* . . . for securing and paying to the parties for the time being in right of the obligations of the first party undertaken in respect of the B debenture stock . . . and *quinto loco*, after satisfying the whole of said purposes in their respective orders, the second party shall hold the said securities for the first party, or their assignees, and the said sinking fund shall thereupon cease to be accumulated . . . (Thirty-fourth) The trustees may lend out or invest the trust funds in their hands from time to time, or any part thereof, on heritable security, or in or upon the stocks, shares, debentures, or deposit-receipts, or other securities . . . as they in their sole discretion may think proper, and may from time to time at their discretion vary any such investment or security. Further, it is hereby provided and declared that while any of the said terminable debentures remain unpaid, the second party may invest any of the funds in its hands other than the sums paid in advance of calls on the A preference shares of the first party in the purchase or redemption at or below par of the said terminable debentures or any portion thereof. After the whole of the said terminable debentures have been redeemed the second party may invest the whole or any portion of the funds in its hands, other than as aforesaid, in the purchase or redemption at or below ten per cent premium of the whole or any portion of the A debenture stock. After the said debentures and A debenture stock have been paid off, the second party may invest the whole or any portion of the funds in its hands, other than as aforesaid, in the purchase or redemption at or below par of the B debenture stock, or any portion thereof."

The Arizona Company made payment from time to time of various sums to account of the sinking fund, in conformity with article fourth of the agreement, and the same having been invested by the Trust Company in sundry stocks and shares, in terms of said article thirty-fourth, the latter received and had in its hands considerable sums of interest thereon. The amount of the free profits falling to the sinking fund for the first year was nearly £12,000.

A question having arisen between the two companies as to the

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No. 120. disposal of the interest received by the Trust Company, a special case was presented by the Arizona Copper Company, of the first part, and the London Scottish American Trust, of the second part.

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The foregoing agreement, and the facts above stated, were set out in the case, and the following question was submitted for the opinion and judgment of the Court:—"Is the first party, in ascertaining and settling the proportion of their free annual profits payable to the second party in terms of the fourth article of the said assignation, agreement, and declaration of trust, entitled to credit for the amount of the income collected by the second party and arising on sums previously paid to the second party by the first party in terms of said fourth article, and forming the sinking fund for the time? or is the second party bound to retain such income and accumulate it with the other funds forming the sinking fund for the time, to be applied as provided in the said assignation, agreement, and declaration of trust?"

Argued for the first party;—The income derived from the investments of the sinking fund in the hands of the second party formed part of the income of the first party, and the first party were bound to take the same into account in determining the free annual profits, 25 per cent of which was payable to the second party, and the second party was bound to give credit for it as a payment from profits. The fourth article of the agreement conferred on the first party the option of satisfying the stipulated payment on account of the sinking fund by delivery of terminable debentures duly paid to and discharged by the holders thereof, or by payment of cash. If the payment were satisfied by delivery of such debentures, these being discharged would not carry interest, and the cesser of interest would wholly ensure to the increase of the free annual profits of the first party, and only 25 per cent of the resulting increase of these profits would be included in the proportion of the free annual profits falling to be paid on account of the sinking fund. If, on the other hand, the payment were made in cash and invested by the second party, and the whole income therefrom retained by the second party as part of the sinking fund over and above the proportion of the free annual profits, the amount accumulated would be increased, while the income and free annual profits of the first party would remain the same. That was not a reasonable result. The presumption was in favour of the two modes of satisfying the payment on account of the sinking fund leading to the same results, and therefore the Copper Company was entitled to get credit for the income whether it was derived from funds in the hands of the second party or arising from the cancellation of its own interest-bearing obligations.

Argued for the second party;—The income of the funds forming the sinking fund for the time fell to be accumulated with and added to the sinking fund, and applied to the purposes set forth in the trust-deed. There was nothing in the agreement to suggest that the interest received on money in the hands of, and invested by, the second, was to be handed over to the first party.

LORD PRESIDENT.—The question in this special case relates to the interest of moneys which have already been impressed into the hands of the second party, and the contention on behalf of the company is that, although those interests are received by, and are in the hands of the second party, yet the company is entitled to treat those interests as forming part of their free

annual profits. I do not think that a complete statement of the question, No. 120. because the words which are operative, as regards the obligation of the company, do not merely say that certain things shall be done about the annual profits, or rather, I should say, about a proportion of the annual profits, but they say that the company shall accumulate, as a sinking fund, year by year, 25 per cent of its free annual profits. I think those words clearly shew that the moneys which are being dealt with are moneys which, apart from stipulation, the company might accumulate, or might do something else with,—in fact, that they are moneys which are in the hands of the company.

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But the moneys now in question are not in the hands of the company. They are interests which, according to the scheme of this deed, are received and drawn by the second parties. That is the necessary consequence of the provision that the capital sum constituted by 25 per cent of each year's annual profits is impressed in the hands of the second party. But the contract is more clear and careful than that, because it prescribes the duties of the second party. They are to lend out and invest what is in their hands, and they, of course, are to draw in and retain the proceeds of those investments. Now, the 5th clause of the contract tells what is to be done with those moneys which are, under the contract, in the hands of the second party; and among the moneys which, according to the scheme of the contract, are in the hands of the second party are those very interests which we are dealing with. Now, if the intention of the agreement were that those interests, which, as I have pointed out, are lawfully drawn in and taken into the hands of the second party, were to find their way back for the purposes of the agreement into the profits of the first party, I think that would have been said. It is not said, and accordingly, I think it must be held that the interests remain separated, by the working out of the agreement, from the profits, and are still in the hands of the second party, and necessarily applicable solely to the trust purposes specified in the fifth article. That being so, I confess I do not think it possible that the first party can accumulate moneys which are not in their hands to accumulate or not to accumulate. Accordingly, on that ground, I think the contention of the second party is to be preferred.

LORD ADAM.—I am of the same opinion. The first parties are bound to accumulate as a sinking fund, in the hands of the second parties, 25 per cent of their full annual profits, or the whole if less than £5000, by paying over that amount to them as trustees. The money so accumulated is to be disposed of in accordance with the directions in the trust-deed. Now, nothing is said specially in the deed as to what the trustees are to do with the interest of the money thus paid. Accordingly, the ordinary rule being that interest follows the principal, if the principal is dedicated to some special purpose, it follows that the interest must go with it, and on this brief ground I agree with your Lordship.

LORD M'LAREN.—It must be admitted that in this contract there is no direction to the trustees to accumulate the money which is paid into their hands. The word accumulate is used only in a secondary sense to express the payment of annual contributions by the first party, the Arizona Copper Company, into a sinking fund which is placed under the control of trustees.

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That can mean nothing more than an addition every year to the heap already in their hands. But this does not go very far to solve the question before us, for when we come to the clauses which express the conditions on which the trustees are to hold the fund, there is in clause 34, if not an express direction, a plain implication that the trustees are as a matter of duty to invest the money received by them under the agreement. The securities on which they may invest the trust funds are specified, and it is obvious that it would not be good trust management to take money and then to let it lie in bank until an opportunity arose of paying off debentures. Therefore I take it that after investment, and when the money has become an income-producing fund the income is as truly trust-estate as the capital. On a sound construction of clause 5, which specifies the purposes of the trust, this must be held to cover trust money derived from income as well as the capital received by direct contribution from the shareholders. Now, these trust purposes are quite explicit, and amount to this, that the whole money is to be applied to payment of the creditors' claims according to the order of their securities,—first the holders of terminable debentures, then of A debentures, and thirdly of B debentures. The money being thus appropriated, it is impossible that it can also be considered as profits of the company out of which further contributions are to be paid to the sinking fund. Profits are limited on construction to profits directly made by the company, and do not include money which in a sense is the company's, but which is in the hands of trustees appropriated to specific purposes.

LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Answer the first branch of the query in the negative, and the second or alternative branch in the affirmative, and decern: Find the first parties liable in expenses as between agent and client."

DAVIDSON & SYME, W.S.—MENZIES, BLACK, & MENZIES, W.S.—Agents.

No. 121.

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Heddle v.
Magistrates of
Leith.

JAMES HEDDLE, Appellant.—*Party*.
THE MAGISTRATES AND COUNCIL OF THE BURGH OF LEITH,
Respondents.—*Balfour—Clyde*.

Police—Assessments—Resolution to apply assessments to expenses of opposing bills in Parliament—Appeal—Competency—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), sec. 339.—Sec. 339 of the Burgh Police Act, 1892 (being one of the sections included in Part IV. Police Administration), enacts that "any person liable to pay or to contribute towards the expense of any work ordered or required by the Commissioners under this Act, and any person whose property may be affected, or who thinks himself aggrieved by any order or resolution or deliverance, or act of the Commissioners made or done under any of the provisions herein contained, may, unless otherwise in this Act specially provided, appeal either to the Sheriff or to the Court of Session."

Police Commissioners passed a resolution to charge the expenditure incurred by them in opposing a private bill in Parliament to the Public Health Assessment. A ratepayer appealed under sec. 339 of the Burgh Police Act, 1892, on the ground that the resolution was *ultra vires*. Appeal dismissed as incompetent.

Observed that a ratepayer might raise the question by declarator.

AT a meeting of the Magistrates and Council of Leith, as Commissioners of Police for the burgh, held on 6th October 1896, they resolved to charge (1) the expenses incurred by them in their opposition to the Edinburgh Extension Bill, which had for its object the annexation of Leith to Edinburgh, to the Public Health Assessment; and (2) the expenses incurred by them in their opposition to the Edinburgh Improvement and Tramways Bill, and the Edinburgh Street Tramway Company's Bill, to the Burgh General Assessment, the expenses to be spread over a period of five years.

James Heddle, a ratepayer in Leith, lodged an appeal under section 340 of the Burgh Police (Scotland) Act, 1892, to the Magistrates and Council of Leith, against the assessments. The appeal was unanimously dismissed.

Heddle thereupon presented an appeal to the Second Division of the Court of Session, in which he averred;—(20) “That the appellant considers himself aggrieved by the aforesaid resolutions of 6th October 1896 to charge to any assessment or rate, as condescended on by the respondents, the expenses incurred in opposing or promoting the above-mentioned three bills, and now appeals against the aforementioned resolutions, deliverance, or judgment, and statement aforesaid, in virtue of section 339 of the Burgh Police (Scotland) Act, 1892,* the Public Health (Scotland) Act, 1867, and to the extent, if any, that the said appeal may be found to be justified at common law, for the reasons above stated, and for other reasons to be stated at the hearing of the appeal.”

He prayed the Court “to recall the judgment, decision, or deliverance aforesaid *simpliciter*, and to require and ordain the respondents to withdraw and exclude from the statutory estimates and assessments the sums complained of; and to ordain that, inasmuch as the assessments for the year now current are in course of being levied, and the sums complained of in whole or in part paid, the respondents

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), in Part IV. of the Act, commencing with section 99 and ending with section 339, deals with “Police administration.”

By section 339 it is enacted,—“Any person liable to pay or to contribute towards the expense of any work ordered or required by the Commissioners under this Act, and any person whose property may be affected, or who thinks himself aggrieved, by any order or resolution or deliverance, or act of the Commissioners made or done under any of the provisions herein contained, may, unless otherwise in this Act specially provided, appeal either to the Sheriff or to the Court of Session, by lodging a note of appeal within fourteen days after intimation of the order or deliverance of the Commissioners complained of, or within fourteen days after the commission of the act complained of, with the Sheriff-clerk of the county in which the burgh is situated, if the appeal is made to the Sheriff, or with any Principal Clerk of Session at Edinburgh if the appeal is made to the Court of Session, which note of appeal shall state the grounds of such appeal and be signed by the appellant or his counsel or agent, and the Sheriff or Court shall order a copy of the appeal to be served on the Clerk to the Commissioners, and appoint him within six days after such service to lodge answers thereto, and shall thereafter hear parties and determine the matter of the appeal, and shall make such order therein, either confirming, qualifying, varying, or redressing the order, resolution, deliverance, or act appealed against, and shall award such costs to either of the parties as the Sheriff or Court shall think fit.”

No. 121. shall place and pay into the bank account of the respective rates, and keep to the credit of the next respective estimates of income, and expenditure, and assessments the respective sums so charged and complained of.”
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The Magistrates and Council of Leith, as Police Commissioners and as Local Authority, lodged answers.

The answer to article 20 was,—“ Explained that the appellant is not a person aggrieved by the foresaid resolutions of 6th October 1896 within the meaning of said section, so as to entitle him to appeal these said resolutions, and the present petition is therefore incompetent. Further, the appellant has neither title nor interest to maintain the present appeal, and the prayer of his petition is incompetent.”

Argued for the respondents;—Section 339 of the Burgh Police Act, 1892, had no application to the facts which the appellant desired to bring before the notice of the Court. Occurring as it did in Part IV. of the Act, it only applied to police administration. It had no connection with rating and borrowing, which were dealt with in Part V. of the Act. The remedy of a ratepayer who objected to a resolution of the Commissioners to impose an assessment as illegal was an action of interdict or of declarator and interdict.

Argued for the appellant;—Section 339 was broad in its terms, and gave the right of appeal to any person who thought himself aggrieved by an order or resolution of the Commissioners. The respondents’ objection was a technical one, and should not be given effect to.¹

LORD YOUNG.—We have been told, and I think quite accurately, that there is no previous instance of an appeal resembling this. An appeal against the resolution of the proper authority as to what they will assess for is without precedent, and *prima facie* it looks an incompetent way of bringing under the consideration of this Court the question whether the Magistrates are entitled either to raise by assessment a fund in order to meet such charges as those which are here in question or out of the proceeds of an assessment laid on to take money to pay these charges.

Now, it is certainly a matter of interest and importance to have it decided whether or no the police authority here—the Magistrates and Town-council—are entitled to raise by assessment funds to meet such charges as are here in question, or to take money out of the proceeds of an assessment in order to meet them, and if there is a dispute as to that question it is very proper that it should be brought before the Court for determination. But to bring it before the Court by appeal against a resolution to raise an assessment, which contains, I assume, some statement indicating that they had in view these charges in fixing the amount of the assessment to be raised—to say that that could be brought under the consideration of the Court by appeal at the instance of any individual ratepayer—is a proposition for which I would require some authority.

If clause 339 of the Police Act were, upon the face of it, plainly an authority for that, it would of course be sufficient, but I incline to think that it is not, and that the proper way to raise the question—the way to which the burgh authority assent—is by declarator and interdict, or declarator

¹ Ward v. Mayor, &c. of Sheffield, 1887, L. R., 19 Q. B. D. 22, *per* J. Cave, pp. 28 and 29.

without any interdict, because we have no reason to suppose that the burgh authority would act against a judgment of this Court—either not appealed against or confirmed upon appeal—finding what was the law, and consequently their duty in the matter. Therefore I think it would not be the proper course to proceed in this appeal to try that question, as I think it is not properly brought before us by the appeal.

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I think the proper case for appeal under the section is, where any individual under the jurisdiction of the police authority suffers in his person or property by any proceeding of theirs under the Act. He may appeal with respect to any assessment imposed upon him, and say,—“That is more than my share; I complain against the assessment so far as I am concerned; you have overrated my premises, or I am not the party that is liable in respect of the premises for which you have assessed me.” All those are individual things which he may bring forward individually by appeal to the Sheriff or by appeal to this Court. But a general question, such as the right of a public authority to apply funds raised by assessment, either under the Burgh Act or under the Public Health Act, to certain purposes, or to take funds out of the proceeds of an assessment previously imposed for these purposes, is, I think, not conveniently, and certainly in my opinion not competently, brought before us by appeal. I am therefore, upon the whole matter, of opinion that this appeal ought to be dismissed as incompetent.

LORD TRAYNER—The question that the appellant really desires to have determined is plainly enough brought out in the statement of facts in the appeal, and is an important enough question, and upon the mere question of technicality of form, I would not have been without a desire to aid the appellant in having it settled without putting him to the expense of bringing another action if that could have been done. But the important question which is raised, as I say, on his statement, is not the question which he asks us to determine in the prayer of the appeal. The prayer of his appeal contains several clauses. The first part of it—and upon the success of which all the other parts of the prayer depend—runs thus: It asks us “to recall the judgment, decision, or deliverance aforesaid *simpliciter*.” Now, the only judgment, decision, or deliverance referred to in the appeal is the judgment of the Magistrates and Council themselves upon an appeal which Mr Heddle took against an assessment which has been made and imposed upon him individually. That was an appeal which he took under section 340 of the Burgh Police Act—an appeal which is there specially provided for. He does not ask us to review that decision, and I doubt very much whether we would have any competency to review that decision. But he asks us to recall it as a means of enabling him to get into the general question, which, as I have already indicated, plainly could not give him the remedies and relief that he prays for in this prayer.

I rather think that the section on which he bases his right of appeal—the 339th—although it is exceedingly broad in its terms, has no reference to the case we are dealing with, and certainly is not a section under which the question that Mr Heddle wants to have determined can be brought up. Therefore if the first part of this prayer is refused, necessarily the whole of

No. 121. it follows, and upon that ground I agree in the judgment which Lord Young has proposed,—that this appeal ought to be dismissed. There is a remedy open to Mr Heddle, as he well knows—a form of process—in which the question he wants to have settled can be raised and determined, and if Mr Heddle persists in trying the question, he must do it in the form which the Court has provided. This is not such a form, and therefore I am of opinion that this appeal ought to be dismissed.

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LORD MONCREIFF.—I agree with both your Lordships that the appeal is incompetent. I think there is no warrant for the appeal either at common law or under either of the statutes mentioned in the petition.

LORD JUSTICE-CLERK.—I am of the same opinion.

THE COURT dismissed the appeal as incompetent.

PARTY—IRONS, ROBERTS, & Co., S.S.C.—Agents.

No. 122. JOHN GORDON RUSSELL, Pursuer (Appellant).—*Shaw—Munro.*
JOHN ROSS GRANGER AND OTHERS (Bell's Trustees), Defenders
(Respondents).—*D. Dundas.*
Mar. 5, 1897.
Russell v.
Bell's
Trustees.

Succession—Vesting—Payment—Discretion of trustees.—A testatrix by her trust-deed directed her trustees to pay twelve months after her death the residue of her estate to her four children *nominatim*, equally, and declared that should any child die “before the said residue becomes payable” his share should go to his issue, and failing such to the survivors or survivor of the other three children. A codicil added some years later bore:—“I desire that the portion falling to my son W. should not be handed over to his own care, but that he should only draw from my trustees the interest thereon weekly. If, however, at any time my trustees consider it would be for his true benefit to hand over to himself what might then be his share, I hereby empower them to do so.” The trustees paid to W from his share certain capital sums, but refused to make further payments of capital.

In a question between the trustees and a creditor of W who had used arrestments in their hands, *held* that no part of the capital of W's share had vested in him except the sums paid to him by the trustees.

2D DIVISION.
Sheriff of
Lanarkshire.

MRS MARY BELL, Glasgow, died leaving a trust-disposition and settlement dated 2d September 1870 with codicil thereto, dated 30th August 1880, both recorded 18th September 1880. By her settlement she left her whole estate to a trustee, and directed—“In the third place, on the death of the said Jeremiah M. Bell [her husband] should he survive me, but should he predecease me, then within twelve months after my death, my said trustee shall pay over the residue and remainder of my means and estate . . . to and in favour of my four children—Amelia Agnes Bell, Adelaide Mary Bell, Mary Hutcheson Bell, and William James Bell, share and share alike, the shares payable to my daughters shall be payable exclusive of the *jus mariti* or right of administration of any husbands they may marry, and shall not be liable for the debts or deeds of their husbands, and in the event of the death of any one or more of my said children before the said residue becomes payable, the share which would have been payable to such deceiver shall accresce and belong to his, her, or their lawful children, share and share alike, and should

any one or more of my said children die without leaving lawful issue, the share which would have been payable to such deceiver shall fall to and be payable to the survivors in equal shares, and in the event of there being only one of them surviving, the other three having predeceased without leaving lawful issue, the whole of said residue shall be payable to such survivor." No. 122.
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The codicil was as follows:—"I desire that the portion falling to my son, Wm. James Bell, should not be handed over to his own care, but that he should only draw from my trustees the interest thereon weekly. If, however, at any time my trustees consider it would be for his true benefit to hand over to himself what might then be his share, I hereby empower them to do so."

Mrs Bell survived her husband.

The trustees retained William James Bell's share of the residue, but in the exercise of their discretionary power they made certain advances of capital to him in 1885 and in 1887. Since that date the trustees refused to make further payments of capital.

In 1892 John Gordon Russell obtained decree in the Sheriff Court at Glasgow against William James Bell, and having arrested his share of the residue in the hands of the trustees, he raised in 1893 this action of furthcoming against the trustees.

The defenders pleaded;—(3) The interest of the common debtor in the estate alleged to be arrested is by the clause in the codicil quoted in the first article of this statement of facts purely alimentary, is so held by the trustees for his behoof, and is not assignable by him, nor arrestable nor attachable for his debts or deeds.

On 29th January 1896 the Sheriff-substitute (Erskine Murray), found that the funds in the hands of the trustees were not arrestable.

The pursuer appealed to the Sheriff (Berry), who on 20th November 1896 adhered.

The pursuer appealed to the Court of Session, and argued;—An absolute right of fee in the share of his mother's estate was conferred on Bell, vesting a *morte testatoris*, and vesting was not affected by the provisions for survivors, these not being destinations over.¹ The words "before the said residue becomes payable" were not effectual to postpone vesting.² If a right of fee vesting a *morte* were conferred by the words of gift, mere words of restriction either in the same deed or a codicil were not effectual to limit the fee, and the limitation would be regarded as repugnant, unless there was an actual revocation of the fee, or a provision conferring the fee, or at least a power to the trustees to confer the fee, on a new line of fiars.³ This element was absent. There was no revocation in the deed, and the

¹ Byars' Trustees v. Hay, July 19, 1887, 14 R. 1034, *per* Lord Rutherford Clark, p. 1037; Wilkie's Trustees v. Wight's Trustees, Nov. 30, 1893, 21 R. 199; Greenlees' Trustees v. Greenlees, Dec. 4, 1894, 22 R. 136; Wilson's Trustees v. Quick, Feb. 28, 1878, 5 R. 697, *per* Lord Adam, p. 702.

² McElmail v. Lundie's Trustees, Oct. 31, 1888, 16 R. 47, *per* Lord President Inglis and Lord Mura.

³ Greenlees' Trustees v. Greenlees, 22 R. 136; Wilkie's Trustees v. Wight's Trustees, 21 R. 199, *per* Lord Rutherford Clark, p. 203; Ritchie's Trustees v. Ritchie, March 16, 1894, 21 R. 679; Mackinnon's Trustees v. Official Receiver in Bankruptcy in England, July 19, 1892, 19 R. 1051; Miller's Trustees v. Miller, Dec. 19, 1890, 18 R. 301, *per* Lord President Inglis, p. 305; Lawson's Trustees v. Lawson, July 17, 1890, 17 R. 1167; Duthie's Trustees v. Forlong, July 17, 1889, 16 R. 1002.

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codicil did not disclose a revocation, or gift of fee, or power to the trustees to reconfer the fee. Accordingly the trustees could be forced to pay the capital to Bell, and still more clearly to his creditors.¹ The cases relied on by the respondents were distinguishable. In *Chambers*² the trustees had power to settle the fee on a new line of fiars. In *White*³ if the trustees withheld payment of capital the fee was conferred on the children of the beneficiary. It was clear that ulterior destination of the fee was essential if the original gift of fee was to be affected. A mere discretionary power was not enough.

Argued for the respondents;—There was no vesting *a morte* or indeed till actual payment, and in terms of the deed payment was in the absolute discretion of the trustees. As Bell's right was therefore dependent on an exercise of discretion, nothing vested till that occurred.⁴ Besides the survivorship clause referred to the period of payment, and this postponed vesting till payment. *Chambers' Trustees*² ruled this case. Here, as in *Chambers' Trustees*,² it was clear that the exercise of the power was an inherent condition of the gift until it was actually made, and thus the discretionary power suspended vesting. Here also (and this was *a fortiori* of *Chambers' Trustees*²) the restriction was in the codicil, which shewed second thoughts on the part of the testatrix. There was no conflict between *Chambers' Trustees*² and subsequent cases in the Court of Session. They were reconcilable. A gift of fee, subject to the exercise of a discretionary power by trustees, did not vest till payment, or at most only vested subject to defeasance by them at any time before payment, *e.g.*, in *Chambers' Trustees*²; but where there was an absolute gift of fee on one hand, and an attempt to restrict it on the other, mere words of restriction would be regarded as creating repugnancy, and as ineffectual to prevent vesting, *e.g.*, in *Miller's Trustees*.⁵ The case of *Greenlees*⁶ was held to present an absolute gift of fee fully vested. A contrast to this was *Muir's Trustees*.⁷ In *Ritchie's Trustees*⁸ vesting was clear, and the directions to trustees were only administrative provisions. In *Wilkie's Trustees*¹ it was clear that vesting had taken place, and so the Court disregarded mere provisions as to postponement of payment. In *Mackinnon's Trustees*,¹ the fee was to vest at twenty-five, and the trustees were not entitled to retain after the beneficiary reached that age. In *Lawson's Trustees*⁹ vesting was clear, otherwise there would have been intestacy. *Duthie's Trustees*¹⁰ was a pure case of conferring an absolute fee and attempting to restrict it, with the result of creating repugnancy. But all these cases were distinct from the present. There was no vesting, and no intestacy

¹ *Mackinnon's Trustees v. Official Receiver in Bankruptcy in England*, 19 R. 1051; *Wilkie's Trustees v. Wight's Trustees*, 21 R. 199, *per* Lord Trayner, p. 203.

² *Chambers' Trustees v. Smiths*, Nov. 9, 1877, 5 R. 97, and April 15, 1878, 5 R. (H. L.) 151.

³ *White's Trustees v. White*, June 20, 1896, 23 R. 836.

⁴ *Bryson's Trustees v. Clark*, Nov. 26, 1880, 8 R. 142, *per* Lord President Inglis, p. 145.

⁵ *Miller's Trustees v. Miller*, 18 R. 301.

⁶ *Greenlees' Trustees v. Greenlees*, 22 R. 136.

⁷ *Muir's Trustees v. Muir's Trustees*, March 19, 1895, 22 R. 553.

⁸ *Ritchie's Trustees v. Ritchie*, 21 R. 679.

⁹ *Lawson's Trustees v. Lawson*, 17 R. 1167.

¹⁰ *Duthie's Trustees v. Forlong*, 16 R. 1002.

would ensue if this conclusion were come to, because by the will any part of his share unpaid to Bell at his death would go to his issue or his sisters, and the survivors. But if these cases were similar to the present, and were inconsistent with *Chambers' Trustees*,¹ the latter must prevail as a higher authority. Lord Hatherley in *Chambers' Trustees* was even of opinion that if there had been vesting it might be recalled when the trustees determined to pay no more of the capital. On the deeds the clear intention of the testatrix was in the direction taken by the trustees.

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At advising,—

LORD MONCREIFF.—In this action of furthcoming the pursuer, a creditor of William James Bell, having obtained a decree against the latter for £276, 1s. 9d., called upon the testamentary trustees of Bell's mother to make forthcoming to him out of the funds in their hands a sum sufficient to satisfy the debt.

The defence which the Sheriffs have sustained is that the funds in the trustees' hands are not in the circumstances arrestable, no absolute right of fee in the capital of the share in which he is interested having vested in William James Bell.

I think the question we have to decide is one of very great difficulty, the difficulty arising, not from any doubt as to the truster's intention, but from the course of recent decisions to which we were referred. Although with considerable hesitation, I am of opinion that the judgment of the Sheriff is sound, and should be affirmed, because I am satisfied that no absolute right to the capital of the share in question, in so far as not yet paid over, is vested in William James Bell, and that accordingly the trustees are not bound to make the balance of that share still in their hands forthcoming to the pursuer.

Under Mrs Bell's settlement of 2d September 1870, had it stood alone, right to a share of the residue would have vested in William J. Bell on the death of his mother, if—as I understand was the case—she survived her husband. The scheme of the settlement was that the shares of residue should be payable at the death of the longest liver of the spouses, but that if any of the children should die before the residue became payable, their share should go to their lawful children, and failing children to the survivors of the immediate children of the truster. The effect of this, I take it, was to suspend vesting until the time fixed for payment.

But ten years after the execution of the settlement, viz., on 30th August 1880, the truster having apparently become satisfied that her son William was not fit to be entrusted with the share of residue destined to him, executed a codicil which materially altered the original will as regarded his share. That codicil is very shortly expressed, and was evidently not prepared by a law-agent, but its meaning is sufficiently clear. The first and leading direction is as follows:—"I desire that the portion falling to my son, William James Bell, should not be handed over to his own care, but that he should only draw from my trustees the interest thereon weekly." This I read as a virtual revocation of the direction in the will that a share of residue should be paid to her son William if alive at her death. She now

¹ Nov. 9, 1877, 5 R. 97, and April 15, 1878, 5 R. (H. L.) 151.

No. 122. directs that it shall not be paid to him, but that he shall only draw the interest weekly.

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Following upon this direction power is given to the trustees in certain circumstances to pay over to him the capital of his share. It is thus expressed,—“If, however, at any time my trustees consider it would be for his true benefit to hand over to himself what might then be his share, I hereby empower them to do so.”

The question which we have to decide is, whether the directions contained in the codicil operate suspension of vesting, which would otherwise have taken place, or whether they are merely an ineffectual attempt to annex restrictions to a fully vested right of fee. I am of opinion that the former is their true character and effect—that in virtue of those directions the trustees, if they think fit, are entitled to withhold payment of the capital during the whole of William's life, and that until they actually pay it over to him he has no vested right in it. I sympathise with the Sheriff-substitute in his perplexity as to which class of decisions he should follow. But I am of opinion that this case belongs to the class of which *Smiths v. Chambers' Trustees*,¹ a decision of the House of Lords, is the leading example, and that the judgment appealed against does not necessarily conflict at least with the principle upon which the cases of *Miller's Trustees*,² *Wilkie's Trustees*,³ and *Greenlees' Trustees*⁴ were decided.

The case of *Smiths v. Chambers' Trustees*¹ seems to be directly in point. By the last purpose of his settlement Dr Chambers directed, as to the residue of his estate, that it should be paid and conveyed to the children of the marriage equally among them (with the exception of one son, William Chambers) “and with and under the exceptions and modifications to be afterwards stated.” The shares were to be payable six months after his decease in the case of such children as were major, and it was declared that the whole provisions in favour of his children should vest in those surviving him on his death. Then came the following discretionary powers which were conferred upon his trustees,⁵—“And notwithstanding the periods above appointed for the payment of the shares of the residue of my means and estate, I provide and declare that it shall be lawful to and in the power and option of my trustees, if they see cause and deem it fit, to postpone as long as they shall think it expedient to do so, the payment of the provisions or shares of residue hereinbefore provided as aforesaid in the case of all or any of my children . . . and to apply the interest or annual produce of the same during the period of the postponement to or for behoof of such children . . . or by a deed under their hands to retain the said provisions or any of them vested in their own persons, or to vest the same in the persons of other trustees (whom they are hereby authorised to appoint) . . . so that my children, or any of them, as the case may be, may draw and receive only the interests or other annual proceeds of their respective provisions during their joint lives, or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such children . . . and their lawful issue, on such conditions and under such restrictions and

¹ 5 R. 97, H. L. 151.

² 18 R. 301.

³ 21 R. 199.

⁴ 22 R. 136.

⁵ 5 R. 98.

limitations and for such uses as my trustees in their discretion may deem most expedient, of which expediency and the time and manner of exercising the powers and option hereby given they shall be the sole and final judges." No. 122.
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While part of the share of James Chambers, one of the trustor's sons, was still in the hands of the trustees it was arrested by his creditors, but founding on the powers conferred upon them the trustees refused to pay it over and resolved (after litiſcontestation) to pay James Chambers the interest only. Lord Young, who was Lord Ordinary, held that under this deed the provision in favour of James was subject to modification by the trustees in exercise of the powers conferred upon them, and that the declaration as to vesting was equally dependent upon the exercise of those powers. He accordingly held that it was within the powers of the trustees to retain the share of residue falling to James Chambers, and employ the interest of the same as an alimentary fund for his behoof. The Inner-House, by a majority, recalled this judgment, holding that the clause of modification imported merely a resolute condition, and that the creditor's arrestment having been laid on prior to the purification of the condition, attached the fund. Lord Shand dissented, holding that the condition suspended vesting, that there was no vesting of an absolute and unconditional right, and that the trustees might, at their discretion, postpone payment and restrict the interest of James to a liferent.

The House of Lords reversed the decision of the Court of Session, holding that the trustees were entitled to withhold payment of the capital and apply it for behoof of the legatees in such manner and at such time as they thought fit.

The learned Lords regarded the interest of the beneficiary as a qualified or conditional fee. Lord Hatherley says,—“Stopping here, we find a power in the trustees overruling all directions for payment and vesting before given, and directing them during postponement to apply the interest for behoof of the children. This must mean that the child is to have no control over the fund at all when the trustees resolve on postponement.”

Lord O'Hagan says,—“In this way the settlor provided that his purposes should be carried into effect, and the result was that the beneficiaries took an estate vested in them, and if the trustees thought proper, to belong to them absolutely at the periods indicated, but it was a qualified estate to be enjoyed by them only on the conditions and at the times which the trustees in their uncontrolled discretion might appoint.”

Lord Blackburn also seems to take the view that the beneficiary took a qualified fee subject to divestiture in the discretion of the trustees; but that neither he nor his creditors had right to demand payment so as to defeat the directions and purposes of the settlor. The present case is somewhat stronger, in this respect, that instead of the right of fee being vested subject to divestiture in the discretion of the trustees, the testatrix has herself restricted her son's interest to a liferent, giving her trustees the power, if they think fit, to restore it to one of fee.

It will be observed that in the case of *Chambers' Trustees*¹ not only was there at the outset in the deed an express direction to pay each child a share

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 Trustees.

of the residue six months after the decease of the testator, but it was declared that the shares should vest at the death of the testator. The result, however, of the decision of the House of Lords was, that what appeared to be an unconditional gift of fee was held effectually modified and controlled by the discretionary powers conferred upon the trustees.

If I held that an unconditional right of fee has vested in W. J. Bell, I should feel bound, in deference to the decision of the Court of seven Judges in *Miller's Trustees*,¹ to hold that the restrictions are ineffectual. But in that case it was admitted that the fee was fully vested; so also in the cases of *Greenlees' Trustees*² and *Wilkie's Trustees*.³ In all these cases the restrictions were disregarded as attempts to cut down or derogate from a fully vested right of fee.

Without attempting to reconcile all the decisions which were cited to us, I may say that I think the apparent conflict between the two classes of decisions is due to the different views which may be taken on the terms of any particular settlement as to whether right to the fee of a provision has or has not fully and unconditionally vested in a beneficiary. But I do not understand it to be disputed that if upon a sound construction of a settlement an absolute right has not vested, and the funds still remain in the hands of the trustees, such restrictions imposed by the trustees must receive effect.

Here the original will must be read as modified by the codicil. The codicil having been executed after an interval, I think the presumption against vesting is fully stronger than if the directions contained in it had occurred in the will itself, because they were introduced to meet a change of circumstances and a consequent change of mind on the part of the testatrix. The codicil is undoubtedly repugnant to the original settlement, but as it contains the latest expression of the will of the testatrix it *pro tanto* supersedes the former.

The appellant's counsel was quick to note, and very properly commented upon, the absence from this settlement of an important element to be found in the deeds in the cases of *Chambers' Trustees*⁴ and *White's Trustees*.⁵ In both of those cases express directions were given to the trustees as to the disposal of the fee of the shares in question in the event of the trustees deciding not to pay them over to the beneficiaries. In the codicil of 30th August 1880 there is no fresh direction as to disposal of the capital of W. J. Bell's share, and this struck me from the first as creating some difficulty. But the importance of such a direction consists in its affording a complete indication of the truster's intention that vesting shall not take place until payment; and although owing to the absence of such a direction this case is perhaps not so clear as the cases of *Chambers' Trustees*⁴ and *White's Trustees*.⁵ I think that the intention of the truster is sufficiently expressed to receive legal effect.

Reading the codicil with the will, I think the truster's intention is this—the residue is to be divided into four shares; three of the shares are to be paid to her daughters within twelve months after her death; as regards her

¹ 18 R. 301.² 22 R. 136.³ 21 R. 199.⁴ 5 R. 97, H. L. 151.⁵ 23 R. 836.

son, W. J. Bell, the fourth share is to be retained by the trustees and the interest only to be paid to him weekly, the trustees, however, being empowered, if they think it for his advantage, to pay over to him part or the whole of the capital; and lastly, in the event of W. J. Bell dying before the capital becoming payable, being in his case the time when the trustees choose, if they ever do so, to pay it over, right to it shall pass to his issue, if he have any, or failing issue to his surviving sisters. This I believe to be the proper construction of the two writs read together; and by so reading them I think we shall give effect to the true intention of the truster without doing undue violence to the language used.

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The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD TRAYNER was absent.

THE COURT dismissed the appeal, and affirmed the interlocutor appealed against.

DOUGLAS & MILLER, W.S.—MACKENZIE & BLACK, W.S.—Agents.

MRS CHRISTINA TURNER, Pursuer (Respondent).—*Clyde*.
JAMES ROBERTSON AND OTHERS (Fraser's Trustees), AND ANOTHER,
Defenders (Reclaimers).—*M'Lennan*.

No. 123.
Mar. 6, 1897.
Turner v.
Fraser's
Trustees.

Process—Leave to reclaim—Remit to Auditor—Court of Session Act, 1868 (31 and 32 Vict. c. 100), secs. 27, 28, and 54—Act of Sederunt, 10th March 1870, sec. 2.—In an action of accounting at the instance of a beneficiary against trustees, the pursuer objected to the amount of the business account of the law-agent of the trustees. The Lord Ordinary remitted the account to the Auditor of the Court of Session to tax, and did not grant leave to reclaim. The defenders having reclaimed, the Court *refused* the reclaiming note as incompetent.

Quin v. Gardner, June 22, 1888, 15 R. 776, distinguished.

Trust—Trustee—Law-agent of Trustees—Right of law-agent to have his account taxed by local auditor.—In an action of accounting brought by beneficiaries against testamentary trustees, the pursuers objected to the account of the law-agent of the trustees on the ground that it was overcharged. The trust-estate was situated in Glasgow, and the law-agent was a Glasgow solicitor. It appeared that the account had been taxed *ex parte* at the instance of the law-agent by the Auditor of the Faculty of Procurators in Glasgow, without notice to the pursuer, and the defenders offered to have it re-remitted to him. The Lord Ordinary (Kyllachy) remitted the account to the Auditor of the Court of Session to tax and to report. The defenders reclaimed, and maintained that in any view the account should be remitted to a Glasgow accountant to audit, and not to the Auditor of the Court of Session. The Court *refused* the reclaiming note.

Trust—Law-agent's business account—Taxation—Scale of charges for attending meetings of trustees when law-agent himself a trustee.—In taxing the business account of a law-agent to a trust, the Auditor restricted his charges as a law-agent for attending meetings of the trustees in respect that the law-agent was himself a trustee. The Lord Ordinary (Kyllachy) having repelled an objection to the Auditor's report, the trustees reclaimed. The Court *refused* the reclaiming note.

THIS was an action of accounting brought by Mrs Christina Fraser or Turner against James Robertson and others, the trustees acting under the trust-disposition and settlement of the deceased Mrs

1ST DIVISION.
Ld. Kyllachy.

No. 123. Fleming or Fraser, Govanhill, Glasgow, and against Mr Robertson as factor and law-agent of the trustees.

Mar. 6, 1897.
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It was provided by Mrs Fraser's settlement, *inter alia*, that the trustees should, after implementing sundry other purposes, realise the residue of the truster's estate, and divide the proceeds equally between the pursuer and her sister, Mrs Templeton.

The trustees were authorised to appoint factors or agents from their own number, and "to pay him or them the usual and ordinary remuneration."

It appeared from the statements of the parties in the action that the only matter in dispute was with reference to the business accounts incurred by the trustees to Mr Robertson as their factor and law-agent.

The pursuer averred that "the said accounts are inaccurate in various particulars. In particular, the said James Robertson has stated in his said account of intromissions law business accounts and charges for factorage, amounting to £155, 3s. 2d., which are grossly overcharged. He alleges that these accounts have been audited by the Auditor of the Faculty of Procurators in Glasgow, but they were not previously submitted to the trustees, and no authority was given by them for their being taxed by said official. The pursuer has repeatedly called upon Mr Robertson to submit his said accounts to the Auditor of the Court of Session for taxation, but he has hitherto declined to do so."

The defenders stated,—“The truster was domiciled in Glasgow at the time of her death, and her whole means and estate were locally situated in Glasgow. It was an implied term of the appointment of the said James Robertson as agent for the said trust that his accounts should be subject to the audit of the Auditor of the Faculty of Procurators of Glasgow.” They also stated that the accounts in question had been audited by the Glasgow Auditor, but that they were willing, and offered, that they should be again remitted to him.

The case having been heard in the Procedure-roll, the Lord Ordinary (Kyllachy), on 4th December 1896, pronounced the following interlocutor:—"The Lord Ordinary having heard counsel in the Procedure-roll on the question between the parties as to the right of the pursuer to have the business accounts of the defender James Robertson, one of the trustees, and law-agent and factor of the trust, taxed, finds that the said accounts have been already taxed by the Auditor of the Faculty of Procurators, Glasgow, but that it is admitted that said taxation took place *ex parte*, and was obtained by the defender the said James Robertson at his own hands, and that without special authority from or intimation to the other trustees or beneficiaries: Finds that in these circumstances the pursuer is entitled to have the said business accounts taxed of new: Therefore remits the same to Mr James M'Intosh, S.S.C., Auditor of the Court of Session, to tax, and to report *quam primum*; reserving all questions of expenses."

On 10th December 1896 the defenders reclaimed.

On the case appearing in the Single Bills, the pursuer objected to the competency of the reclaiming note, and argued;—The leave of the Lord Ordinary had not been granted, and the reclaiming note was therefore excluded by sec. 54 of the Court of Session Act, 1868. The remit to the Auditor was in no sense an allowance of proof. In the

case of *Quin*,¹ relied on by the defenders, the interlocutor, while in the form of a remit, directed an inquiry which was tantamount to a proof. That was not the intention or scope of the present interlocutor.

Argued for the defenders ;—The reclaiming note having been presented within six days was competent without leave under secs. 27 and 28 of the Court of Session Act, 1868, and sec. 2 of the Act of Sederunt, 10th March 1870. The interlocutor reclaimed against was pronounced after a discussion in the Procedure-roll. That was the appropriate stage for deciding whether or not there should be a proof, and the interlocutor in question was in effect within the category of interlocutors "importing an appointment of proof, or a refusal or postponement of the same." The defenders had therefore an unqualified right of appeal. In point of fact the Lord Ordinary had been asked for and had refused leave to reclaim. The case of *Quin v. Gardner*¹ was directly in favour of the defenders' contention, and should be followed.

No. 123.
Mar. 6, 1897.
Turner v.
Fraser's
Trustees.

At advising, the opinion of the Court was delivered by the

LORD PRESIDENT.—The Court are of opinion that this reclaiming note is incompetent, the interlocutor reclaimed against not falling within the provisions of the 27th and 28th sections of the Court of Session Act, 1868, as modified by the Act of Sederunt of 10th March 1870. We consider that the case of *Quin* does not apply. The reclaiming note is therefore excluded by the 54th section of the Act.

THE COURT refused the reclaiming note as incompetent.

Thereafter, the accounts of Mr Robertson having been taxed by the Auditor, the defenders lodged objections to his report.*

On 14th January 1897 the Lord Ordinary repelled the objections and approved of the report, and on 28th January he found that it was admitted as the result of the audit that the sum due to the pursuer was £168, 15s. 4d., decerned against the defenders for payment of that sum, and *quoad ultra* dismissed the action.†

¹ *Quin v. Gardner*, June 22, 1888, 15 R. 776.

* "The defenders object to the said report in so far as—(First) The reporter has disallowed charges in the said accounts for attending meetings of trustees to the extent of £5, 15s., having allowed only a charge of 10s. for attending each meeting, in respect that the defender James Robertson is a trustee under Mrs Fraser's settlement as well as law-agent in the trust. The reporter stated at the taxation of the accounts that it was his practice to limit the charge for each meeting to 10s. in such circumstances, but no such practice is known in Glasgow. . . . (Third) The reporter has not added to the business accounts a fee to the defender James Robertson for coming from Glasgow and attending the audit in Edinburgh, and trouble in looking out and sending to Edinburgh the various documents or drafts thereof, charged for in the account, and his letter-books containing copies of the letters charged for. A fee of five guineas should be allowed under this head."

† "OPINION.— . . . Judging by results, it cannot be said that the pursuer has been otherwise than successful in establishing her contention, viz., that the business account for which the defenders, and particularly the defender Robertson, had taken credit in the trust accounts was to a substantial extent overcharged. The amount of the account was £155. It has been cut down to £134, and, in particular, it has been found that the law-agent, being himself a trustee, was not entitled to charge for his attendance

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The defenders reclaimed, and argued;—(1) The interlocutors of 4th December 1896 and of 14th and 28th January 1897 should be recalled, and the business account of Mr Robertson remitted to an accountant in Glasgow to audit. The account was for work done in Glasgow by a Glasgow solicitor in connection with a trust-estate situated in Glasgow, and it was unreasonable to force the solicitor to have it taxed in Edinburgh. The Court should lay down a general rule that Glasgow business accounts should be remitted to a business man in Glasgow to audit. (2) The law-agent's charges for attending meetings of the trustees were reasonable charges, and in accordance with the practice in Glasgow, and should not have been reduced.

Counsel for the respondent was not called upon.

LORD PRESIDENT.—Of the two special points last discussed the second seems to be purely consequential on the determination of the question of so-called principle. The other point rests on the distinction drawn by the auditor between the attendance at a meeting of trustees of a law-agent who is a trustee, and of a law-agent who is not. That must to a certain extent depend on the circumstances of each case, and, in particular, on the subject-matter of the business before the meeting. But the recognition of such a distinction seems to me a very sound view.

I do not wish to give any encouragement to the raising by reclaiming notes of questions of this kind, and I am certainly not going to be drawn into a discussion on the relative merits of Edinburgh and Glasgow auditors. These accounts have been remitted by the Lord Ordinary in his discretion to a competent auditor, and it would be preposterous if we were to recall the two interlocutors in question.

LORD M'LAREN.—I am of the same opinion, and I may say that, in my view, if the Lord Ordinary had remitted the accounts to any other skilled person, we would probably not have proposed to interfere with his discretion. But the natural and usual procedure when accounts come to this Court for revision is to remit, as the Lord Ordinary has done, to the Auditor of the Court of Session.

LORD KINNEAR.—I agree, and I have nothing to add except that the

at the meetings of the trustees on the same scale as if he had as trustee no duty of attendance, and was to be held as attending simply as law-agent of the trust.

"Then as to the reasonableness of the parties respectively in the communications which preceded the actions, the pursuer, it appears, offered to refer the accounts to the Auditor of the Court of Session. Now, I can hardly say that that was an unreasonable proposal. The defender, on the other hand, insisted, in the first place, that he was entitled to stand on the audit (made at his own instance, and not under any reference or agreement) by a gentleman in Glasgow who holds an appointment as auditor from the Glasgow Faculty of Procurators. And, though ultimately he offered a re-taxation, he did so on the condition that the account should be referred for re-taxation by the same gentleman who had taxed it before. That appeared, and still appears, to me to have been an untenable position, and I think also it was a position which was specially unfortunate in view of the circumstances that he was himself a trustee, conjoined as such with the pursuer and her sister, and therefore, I think, bound to have been specially careful to exclude even the suggestion that his accounts were overcharged. . . ."

reasons given by the Lord Ordinary for his judgment appear to me to be perfectly satisfactory. He says that the defender in the first instance maintained that he was entitled to stand on an audit made *ex parte* at his own instance by a gentleman in Glasgow, and that when that was not accepted he insisted that any new audit should be made by the same gentleman. The Lord Ordinary did not consider that a reasonable proposition, and accordingly, the action being in this Court, he thought it right to refer the account to another auditor, and selected the Auditor of the Court of Session.

I agree that the *ex parte* audit could not be treated as final, and that with reference to the person by whom the new audit is to be conducted, it is out of the question for us to interfere with the discretion of the Lord Ordinary.

LORD ADAM concurred.

THE COURT refused the reclaiming note.

R. AINSLIE BROWN, S.S.C.—CUMMING & DUFF, S.S.C.—Agents.

ROBERT DAVIDSON WADDELL, Petitioner (Respondent).—*Clyde*.

JOHN WHYTE, Respondent (Appellant).—*Lees—Maclaren*.

No. 124.

Mar. 10, 1897.
Waddell v.
Whyte.

Police—Street—Taking down and re-erecting buildings—Height—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), secs. 290 and 364.—By section 290 of the Glasgow Police Act, 1866, every proprietor who intends to lay out any street shall make application to the Dean of Guild for warrant to do so, and shall state in his application, *inter alia*, what is the maximum height above the level of the street of the buildings intended to be erected.

In 1872 a proprietor obtained a warrant from the Dean of Guild for the lining of a street on an application in which he stated that the maximum height of the intended buildings was 60 feet. *Held* that the lining did not determine the height of the buildings for all time, and did not make it incompetent for the Dean of Guild in 1896 to authorise the erection in the street of buildings of a greater height than 60 feet.

In October 1896 Robert Davidson Waddell, sausage manufacturer, Glasgow, presented a petition to the Dean of Guild Court there, in which he stated that he was proprietor of certain subjects on the west side of Napiershall Street, and that he proposed to take down the existing buildings and to erect business premises adjoining his present works according to plans produced. He craved the Court to authorise the proposed buildings.

1ST DIVISION.
Dean of Guild
Court of
Glasgow.

The petition was presented under section 364 of the Glasgow Police Act, 1866.*

Answers were lodged by John Whyte, Master of Works of the city of Glasgow.

The respondent stated that in 1872 John Henderson and Robert Kay, the predecessors of the petitioner in the subjects in question, presented a petition under section 290 of the Glasgow Police Act, 1866,† to the Dean of Guild, craving the Court to sanction certain

* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 364, enacts that every person intending to erect or alter any building within the city shall make application to the Dean of Guild for a warrant to do so.

† The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 290, enacts,—“Every proprietor who intends to lay out or to form any street shall make application to the Dean of Guild for a warrant to do so, and every proprietor who has already laid out or formed any street on which no

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streets, and to grant warrant to lay out these streets all as delineated on plans produced; that the petitioners stated that three of these streets including the street numbered 4 on the plan—now called Napiershall Street—were intended when formed to be public streets, and that the maximum height of the buildings intended to be erected in the line of these streets was 60 feet, and that the Dean of Guild granted warrant to line the whole of the streets in terms of the petition.

The respondent further stated,—“The plans lodged shew that the petitioner proposes to erect buildings in Napiershall Street of the height of 70 feet, in direct contravention of the lining granted to the said John Henderson and Thomas Kay, and the objector maintains that it is not within the power of the Dean of Guild to grant warrant for the erection of buildings higher than those authorised in the original lining of said streets. The petition should therefore be dismissed, or the plans altered so as to reduce the height of the buildings to 60 feet.”

On 24th December 1896 the Dean of Guild pronounced this interlocutor :—“Having considered closed record, plans, and productions, finds that the petitioner's proposed buildings in Napiershall Street are 70 feet in height, and are intended to form an addition to the works belonging to him situated in North Woodside Road and Mount Street: Finds that Napiershall Street was lined as a public street 60 feet in width: Finds that in the petition presented by the petitioner's authors for the lining of Napiershall Street it was stated that the maximum height of the buildings intended to be erected in the line of the said street was 60 feet: Finds that the Master of Works, founding on sections 290 and 291 of the Glasgow Police Act, 1866, maintains that it is not within the power of the Dean of Guild to grant warrant for the erection of buildings higher than 60 feet in the line of Napiershall Street: Finds that it is not incompetent for the Dean of Guild to grant warrant for the erection of buildings of the description proposed and of the height proposed by the petitioner: Therefore repels the objections and grants warrant as craved. . . .”*

building has been erected shall make application to the Dean of Guild for a warrant to sanction such street, and in either case the proprietor shall state in his application whether such street is intended to be a public street or a private street, and what is the maximum height above its level of the buildings intended to be erected, and shall produce along with such application a plan, . . . and the Dean of Guild shall cause the Master of Works and any other persons whom he considers interested to be cited, and allow them time to examine the said plans and sections, and lodge answers or be heard with respect to the application.”

Section 291.—“If the application to the Dean of Guild relates to an intended public street, and is granted by him . . . the proprietor making such application shall acquiesce in and fulfil any conditions which he may impose with reference to the following matters, viz., with reference to the width of the street relatively to the height of the buildings, or the height of the buildings relatively to the width of the street, so as to secure as far as possible that the maximum height of the front walls of such buildings on each side thereof shall not exceed the space between such front walls, except in the case of public buildings, the height of which shall be in the discretion of the Dean of Guild. . . . And every such condition shall be enforceable and carried into effect by the Master of Works.”

* “NOTE.—It appears clearly from the last portion of sec. 290 † of the

† Quoted *supra*, p. 641, note.

The Master of Works appealed, and argued ;—The question in this case was, Did the proceedings in 1872 affect the rights of parties ? The Dean of Guild had not applied his mind to that question, but had treated the application as if made substantially under sections 290 and 291. Once a lining was granted and a building sanctioned of a stated height, however modest the height might be, that limitation was binding, and became the law of the street. The person who came in the first instance and asked for a certain height made his bargain. Why should he be allowed to break it ? Other persons bought property in the street on the faith of it, and it would be a great hardship to them if the heights of the other buildings were increased at the will of the Dean of Guild.

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The petitioner argued ;—This was not the case of erecting a building for the first time in a street for the construction of which a warrant had just been obtained, but a case of taking down and re-erecting a building in an existing street. Sections 290 and 291 had no application. Even if they had, there was nothing in them to prevent the Dean of Guild sanctioning buildings of a height greater than the width of the street if they were not to be dwelling-houses. It was idle to maintain that the earliest lining fixed the height once for all, and that a proprietor, however low the original building might be relatively to the street, was in no circumstances entitled afterwards to build a higher.

Glasgow Police Act, 1866, that the Legislature considered it contrary to the public interest that the front walls of dwelling-houses should exceed in height the width of the street. But it is equally clear that the Legislature did not consider it contrary to the public interest that the front walls of buildings other than dwelling-houses should exceed in height the width of the street by not more than one-fourth in case of streets above 40 feet wide. Taking the view of the Legislature as expressed in this part of sec. 290, the petitioner's proposed buildings not being dwelling-houses, and not exceeding by one-fourth the width of the street, are not open to objection. But this part of sec. 290 only applies in its terms to streets declared public by the Police Commissioners, not to streets sanctioned as public by the Dean of Guild. There is no reason at all why Napiershall Street should not have been made a public street by the Police Commissioners instead of by the Dean of Guild, and it cannot affect the public interest in the height of the buildings whether it has been made a public street in the one way or the other. But certainly the terms of sec. 291 relating to streets sanctioned as public by the Dean of Guild create considerable difficulty, and Napiershall Street is in this position. The Dean of Guild may impose conditions so as to secure as far as possible that the maximum height of the front walls of 'buildings' shall not exceed the space between the front walls (i.e., the width of the street), except in case of 'public buildings,' the height of which is in the discretion of the Dean of Guild. No definition is given of 'public buildings,' but it can scarcely be made to include every building other than a dwelling-house, to follow the phraseology of sec. 290. But the Dean of Guild is given in sec. 291 a certain discretion as to imposing conditions in regard to the height of buildings relative to the street, and he can hardly be wrong in exercising this discretion to sanction buildings of a height that the Legislature considers in sec. 290 unobjectionable, except in case of dwelling-houses. As the Dean of Guild thinks the lining should be granted, it is not necessary to consider whether the conditions as to height referred to in sec. 291 have been made operative by the proceedings in the lining of the street, or if not, whether they can be made operative in this lining. . . ."

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LORD PRESIDENT.—This application to the Dean of Guild is made under the 364th section of the Glasgow Police Act of 1866. That is a provision that application must be made to the Dean of Guild before any building is erected or altered within the burgh.

Now, so far as that section is concerned, there is no prohibition or limitation such as is sought to be enforced by the Master of Works. He makes appeal, however, to another set of sections, viz., 290 and 291, and he says that, as matter of fact, this street was authorised to be constructed under section 290, that in the application to the Dean of Guild for authority to construct the street it was stated to be the intention of the applicant that the houses should be 60 feet of a maximum height, and that warrant to construct the street was granted in terms of the application. The argument founded upon this section is that the warrant of the Dean of Guild imposes a perpetual limitation upon the applicant to this Court restricting him to buildings of 60 feet, and no higher. I must own that that is a somewhat startling conclusion. It would come to this, that however modest might be the height of the houses proposed to be built at the time when the authority for forming the street is obtained, that height is stereotyped to the end of time. The matter stands thus, that suppose in 1872 somebody was minded, on a perhaps somewhat lavish scale of building, to have a street 60 feet wide, with buildings of 20 feet in height, and he frankly stated that that was his intention, the imprimatur of the Dean of Guild warranting the street would impose the limitation that no houses there should ever be higher than 20 feet. That is a very strong proposition.

But when sections 290 and 291 are examined it seems to me that no such conclusion is necessitated by their terms. As I read section 290 its purpose is this :—No one shall make a street within the burgh except with the authority of the Dean of Guild. In order to judge of the sufficiency of the street, in point of width and construction, the Dean has to be told what in the end are the intentions of the proprietor about the street, whether it is to be a private or a public street. If a public street, then he says,—“Let me hear what is the height of your buildings, and I will authorise a street which will be suitable for that purpose.” But it seems to me that when once a street has been authorised to be constructed, with due regard to its capacities for what may be its ultimate destination, it is in nowise necessary for the protection of any interest which has been pointed out to us, that the erection of buildings in that street shall be further limited than by the ordinary rules which are applicable within burghs. The height of houses has been determined, not from a consideration of the width of the street, but from other considerations. But the height of the houses was not fixed on a uniform scale, and depended upon the existing intentions of the proprietors. It did not at all follow that there might not be circumstances in which a street might be found to be suitable for other purposes, in which larger buildings would be required, and to hark back to the original intention of the proprietors, and what was the original provision as to the breadth of the street, could only affect the new question in so far as the breadth of the street was or was not sufficient for the height of the proposed new buildings. I think that the conclusion arrived at by the Dean of

Guild in his interlocutor is perfectly right, and that we should dismiss the appeal and affirm his judgment. No. 124.

LORD ADAM.—I concur.

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LORD M'LAREN.—I am of the same opinion, with every desire to do full justice to those provisions of the Police Acts of Glasgow and other cities that are intended to secure the health and comfort of the people who inhabit the streets ; and no one can doubt that it is very desirable that in laying out a new quarter of a town some general regulations should be made, proportioning the height of the buildings to the width of the streets, and practically the air space in connection with them. But it is a very different proposition to affirm that after this is done all alterations from the original design shall be prohibited. If that had been intended I should have expected to find a specific declaration in the statute to some such effect ; but, on the contrary, we see indications that these restrictions are not intended to be perpetual, one of them being that, in the petition to form the street, the applicant is only directed to state what his intention is with reference to the buildings that are to be placed along the sides of the street. In the present case, if the Dean of Guild Court had been considering a new application to put up this street, apparently it would have been the right of the proprietor, if he elected to put up commercial buildings instead of dwelling-houses, to increase the height of these by one-fourth, for reasons which are obvious enough and really do not enter into the argument. And all that the Dean of Guild has done is to give to the present proprietor, for his sausage factory, that height which he might have had if his building had been erected at the time when the street was originally laid out. It cannot, therefore, be said that the interlocutor contravenes, in any way, the spirit of the Act of Parliament, and I am not convinced that it has, in fact, infringed any of the conditions of the Act which have been brought before us. I should have been sorry to come to a different conclusion in the case, because I think that these provisions, intended for health and amenity, are much more likely to be successful, and to be worked out with the goodwill of those who are affected by them when they are not enforced in a rigid and arbitrary manner, but with what I venture to think is the degree of freedom which the statute allows.

LORD KINNEAR.—I concur.

THE COURT refused the appeal.

SIMPSON & MARWICK, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

MRS ELIZABETH DONNISON, Pursuer (Respondent).—*W. Campbell—Chree.* No. 125.

THE EMPLOYERS' ACCIDENT AND LIVE STOCK INSURANCE COMPANY, LIMITED, Defenders (Reclaimers).—*John Wilson—D. Anderson.* Mar. 10, 1897.

Insurance—Accident Insurance—Conditions as to notice of accident—Post-mortem Examination—Waiver.—A policy of accident insurance with an insurance company provided that it should be a condition precedent to recovery that notice should be given within fourteen days of the accident, and that in the case of death the representatives should agree to a *post-* Donnison v.
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No. 125. *mortem* examination if required by the insurers. The insured met with an accident and died about a month afterwards. Notice of the accident was not sent to the company till three days before his death. After the death the company wrote to the widow:—"In accordance with the conditions of our policy, we desire to have a *post-mortem* examination of the deceased." The company did not inform the widow that they intended to reserve the objection to want of timeous notice. The widow gave her consent to the *post-mortem* examination, which took place accordingly. In an action on the policy brought by the widow as executrix, *held* (*aff. judgment of Lord Low*) that the company, by demanding a *post-mortem* examination, had waived the defence of want of timeous notice.

2D DIVISION.
Lord Low.

IN May 1896 Mrs Elizabeth Duke or Donnison, widow and executrix of Amor Spoor Donnison, manufacturer's agent, Edinburgh, brought an action against the Employers' Accident and Live Stock Insurance Company, Limited, concluding for payment of £1000, as being the sum due to the pursuer under a policy of insurance by which Mr Donnison was insured with the defenders.

By the policy Mr Donnison became entitled to certain sums in the event of his being disabled by an accident, and his representatives to £1000 in the event of his death through accident.

The policy bore, *inter alia*,—"Provided always that this policy is subject to the conditions endorsed hereon, which are to be taken as part hereof, and are hereby agreed to be conditions precedent to the right of the insured to sue or recover hereunder."

Amongst the said conditions were the following:—

"3. The assured shall not be entitled to make any claim under this policy for any injury from an accident, unless such injury shall be caused by some outward violent and visible means of which proof satisfactory to the directors can be furnished, and that this assurance shall not extend to . . . any injury caused by or arising from . . . natural disease or weakness or exhaustion consequent upon disease, or by any medical or surgical treatment or operation rendered necessary by disease, or to any death arising from disease, although such death may have been accelerated by accident. . . .

"4. In the event of any accident (whether fatal or not) occurring to the assured, it is a condition precedent to any right of the assured or his representatives to make any claim that notice thereof in writing must be delivered to the company at their chief offices in Edinburgh, or their Manchester offices, within fourteen days after the occurrence of the accident, stating the nature and date of the injuries, the place where, and the manner in which they were received. . . .

"5. In case of death the legal representatives of the assured must deliver to the company a certificate from the medical attendant of the assured stating, as fully as possible, the nature, extent, and duration of the injuries, and the cause of death, and shall produce all documents necessary to prove their title as such legal representatives, and shall furnish all such other information and evidence as the directors may require from time to time, or may consider necessary or proper to elucidate the case, and shall agree to a *post-mortem* examination if required by the company."

The pursuer averred that on 3d February 1896 Mr Donnison sustained an injury to one of his toes in consequence of a heavy travelling case accidentally falling on it; that at first he did not regard the injury as serious, but that ultimately gangrene set in; and that he died on 5th March in consequence of the injury.

The defenders, besides answers on the merits, averred that they did not receive notice of the injury until 2d March, being more than fourteen days after the occurrence of the accident, and they therefore pleaded,—(2) The pursuer is barred from recovering the sum insured under the said policy, in respect she has failed to comply with condition 4 thereof, which is declared a condition precedent to her right to sue or recover thereunder.

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In answer to this defence, the pursuer averred that the defenders had, in opposition to her wishes, enforced their right to a *post-mortem* examination under condition 5 of the policy, and she therefore pleaded,—(3) The defenders, having by their actings waived any objection on the ground of want of notice, are barred from now founding thereon as excluding the action.

Before further answer a proof on the question of waiver was allowed. The following statement of the result of the evidence is taken from the opinion of the Lord Ordinary:—

"Mr Donnison received an accident to his foot on 3d February 1896. He did not, however, give any notice to the defenders of the accident or of a claim in consequence thereof until the 2d of March, when he wrote to them intimating a claim. He did not in that letter give the date of the accident. On the 3d of March the defenders sent a printed form containing a number of questions which Mr Donnison was requested to answer. He filled up the answers on the same day and sent the paper back to the defenders. One question was,— 'State day, hour, and place of occurrence'; and the answer was,— 'February 3d, at 6 o'clock, in Dublin.'

"The defenders therefore became aware on the 3d of March that Mr Donnison had not given notice of his claim within fourteen days of the occurrence of the accident. Their interpretation of the policy—which is not contested—is that the failure to give notice within fourteen days entitled them, if they chose to exercise the power, to reject the claim without any further inquiry.

"On the 4th of March Mr Donnison was examined by the medical men of the defenders, and on the 5th of March he died.

"On the 6th of March Mr M'Cankie, the defender's managing director, called for the pursuer—Mr Donnison's widow—and arranged for a *post-mortem* examination of Mr Donnison's body, which took place the following day.

"The question is whether by insisting upon a *post-mortem* examination the defenders have barred themselves from founding upon the condition which entitles them to reject a claim if notice is not given within fourteen days of the occurrence of the accident.

"There are some discrepancies in the evidence as to what occurred at the meeting between Mr M'Cankie and Mrs Donnison, but the main features of the interview are plain enough.

"Mr M'Cankie had written a letter to Mrs Donnison, which he says that he took with him, read to her, and left with her. I do not doubt that he read the letter, and whether he left it or not is not material. The letter commenced,— 'In accordance with the conditions of our policy, we desire to have a *post-mortem* examination of the deceased Mr Donnison,' and then certain hours which would suit the doctors were suggested.

"Mrs Donnison was naturally very much averse to the idea of an examination, but Mr M'Cankie told her that the company were entitled to have an examination, and I think that the evidence shews that he read to her the clause from the policy.

No. 125. “Mrs Donnison then said that she must consult her family, and went into another room for that purpose. Her son-in-law, Mr Morrison, was there, and he asked Mrs Donnison to let him see the policy, which she did. Upon reading over the clause in regard to a *post-mortem* examination, Mr Morrison told her that if the defenders insisted upon a *post-mortem* examination he did not see how she could prevent them. Mrs Donnison then went back to Mr M'Cankie and said if she was compelled she must let them do it, or words to that effect.”

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The pursuer was not told that the defenders, notwithstanding the *post-mortem* examination, reserved their right to enforce the condition as to notice.

On 19th February 1897 the Lord Ordinary (Low) pronounced this interlocutor:—“Sustains the third plea in law for the pursuer, and repels the second plea for the defenders: Appoints the cause to be enrolled for further procedure . . . Further, grants leave to reclaim.”*

* “**OPINION.**—(After the narrative of facts given above)—The defenders contend that their insisting upon a *post-mortem* examination did not bar them from founding upon want of notice. Their argument was to the following effect: The defenders were entitled to consider whether they would found upon want of notice or not, and to enable them to do so it was necessary to ascertain by a *post-mortem* examination whether the deceased had died of the injury or of disease. The pursuer could only found upon the fact of the examination being insisted upon if she could shew that it prejudicially affected her claim under the policy. It was clear that it in no way affected the claim under the policy.

“Now I have no doubt that Mr M'Cankie was quite justified in asking for a *post-mortem* examination. The claim in regard to notice was one in favour of the defenders, which they could enforce or not as they liked. I fancy that in practice such a condition is frequently not strictly enforced, and in order that the directors might judge as to the course which it was expedient to follow, I think that it was reasonable that they should know what an examination of the body disclosed.

“But then I think that Mrs Donnison should have been told what the position of matters was. She should have been told that the want of notice entitled the directors, if they chose, to reject the claim, and that notwithstanding the *post-mortem* examination they might still adopt that course.

“It is quite certain that nothing of that sort was said to the pursuer, and it is equally certain that she believed, and was led to believe, that she had a good claim under the policy unless the examination disclosed an objection to the claim of which the defenders were not then aware.

“I do not think that it is necessary for the pursuer to shew that her claim under the policy has been prejudiced—that is to say, that she has been put in a worse position as regards the claim than she was in before. I think that the principle to be applied is analogous to the principle of *rei interventus*. It is no slight or unimportant thing for a woman to consent to a *post-mortem* examination of her husband's body, and if her consent was asked and given upon the footing (as it was in this case) that a claim existed against the company which they were entitled to test by an examination, it seems to me that they are not now entitled to maintain that no claim existed. It would have been different if the defenders had not known of the want of notice at the time. But they were fully aware of it, and their position is that it gave them an absolute right to reject the claim.

“In these circumstances, when without warning the pursuer of the position which they were entitled to take up, and might still take up, they insisted upon a *post-mortem* examination, which would be of no possible

The defenders reclaimed, and argued;—In order to warrant the implication of waiver the acts founded on must be acts capable of no other reasonable explanation.¹ The request for a *post-mortem* examination here was not such an act. The defenders' position was that they would not take advantage of the objection of want of notice unless the *post-mortem* examination made it clear that the claim on the policy ought to be resisted, taking advantage, if necessary, of every technicality. In obtaining a *post-mortem* examination, the defenders were doing no more than taking the means of preserving evidence which would otherwise be lost. The defenders were not bound to elect between standing on the want of notice and demanding a *post-mortem* examination. It was for the pursuer to fulfil the conditions of the policy by giving timeous notice, and by permitting an examination if required, and the defenders did not by asking for a *post-mortem* examination lose their right to object to the want of notice. The pursuer's argument seemed to be that by asking for a *post-mortem* examination without intimating that they reserved their right to object to the want of notice, the defenders must be held to have waived their right to object; but the defenders, if they desired to reserve their right to object on the ground of want of notice, were under no obligation to do so expressly.² The defenders, if they succeeded in having the action thrown out on the ground of want of notice, might be liable in damages on account of having obtained the *post-mortem* examination, but such a claim to damages—the pursuer's only remedy, if she had any—was a remedy *ex delicto*, and was not relevant to an action on the contract.

The pursuer was not called on.

LORD JUSTICE-CLERK.—This is a peculiar case. I am unable to concur with the argument which has been stated with perfect clearness for the reclaimers. This insurance company imposes two obligations upon persons who take out policies from it. One is, that as a condition precedent to any claim, notice of an accident must be given to the company within fourteen days, and the other is that the representatives of a deceased person making a claim upon the company must agree to a *post-mortem* examination if required by the company. In this case the company found on the fact that notice was not given within fourteen days. But the company, without, it must be presumed, intending to abandon this defence of no timeous notice, seeing that they now state it, made a demand upon the widow for a *post-mortem* examination. That was certainly a strong step to take where it was intended to take the defence of no timeous notice. There is a natural repugnance in a widow to the idea of a *post-mortem* examination being made on her husband's body. The company's demand was assented to and the *post-mortem* examination was carried out. Then after action was brought the insurance company proceeded to state the defence of no timeous notice.

benefit if they were to stand upon want of notice, I think that they must be held to have waived their right to take that objection, and are now barred from doing so."

¹ Wing v. Harvey, 1854, 5 De G. M. & Gord. 265; Shepherd v. Reddie, March 1, 1870, 8 Macph. 619, 42 Scot. Jur. 316.

² Morrison v. The Universal Marine Insurance Co., 1873, L. R., 8 Exch. 197.

No. 125. The Lord Ordinary has found that the company must be held to have waived their right to take that objection to the pursuer's claim, and I think he is right.

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The only difficulty I have had is in the view that the company might have proceeded on the consideration that, if it were held for any reason that the defence of no timeous notice was bad, it might when that had been determined be too late to have a *post-mortem* examination. That is the only difficulty which has occurred to me. But I think that the insurance company was bound to make up their mind at once what course they proposed to take as to the defence of no timeous notice—whether to take their stand on it or not. If they were satisfied that they had a good defence to the claim in the plea of no timeous notice, then they should have taken their stand on that defence. If otherwise, they should have abandoned it altogether.

On the whole matter, I am of opinion, with the Lord Ordinary, that in making the demand upon the widow for a *post-mortem* examination, without giving her any notice of their intention to put forward the want of timeous notice as a preliminary defence to her claim, the company must be held to have waived their right to state that defence.

LORD YOUNG.—I concur. Whether notice was or was not given within fourteen days in the sense of the policy might be a question. In the circumstances of this particular case, I assume, because nothing has been stated to the contrary, that notice ought to have been given within fourteen days from the time when this article—it is called a travelling case—fell on the insured and hurt his foot, and that when the claim was made the insurers were aware that notice had not been given within fourteen days. They did get notice of the injury before the death took place. When they got notice of the accident, their medical man went to see the insured, but nothing was said at that time about the notice not having been sent within fourteen days. There might have been a satisfactory explanation as to why the notice was not sent sooner if the objection had been stated before the death of the insured. But nothing was said about it at that time. Then came the intimation of the death, and after that the managing director wrote this letter,—“In accordance with the conditions of our policy, we desire to have a *post-mortem* examination of the deceased Mr Donnison,” and then they suggest two different dates and leave the choice to the widow.

Now, at that time the company knew that they had not received timeous notice of the accident, and that there was no policy still current. The insured was dead, and there could be no policy still current after he was dead. There was no good claim according to their view, because there had not been timeous notice of the accident. In that view they had no right to demand a *post-mortem* examination if they meant to oppose the claim on the ground of want of timeous notice. But they made a demand for a *post-mortem*, and I think they must be taken to have done so on the footing of having waived any defence they had on the ground of notice. They were entitled to waive it. That is not doubtful. Is it not reasonable to suppose, as the Lord Ordinary has done, that they waived this defence when

they wrote the letter I have read, asking a widow for a *post-mortem* examination on the recently dead and still unburied body of her husband? I agree with the Lord Ordinary and with your Lordship that they must be taken to have done so. No. 125.

There was a suggestion that the proper course for the widow was to have brought an action of damages for the *post-mortem* examination. Probably she would have got heavier damages than the amount of her present claim. Although there may be such a claim for damages, it does not follow that she is not perfectly entitled to take up the position which she takes in the present action. Mar. 10, 1897.
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LORD TRAYNER.—I think that the Lord Ordinary was right.

LORD MONCREIFF.—I agree. I think the company had no right to insist on a *post-mortem* examination except on the footing of waiving the defence of want of timeous notice.

THE COURT adhered.

MILL & BRUCE, S.S.C.—LEWIS BILTON, W.S.—Agents.

THE NORTH BRITISH RAILWAY COMPANY, Pursuers (Respondents).— No. 126.
Sol.-Gen. Dickson—Balfour—Grierson.

THE NORTH BRITISH GRAIN STORAGE AND TRANSIT COMPANY, Mar. 11, 1897.
Defenders (Reclaimers).—*C. J. Guthrie—Clyde.* North British
Railway Co. v.
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Railway Rates—Undue Preference—Jurisdiction—Railway Commissioners—Railway and Canal Traffic Act, 1854 (17 and 18 Vict. cap. 31), secs. 2, 3, and 6—Regulation of Railways Act, 1873 (36 and 37 Vict. cap. 48), sec. 6—Railway and Canal Traffic Act, 1888 (51 and 52 Vict. c. 25) sec. 8.—In an action by a railway company against a trader for rates due for the carriage of goods, the defender maintained that he was entitled to have the rates reduced in respect of illegal preferences granted by the pursuers to other traders, contrary to the provisions of the Railway and Canal Traffic Act, 1854.

Held (affirming the judgment of Lord Kyllachy) that the Court had no jurisdiction, exclusive jurisdiction to deal with the matter of undue preferences under the Railway and Canal Traffic Act, 1854, having been conferred upon the Railway Commissioners by the Regulation of Railways Act, 1873, section 6, and the Railway and Canal Traffic Act, 1888, sec. 8.

Railway—Authorised Rates—Deduction in respect of carriage of goods in trader's own waggons—Railway Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act, 1892 (55 and 56 Vict. c. lxxiii.), Schedule of Maximum Rates and Charges, section 2.—Deduction unascertained by arbitration—Compensation.—The Railway Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act, 1892, provided by the Schedule of Maximum Rates and Charges, section 2, that where goods are carried for a trader in his own waggons, the rates authorised to be charged by the railway company shall be reduced by a sum to be determined (in the event of difference between the parties) by an arbiter appointed by the Board of Trade.

In an action brought in 1895 by a railway company against a trader for rates for the carriage of goods between January 1893 and February 1894, the defender contended that he was entitled to a greater deduction from the rates than the railway company had allowed in respect of goods carried

No. 126. in his own waggons, and that the railway company was not entitled to decree for payment of rates until the legal amount thereof had been ascertained after an arbitration in terms of the statute fixing the deductions to be allowed.

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The Court *granted* decree for the rates sued for on the ground that the defender had unduly delayed to get the amount of the deductions settled by arbitration.

2D DIVISION.
Ld. Kyllachy.

ON 11th May 1895 the North British Railway Company raised an action against the North British Grain Storage and Transit Company, Leith, and Samuel Patmore, the only known partner of that company, for payment of a sum ultimately restricted to £1262, 15s. 9d. as the amount claimed by the pursuers in respect of the carriage of various quantities of grain for the defenders during the period commencing 8th January 1893 and ending 3d February 1894.

It was not disputed that in the accounts as ultimately sued for the rates claimed were within the maximum limit of rates chargeable by the pursuers.

The defenders stated;—(Stat. 3) “In 1892 the Board of Trade, acting under the Railway and Canal Traffic Act, 1888, issued an order to regulate the maximum rates and charges which the pursuers’ company could charge from and after 1st January 1893, and this order was confirmed and became law under ‘The Railway Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act, 1892’ (55 and 56 Vict. c. lxiii).” By said Act the pursuers are bound to make a deduction from the rates chargeable by them when the waggons are supplied by the trader.”

(Stat. 5) “. . . The rates for carriage are in many cases charged without allowing any, or at all events a sufficient, sum for waggons supplied by the defenders. In many cases where the grain carried for the defenders was carried in waggons provided by the defenders themselves, sufficient allowances are duly given to compensate the defenders in accordance with the general practice of the railway company, and with their obligations under . . . the statute, but in others the pursuers have charged the same rates as they have

* The Railway Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act, 1892 (55 and 56 Vict. cap. lxiii.) confirms the Railway Rates and Charges, No. 25 (North British Railway, &c.) Order, 1892, made by the Board of Trade under the Railway and Canal Traffic Act, 1888, by which, *inter alia*, it is provided (section 2) that this Order should come into effect on 1st January 1893, and (section 4) that the maximum rates and charges which the North British Railway Company shall be “entitled to charge and make in respect of merchandise traffic,” “shall be the rates and charges specified in the schedule to this Order annexed, and shall be subject to the classifications, regulations, and provisions set forth in the said schedule.” The schedule to the order, “I. Maximum Rates and Charges,” section 2, provides as follows:—“The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train, and includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not otherwise herein provided for. Provided that where for the conveyance of any merchandise the company do not provide trucks, the rate authorised for conveyance shall be reduced by a sum which shall, in case of difference between the company and the person liable to pay the charge, be determined by an arbitrator appointed by the Board of Trade.”

charged to the defenders and other traders, *e.g.*, the Distillery Company, Limited, when the grain was carried in railway company's waggons. In yet other cases, when grain was carried in the defenders' waggons, the pursuers have failed to make deductions from the rates chargeable when the traffic was carried in the railway company's waggons sufficient to compensate the defenders for providing the grain waggons in question. Moreover, the deductions so allowed to the defenders are smaller than were allowed to other traders. The pursuers have before and since 1890 regularly granted to traders, who supply waggons for grain traffic in similar circumstances, allowances higher than those they are willing to allow to the defenders, *e.g.* [various companies were here mentioned]. Further, the pursuers have made to traders supplying waggons for the carriage of other kinds of traffic allowances much higher relatively to the expenditure incurred by these traders on the waggons supplied by them than they have made to the defenders, *e.g.* [various companies were here mentioned]."

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In statement 7 the defenders set forth in detail the various deductions they claimed in respect of their having used their own waggons.

The defenders pleaded;—(2) It being the universal practice of the pursuers in dealing with traders to grant allowances or abatements from the rates for carriage in the railway company's waggons to traders providing their own waggons, sufficient to compensate such traders for so doing, and the defenders having on the request of the pursuers and in reliance on their said universal practice provided their own waggons, the pursuers are bound to make such allowances from the rates charged for the carriage of grain therein as will compensate the defenders for so doing. (4) *Separatim*, the pursuers are bound to make such allowances in terms of the Statute of 1892, 55 and 56 Vict. cap. lxxiii. (5) The allowances claimed by the defenders being moderate, and such as barely suffice to compensate them for the cost of providing and maintaining the waggons in question, the defenders are entitled to deduct the amount of the same from the sum sued for. (6) The balance of the sum sued for having been already paid, or compensated by excess payments made by defenders to the pursuers on accounts prior as well as subsequent to the accounts sued for, and the defenders having raised an action against the present pursuers for recovery of said excess payments, the present action should, at all events as regards said balance, be conjoined with said action, or otherwise be sisted to await the issue thereof. (7) The defenders being entitled under the Statute of 1854 to allowances at the same proportional rates as these granted by the pursuers to other traders, and the pursuers having refused to grant the same to the defenders, the defenders are entitled to deduct the amount thereof from the sum sued for.

The sixth plea referred to an action which the defenders the Grain Company had raised against the Railway Company in October 1895 for recovery of excess payments alleged to have been made by them to the railway company on accounts previous to as well as subsequent to the accounts sued for, for which payments they claimed deduction in the action raised by the railway company.

The pursuers, the Railway Company, pleaded;—(2) The rates charged by the pursuers being such as they are legally entitled to charge, the pursuers are entitled to decree as craved. (3) The defenders' statements are irrelevant and not sufficiently specific. (6) The defences, so far as based on alleged insufficient waggon allowances,

No. 126. raise questions not competent to be disposed of by the Court of Session.*

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* The Railway and Canal Traffic Act, 1854 (17 and 18 Vict. cap. 31), enacts, section 2,—“ . . . No such company (viz., railway company, canal company, or railway and canal company) shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .”

Section 3.—“It shall be lawful for any company or person complaining against any such companies or company of anything done or of any omission made in violation or contravention of this Act to apply in a summary way by motion or summons . . . in Scotland to the Court of Session in Scotland . . . or to any Judge of . . . such Court . . . and

. . . it shall also be lawful for . . . such Court or Judge to hear and determine the matter of such complaint; and for that purpose, if such Court or Judge shall think fit, to direct and prosecute, in such mode and by such engineers, barristers, or other persons as they think proper, all such inquiries as may be deemed necessary to enable such Court or Judge to form a just judgment on the matter of such complaint; and if it be made to appear to such Court or Judge on such hearing, or on the report of any such person, that anything has been done or omission made in violation or contravention of this Act by such company or companies, it shall be lawful for such Court or Judge to issue a writ of injunction or interdict restraining such company or companies from further continuing such violation or contravention of this Act, and enjoining obedience to the same. . . .”

Section 6.—“No proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law.”

The Regulation of Railways Act, 1873 (36 and 37 Vict. cap. 48), section 6, enacts as follows:—“Any person complaining of anything done or of any omission made in violation or contravention of section 2 of the Railway and Canal Traffic Act, 1854 . . . may apply to the Commissioners, . . . and for the purpose of enabling the Commissioners to hear and determine the matter of any such complaint, they shall have and may exercise all the jurisdiction conferred by section 3 of the Railway and Canal Traffic Act, 1854, on the several Courts and Judges empowered to hear and determine complaints under that Act; and may make orders of like nature with the writs and orders authorised to be issued and made by the said Courts and Judges; and the said Courts and Judges shall, except for the purpose of enforcing any decision or order of the Commissioners, cease to exercise the jurisdiction conferred on them by that section.”

The Railway and Canal Traffic Act, 1888 (51 and 52 Vict. cap. 25), enacts (section 2) that the new Commission, styled the Railway and Canal Commission, established by the Act “shall be a Court of record.” Section 8.—“There shall be transferred to and vested in the Commissioners all the jurisdiction and powers which at the commencement of this Act were vested in, or capable of being exercised by, the Railway Commissioners, whether under the Regulation of Railways Act, 1873, or any other Act, or otherwise, and any reference to the Railway Commissioners in the Regulation of Railways Act, 1873, or any other Act, or in any document, shall, from and after the commencement of this Act, be construed to refer to the Railway and Canal Commission established by this Act.”

Section 12.—“Where the Commissioners have jurisdiction to hear and determine any matter, they may, in addition to or in substitution for any

On 13th June 1896 the Lord Ordinary (Kyllachy) pronounced the following interlocutor in the action at the instance of the North British Railway Company:—"Finds that the averments of illegal preferences to other traders contained in the 5th article of the statement of facts for the defenders are not relevant to infer a contravention of the Railway Clauses Act, 1845, and in so far as relevant to infer a contravention of the Railway and Canal Traffic Act of 1854, the jurisdiction with respect to illegal preferences under the said last mentioned Act is now by the Acts of 1873 and 1888 transferred to the Railway Commissioners; therefore sustains the pursuers' 6th plea in law in so far as the same applies to the said averments of illegal preferences contained in the said 5th article of the defenders' statement. . . ."

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other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges, which but for this Act such party would have had by reason of the matter of complaint: Provided that such damages shall not be awarded unless complaint has been made to the Commissioners within one year from the discovery by the party aggrieved of the matter complained of. . . ."

Section 18 (1).—"For the purposes of this Act the Commissioners shall have full jurisdiction to hear and determine all matters whether of law or of fact, and shall as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of their orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of their jurisdiction under this Act, or otherwise, for carrying this Act into effect, have all such powers, rights, and privileges as are vested in a superior Court. . . ." This Act came into operation on 1st January 1889.

* "OPINION.— . . . The defenders' case rests upon the Act of 1854, and undoubtedly that Act may apply, even although the journeys may be different. But then Mr Balfour argued that the Act of 1854, while conferring new rights upon the public and imposing new obligations upon railway companies, made it a condition of those rights that they should be enforced in a particular manner, viz., by a particular tribunal, and that that tribunal, while originally consisting of the Courts of law in the different countries (exercising *quoad hoc* a special jurisdiction), is now a new tribunal constituted by the Act of 1873, viz., the Railway Commissioners. He points out further, that although prior to 1888 there may have been a doubt as to the powers of the new tribunal, that doubt no longer exists since the passing of the Act of 1888—that Act providing for the Railway Commissioners having the means of enforcing both by way of interdict and damages any claim for illegal preference.

"Now, Mr Guthrie answers all this by referring to the case of *Evershed*, and it is certainly the fact that that case did proceed on a different view. That is to say, the Judges did assume that, even after the Act of 1873, the Courts of law could entertain actions founded on the Act of 1854—actions of damages in respect of illegal preferences granted to other traders. At the same time there seems equally little doubt that in the two more recent cases of *Denaby Main Colliery Company v. Manchester, &c., Railway Company*, 11 App. Cases, 97, and *Phipps v. London and North-Western Railway Company*, 2 Q. B. D. 229, 1892, the decision in the case of *Evershed*, in so far as it can be held to have been a decision under the Act of 1854, has been more than questioned. For the explanation suggested, viz., that it really was a case under the Act of 1845, does not appear to me to be satisfactory. Therefore the case of *Evershed* cannot be said to be a case which stands uncontroverted, and that being so, I must apply my

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The interlocutor further allowed the defenders a proof of an alleged agreement with the railway company, but as it was not proved it need not be referred to further.

On the same day the Lord Ordinary pronounced an interlocutor in similar terms, *mutatis mutandis*, in the counter action at the instance of the Grain Company.

On 12th December 1896 the Lord Ordinary pronounced this interlocutor:—"Finds . . . (3) that the defenders have failed to prove the agreement alleged . . . and further, that they have not proved, and, separately, have not averred, facts and circumstances relevant to infer an agreement between the two companies to the effect alleged: In respect of these findings, and of the findings in the preceding interlocutor of 13th June last, decerns against the defenders for payment to the pursuers of the sum of £1262, 15s. 9d."

Of the same date the Lord Ordinary pronounced an interlocutor in the counter action, which, after findings in similar terms, *mutatis mutandis*, to those contained in the interlocutor last quoted, was as follows:—"In respect of these findings and of the findings in the preceding interlocutor of 13th June last, dismisses the action, and decerns; reserving to the pursuers to bring such future action as may be necessary to enforce any determination on the subject of illegal preferences which the pursuers may obtain from the Railway Commissioners."*

The Grain Company reclaimed, and argued;—(1) They had a relevant claim against the Railway Company for illegal preferences given to other traders within the meaning of section 2 of the Railway and Canal Act of 1854. Although an aggrieved trader could ask the Court to apply the remedy of interdict under section 3 of that Act, where a railway company had given undue preferences, that did not prevent the trader, where sued by the railway company for rates, from pleading section 2 in defence, and he also had the "ordinary remedies at law for extortion,"¹ and might bring an action under the Act for recovery of sums not truly due to the railway company in respect of such preferences.² The interpretation placed upon Lord Halsbury's opinion in the *Denaby*¹ case by Justice Cave in *Lancashire and Yorkshire Rail-*

own judgment to the construction of the statute, and I must say that it is to my mind difficult to resist the conclusion expressed by Lord Blackburn and Lord Herschell in the two latter cases, viz., that the Act of 1854 created a special tribunal for cases of illegal preference; and further, that whatever its powers were, these powers were transferred in 1873 to the Railway Commissioners.

"The result appears to be that I must sustain the pursuers' sixth plea in law in so far as the defence is founded on illegal preference. . . ."

* In pronouncing these interlocutors his Lordship gave this opinion:—

"The Grain Company asked that the action at their instance should be sisted to await the result of a proposed application to the Railway Commissioners. I do not think that this is necessary, and I think it will be better and more convenient that, if the Grain Company obtain a favourable judgment from the Railway Commissioners, that judgment should be enforced if necessary by a new and separate action."

¹ *Denaby Main Colliery Co. v. Manchester, Sheffield, and Lincolnshire Railway Co.*, 1885, L. R., 11 App. Cases, *per* Lord Chanc. (Halsbury), p. 112.

² *London and North-Western Railway Co. v. Everahed*, 1878, L. R., 3 App. Cases, 1029, and L. R., 2 Q. B. D. 254, and L. R., 3 Q. B. D. 134.

*way Company v. Greenwood*¹ was unduly restricted. Moreover, the case was decided by a single Judge. No doubt the powers originally given to this Court by section 3 of the Act of 1854 were transferred by the Acts of 1873 and 1888 to the Railway Commissioners, but if the argument was sound that the Court had jurisdiction originally to give effect to section 2 of the 1854 Act in defence to an extortionate claim by a railway company, then there was nothing in the later Acts to deprive them of that jurisdiction. Section 12 of the 1888 Act did not take away any jurisdiction previously possessed by this Court, nor give any further exclusive jurisdiction to the Commissioners. The reclaimers were therefore entitled to plead the overcharge in respect of undue preference in defence to the railway company's action, and to set off against the railway company's claim the sums paid in excess and sued for in the counter action. In any view, the actions should be sisted to await the result of an application to the Commissioners. (2) As regarded the period after 1st January 1893, the reclaimers were in an even stronger position under section 2 of the Schedule of Maximum Rates (North British Act), under which, where goods were carried, as here, in the trader's waggons, the railway company were not entitled to charge their published rate, but only their published rate less a certain deduction. Now, that deduction had not been ascertained. The parties differed as to its amount, and till that was determined by arbitration no decree for a liquid sum could be obtained by the railway company. As regarded the counter action, so far as relating to the period subsequent to 1st January 1893, the only course open to the reclaimers was to bring an action for recovery of the overcharges with a view to compelling arbitration as to the amount, and to obtaining decree for the proper amount when determined in the arbitration. The actions ought then to be sisted pending the result of the arbitration.²

Argued for the Railway Company;—(1) The reclaimers had neglected to have the amount of the alleged overcharges ascertained in the statutory manner. The amount was thus illiquid, and could not be set off against the authorised rates sued for. (2) The reclaimers had no case under the Act of 1854. Alleged overcharges in respect of undue preferences under section 2 of that Act could not be pleaded in defence to an action for recovery of charges for the carriage of goods, or recovered by counter claim or counter action if already paid under protest.³ The Railway Commissioners had exclusive jurisdiction given to them to deal with questions under the Act of 1854, by section 6 of the Act of 1873, and section 8 of the Railway and Canal Act, 1888.⁴ An action for recovery of overcharges in respect of undue preference, under section 2 of the Act of 1854, was in any view now incompetent, because the Commissioners were empowered by section 18 (1) of the Act of 1888 to enforce a decree for repayment of such overcharges. (3) The fact that the reclaimers

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¹ *Lancashire and Yorkshire Railway Co. v. Greenwood*, 1888, L. R., 21 Q. B. D. 215 at p. 219.

² *Tough v. Dumbarton Water-works Commissioners*, Dec. 20, 1872, 11 Macph. 236.

³ *Lancashire and Yorkshire Railway Co. v. Greenwood*, 1888, *vide* note 1, *supra*, L. R., 21 Q. B. D. 215, at p. 220, *per* J. Cave.

⁴ *Phipps v. London and North-Western Railway Co.*, 1892, L. R., 2 Q. B. 229, *per* Lord Herschell, p. 249.

No. 126. had failed to appeal to arbitration with respect to the amount of the waggon allowances disposed of their plea founded upon the Act of 1892. The railway company were then entitled to decree in their action, and to have the counter action dismissed.

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At advising,—

LORD TRAYNER.—We have here two actions, one at the instance of the North British Railway Company against the Grain Storage and Transit Company; and the other by the Grain Company against the Railway Company. The action first mentioned is first in date, and the leading action; the second action has for its purpose the enforcing of the alleged rights pleaded in defence to the first action.

The Railway Company (under the restricted conclusions now insisted in) sue for payment of certain rates due to them by the defenders, in respect of the carriage of various quantities of grain between January 1893 and February 1894. The quantities of grain carried are not in dispute, nor are the rates charged for such carriage said to be in excess of the rates which the pursuers were entitled to charge (except as after noticed), and therefore *prima facie* the pursuers are entitled to decree. But the defenders maintain in answer to the pursuers' claim (1) that they are entitled to have the rates reduced to those at which goods have been carried by the pursuers for other traders, and (2) that the rates sued for are subject to deduction on the ground that the goods were carried in waggons belonging to the defenders themselves. These defences must be considered separately.

1. It is conceded by the defenders that they cannot maintain their claim urged in the first defence, on the ground that the undue preference to other traders was in contravention of the Railway Clauses Act, 1845. Accordingly it can only be maintained on the ground that the alleged undue preference was contrary to the provisions of the Railway and Canal Traffic Act of 1854. But we cannot give effect to that defence. We can neither inquire into the facts alleged, nor give the defenders the remedy they seek, because under section 6 of the Regulation of Railways Act, 1873, and section 8 of the Railway and Canal Traffic Act of 1888, the jurisdiction to deal with such matters is conferred exclusively upon the Railway Commission.

2. The second defence is based (1) upon an alleged agreement, and (2) upon the provisions of the Act of 1892. I agree with the Lord Ordinary that the alleged agreement is not proved, and therefore the defenders can only rely upon the statutory provision. It is to the effect that where goods are carried for a trader in his own waggons, the railway company's rate shall be reduced by a sum (in the event of the railway company and the trader differing about it), to be determined by an arbitrator appointed by the Board of Trade. Now, here the Railway Company and the trader have differed as to the amount of the reduction, but no steps have been taken by the trader to have an arbitrator appointed to settle the difference and fix the amount of the reduction. Until that is done, the amount of the reduction cannot be ascertained, and consequently the amount of the reduction to which the defenders are entitled is not known. It is difficult to give effect to a reduction the amount of which is at present indefinite. It must be put in figures before we can allow it as a reduction from, or set-off against, the pursuers' money claim.

The defenders ask, however, that their action may be sisted (not dismissed) until the amount of the reduction is ascertained. The Lord Ordinary thinks it better and more convenient to dismiss the counter action at once. I am not prepared to differ from him. The defenders should have proceeded long ago to have their claim determined in the manner pointed out by the statute, and they cannot complain if their neglect of their own rights occasions them the expense of a new summons. I would have been more inclined to listen to the defenders' request had any diligence proceeded on the action now depending which it was desirable to maintain. But there is nothing of the kind here.

On the whole matter I agree with the Lord Ordinary, and am for adhering to the interlocutors reclaimed against in both actions.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

THE COURT adhered.

JAMES WATSON, S.S.C.—DRUMMOND & REID, S.S.C.—Agents.

PARISH COUNCIL OF THE PARISH OF BLANTYRE, Pursuers
(Respondents).—*C. K. Mackenzie—Cullen.*

PARISH COUNCIL OF THE PARISH OF RUTHERGLEN, Defenders
(Appellants).—*Salvesen—Deas.*

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Poor—Settlement—Residential Settlement—"Common Begging"—Poor-Law Amendment (Scotland) Act, 1845 (8 and 9 Vict. c. 83), sec. 76.—In a question as to whether a female pauper had acquired a residential settlement in the parish of B., or was chargeable to R., her birth parish, B. admitted that the pauper had resided in the parish for the statutory period, but maintained that she had not thereby acquired a settlement, in respect that during the period she had had recourse to "common begging," within the meaning of sec. 76 of the Poor-Law Amendment (Scotland) Act, 1845. A proof established the following facts:—The pauper was weak-minded, and would not work for her own support, and was, after the lapse of the statutory period, certified insane and confined as a pauper lunatic. During the statutory period she for three-fourths of the year lived with, and was supported by, her brother-in-law and sister, but during the summer months she was in the habit of absenting herself for periods varying from a week to six weeks, and on one occasion extending to three months. During these absences her brother-in-law and sister contributed nothing to her support, and she supported herself by begging on the public high roads, and at houses for help, and receiving coppers, clothes, and food. Her brother-in-law deposed that while he had supported her and allowed her to live in his house he had not been anxious to do so. R. maintained that as the pauper had had a house to which she could always go she was under no necessity to beg, and therefore that her begging was not "common begging" in the sense of the Act.

Held that the pauper had not acquired a residential settlement in B., in respect that, during the statutory period, she had had recourse to common begging.

In July 1896 the Parish Council of Blantyre brought an action in 2^d DIVISION. the Sheriff Court at Glasgow against the Parish Council of Rutherglen, praying for decree for £11, 10s. 8d. as the amount of advances made, and for relief of all advances that might be made, on account of a pauper named Marion Hunter, who was being maintained at the cost of the pursuers in the lunatic ward of the Hamilton Combination Poorhouse.

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No. 127. Rutherglen, which was the pauper's parish of birth, maintained that Blantyre was liable in respect that the pauper had acquired a residential settlement in Blantyre by residence in that parish from May 1886 till March 1892.

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Blantyre admitted that the pauper had resided in the parish for the statutory period, but disputed liability on the ground that during that period the pauper had had "recourse to common begging," within the meaning of section 76 of the Poor-Law (Scotland) Act, 1845.*

A proof was allowed. The following findings in fact from the interlocutor of the Sheriff-substitute were admitted by the parties at the hearing on the appeal correctly to express the result of the evidence:—"Finds (1) that Marion Hunter, now aged 50, was born in the parish of Rutherglen: Finds (2) that she has always been to a considerable extent weak-minded, but for a time in her youth was employed somewhat irregularly in a bleach-work near Rutherglen, as long as her sister, who was then unmarried, could in a manner 'herd' her to her work and look after her: Finds (3) that after the marriage of her sister to a miner, the witness Jamieson, the pauper became more irregular, and thus became unable to support herself by work, and applied to and received relief from Blantyre, where she was then residing with the Jamiesons, but Rutherglen admitted liability, and repaid the advances till 1885, when Rutherglen instructed Blantyre to offer the poorhouse, which was offered and refused: Finds (4) that in 1885, being with child, she again applied for relief, and was sent at the expense of Rutherglen to Paisley Poorhouse, where she gave birth to a child, which soon thereafter died: Finds (5) that from the time when she left Paisley Poorhouse in May 1886 till March 1892, no further application for relief was made on her behalf: Finds (6) that during this period she remained living in family for the most with the Jamiesons at various houses in Blantyre Parish, being constantly there with them in winter, but during the summer she occasionally absented herself for periods, of which the longest was three months, and the rest between six weeks and one week, being in Blantyre, however, the greater part even of the summers: Finds (7) that during this period the only work she did was to attend in a half-hearted way to children of the Jamiesons, and her absences were not due to industrial engagements elsewhere: Finds (8) that whether in Blantyre, in East Kilbride, or in other places to which she strayed in the summer months, she was in the habit of going about with a bag, asking for help for a 'puir body' (that is herself), so that she was generally known as 'Puir Body,' and receiving sometimes coppers, sometimes food, sometimes clothes: † Finds (9) that in so far as she did not support herself by begging in this manner she was supported

* The Poor-Law (Scotland) Act, 1845 (8 and 9 Vict. cap. 83), sec. 76, enacts,—". . . No person shall be held to have acquired a settlement in any parish or combination by residence therein unless such person shall have resided for five years continuously in such parish or combination, and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief. . . ."

† A doctor in the district, a policeman, and another witness, spoke to having seen the pauper begging on the public roads. Other witnesses spoke to the pauper being in the habit of calling on them and begging. All these witnesses had known her for a considerable number of years.

by the Jamiesons: * Finds (10) that on 8th March 1892 she applied .No. 127. for relief to Blantyre, and was sent to Hamilton Combination Poor-house, where she remained only four days: Finds (11) that on 1st Mar. 11, 1897. December 1894 she again applied to Blantyre for relief, and 2s. 6d. Parish Council a week was given till 16th March 1896: Finds (12) that again Parish Council applying to Blantyre for relief on 31st March 1896, she was cer- of Rutherglen. tified insane, and sent to the lunatic ward in Hamilton Combination Poorhouse on 20th April 1896, where she has subsequently remained."

On 7th December 1896 the Sheriff-substitute (Erskine Murray), pronounced this interlocutor (after findings in fact above given):—
 "Finds on the whole case and in law that while, so far as mere residence is concerned, Marion Hunter's residence in Blantyre during these years might have been sufficient for the acquisition of a settlement, her residence is made ineffectual for that purpose by the fact that she had recourse, more or less throughout the whole of that period, to common begging; therefore finds the defenders, the Parish Council of Rutherglen, liable to the pursuers, the Parish Council of Blantyre,

* Jamieson, adduced as a witness by the pursuers, deposed,—“Marion Hunter . . . has been coming to my house more or less for the last twenty years. As far as I could see, during all that time she has been weak in the intellect. There is no change in her now from then. . . . I urged the inspector of Rutherglen before I came to Blantyre to put her in a place of restraint, and he refused. I was angry with her for running away from Paisley, and also angry with her for running away from my own house when I was keeping her. . . . I then said I would not take her in either. That was eighteen years ago. Notwithstanding that, I took her into my house. When she was beat herself, she came to me. Her inclination, since the Rutherglen Parochial Board stopped her aliment eleven or twelve years ago, was to be on tramp. . . . She was in Paisley [in 1886] for about three months. No arrangements for relief having been come to, I refused to keep her. I have enough to do with myself. Afterwards, when she stayed in my house, it was simply because I did not want to see her on the street. . . . From 1886 she was mostly in the [witness'] house, and only away at short intervals. The longest time she ever was away from me was three months. That was about three and a half years ago. . . . She was away at other periods from six weeks to one week. In the winter time she was with me all the time; but in the summer time she was perhaps three weeks with me and three weeks away. . . . When the weather was favourable she ran away. She only came back when she could not subsist away. She has gone away at eleven and twelve at night, and one in the morning. I don't know how she lived when she was away for these periods. She was not able to earn her livelihood. She must have got it from someone. When she came back to me she brought back stuff which she must have got from people. I have seen her with jacket-bodices and skirts and bread. My boys have told me that they have met her on the road, and got coppers from her. . . . I did not support her when she was away. I cannot imagine any other way that she can have earned her living except by begging. . . . Cross-examined.—She is lazy, and won't work. I don't know if she is perfectly able to work. If she would attend to my house she would not need to be where she is. She did not attend to my house while she was living with me, but she might hold the baby. She is quite fit to attend to the house. She is quite able to work in the bleach-fields so far as her body is concerned, but I don't know about her mind. . . . I was not willing to support her during these years; I had plenty to do with myself. I did support her, but was not willing at all.”

No. 127. in the sum of £11, 10s. 8d. as craved, with interest; reserving to pursuers to move for decree for any further sums paid or to be paid by them on behalf of the said Marion Hunter subsequent to the 20th day of April 1896, with interest thereon as craved," &c.

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of Rutherglen.

The defenders appealed, and argued;—"Common begging" meant something more restricted than "begging" simply. It was obviously a technical term which required definition. It meant professional begging, and perhaps in strictness ought to be confined to the old system of licensed begging; but as that system was now unknown a wider interpretation would probably be applied. On the most liberal construction however the expression included only the begging of persons who lived continuously and habitually by begging, who had no other resource than begging, and who but for begging would have been a charge upon the rates. It did not include chance alms, nor did it include the voluntary contributions of friends or benevolent persons, or of charitable institutions.¹ Persons therefore who received substantial assistance, after inquiry into the necessities of their particular case, were not common beggars within the meaning of the Act; and the more substantial and formally given the assistance the further removed would the case be from that of common begging. The distinction seemed to be between miscellaneous begging from all and sundry on the public streets and highways, and calling on persons and asking for assistance after endeavouring to shew that the case was a proper object of benevolence. Now, in the present instance, there was not much direct evidence of general begging on the public streets and highways; most of the witnesses who spoke to begging by the pauper were persons who had known her for years, and upon whom she called; but, at the same time, there was some evidence of general begging, and the tenor of the evidence supported the findings in fact of the Sheriff-substitute, which the defenders admitted. The peculiarity of the case lay not so much in the character of the pauper's begging, which may have been miscellaneous enough while it lasted, but in the fact that she did not require to beg at all. The extreme case would be that of a person who had means of his own, but who from eccentricity chose at times to go about the country begging. If such a person lost his money and so came on the rates, it could not seriously be maintained that he had been a common beggar within the meaning of the Act. Here the pauper had no means of her own, indeed, but she had her brother-in-law, who, if not particularly anxious to help her, always did so, as long as she chose to live in his house, which was for about three-fourths of the year during the period in question. Her absences and her begging were due to nothing but the restlessness of a weak mind; if she had remained with her brother-in-law she need not have begged anything from anybody. Such a person could not be described as a common—that was to say a professional—beggar.

The pursuers were not called on.

LORD JUSTICE-CLERK.—I see no ground for differing from the Sheriff-substitute. As Mr Salvesen has said, the evidence is all on one side. It is to the effect that, during the period in question, for weeks and sometimes

¹ Parish of Edinburgh v. Parish of Dingwall; Parish of Coldingham v. Parish of Cockburnspath,—both reported June 6, 1851, 13 D. 1057, 23 Scot. Jur. 490; Hay v. Ferguson, Jan. 17, 1852, 14 D. 352, 24 Scot. Jur. 155.

even months, this woman was living by what is nothing else than begging. No. 127.
 It is said that a definition of the term "common begging" in the Poor-Law Act, 1845, section 76, is required. All I am inclined to say is that it is proved in this case that this woman was living by common begging. If that be so, then she comes within the exception provided for by the section to which I have referred, and consequently she could not acquire a settlement in the parish of Blantyre, although she resided there for the requisite period under the statute.

Mar. 11, 1897.
 Parish Council
 of Blantyre v.
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 of Rutherglen.

LORD TRAYNER.—I agree. It is proved that the pauper had recourse to common begging during the period of residence which is relied on as giving her a residential settlement. But the statute is quite explicit, that the residence necessary for the acquisition of a settlement must be residence for a period without recourse to common begging. I think, therefore, no residential settlement was acquired.

We are asked to define "common begging." But the language is not technical. It is plain English, about the meaning of which I cannot suppose there is room for any doubt.

LORD MONCREIFF.—I am of the same opinion. I think this woman was a common beggar in the plainest sense of the term.

LORD YOUNG concurred.

THE COURT pronounced the following interlocutor:—"Sustain the appeal: Recall the findings in fact in the interlocutor appealed against, and in lieu thereof find that the pauper, Marion Hunter, was born in the parish of Rutherglen; that she never acquired a residential settlement in the parish of Blantyre, and never lost her settlement in the parish of Rutherglen: *Quoad ultra* adhere to the interlocutor appealed against: Of new decern against the parish of Rutherglen for the sum of £11, 10s. 8d. as craved, with interest: Find the respondent entitled to expenses in this Court," &c.

BRUCE, KERR, & BURNS, W.S.—H. B. & F. J. DEWAR, W.S.—Agents.

JAMES SMITH, Pursuer (Appellant).—*R. E. M. Smith.*
 WALTER FORBES & COMPANY, Defenders (Respondents).—*Constable.*

No. 128.

Mar. 11, 1897.
 Smith v.
 Forbes & Co.

Reparation—Master and Servant—Volenti non fit injuria.—A bottler, when in the employment of a firm of aerated water manufacturers, received an injury to one of his fingers in consequence of the bursting of a bottle which he was engaged in filling. He brought an action of damages against the manufacturers, in which he averred that "in all aerated water manufactories the bursting of bottles is of constant occurrence, and it is the usual and proper precaution of the trade to supply the bottlers and other workers with rubber or worsted gloves and masks"; that it was the duty of the defenders to supply such gloves and masks; that they neglected this duty, and that in consequence of that neglect the pursuer received the injuries complained of. The pursuer further averred that the accident took place on the day after that on which he entered the defenders' employment, and that he had asked for gloves and a mask, and that his request had been refused by the defenders.

No. 128. The defenders pleaded, *inter alia*, that the action was irrelevant in respect that the pursuer's averments shewed that he had accepted the risk of working without gloves or a mask.

Mar. 11, 1897. *Smith v. Forbes & Co.* The Court held that the action was relevant, *diss.* Lord Young, who held that the defenders had no duty to supply gloves to their employees.

Smith v. Baker, L. R. [1891], A. C. 325 ; *Wallace v. Culter Paper Mills Co., Limited*, 19 R. 915, *followed*.

2D DIVISION.
Sheriff of the
Lothians and
Peebles.

IN December 1896 James Smith, bottler, with consent of his father, brought an action in the Sheriff Court at Edinburgh against Walter Forbes & Company, aerated water manufacturers, Beaverbank, praying for damages for personal injury, at common law, or alternatively under the Employers Liability Act, 1880.

The pursuer averred;—(Cond. 1) "The pursuer is a bottler of aerated waters, and has been brought up to that trade. . . . The pursuer is still in minority." (Cond. 2) "On or about the 28th September last the pursuer entered the employment of the defenders as a bottler. The defenders have in their works a steam filler which forces water and gas simultaneously into bottles containing essences. The bottles used are fitted with screw stoppers, and are known as Riley's patent. The stoppers are turned loosely into the bottles after the essences are in. The steam filler is so constructed that when a bottle in the above stage is placed in position to be filled, the stopper is partially unscrewed or removed by the filler, the water and gas forced in, and the stopper replaced as before. When the filled bottle is removed from the machine, the stopper requires to be screwed up tightly by the hand to prevent the gas escaping. It was the pursuer's duty to place bottles in the filler, remove them again, and turn the screw stoppers tight. . . ." (Cond. 3) "On or about the 29th of September (the day after the pursuer began work with the defenders), he was engaged placing bottles in and removing them from the filler as above described. When in the act of tightening up a stopper, one of the bottles burst in his hands, and a piece of glass from the broken bottle struck the forefinger of his right hand, cutting into the middle joint, causing serious injuries. . . ." (Cond. 4) "In all aerated water manufactories the bursting of bottles is of constant occurrence, and it is the usual and proper precaution of the trade to supply the bottlers and other workers with rubber or worsted gloves and masks. This precaution is all the more necessary where, as with the defenders, a steam filler is used. The defenders, though they were well aware of the highly dangerous character of the work pursuer had to do, provided no such safeguard, and in consequence of the want thereof the pursuer has been injured as above condescended on. It was the duty of the defenders to supply masks and gloves, and they have been repeatedly spoken to on the subject, but have disregarded all suggestions. There have been previous accidents in their works from the same cause. . . . Explained that none of defenders' employees wore masks or gloves, and that pursuer asked Mr Connor, one of defenders' firm, for a mask and gloves, but said request was refused or disregarded. It was not only the duty of defenders to have a supply of masks and gloves, but to see that their employees wore same. . . ."

The pursuer pleaded;—(3) The defenders, or those for whom they are responsible, having neglected to see that the pursuer was protected against injury by the usual and proper safeguard of the trade, and the

pursuer having been thereby injured, the defenders are liable to him No. 128.
in damages as concluded for.

The defenders averred that they had provided a sufficient supply of gloves and masks, and further pleaded, *inter alia*;—(1) The action being irrelevant ought to be dismissed, with expenses to defenders. (2) The pursuer, having chosen to work in face of a known danger, and without using proper precautions, and having been injured, as he alleges, in consequence of the absence of said precautions, is not entitled to recover damages from the defenders.

On 16th December 1896 the Sheriff-substitute (Maconochie) pronounced this interlocutor:—"Finds that a relevant case has been stated by the pursuer; therefore repels the first plea in law for the defenders: Allows both parties a proof of their respective averments on record, and to the pursuer a conjunct probation."*

The pursuer appealed for jury trial, and proposed an issue in common form.

Upon the motion for adjustment of issue, the defenders objected that an issue ought not to be allowed, on the ground that the action was irrelevant, and argued;—The pursuer, according to his own averments, knew of the danger of working without gloves, and went on working after his request for gloves had been definitely refused. The case therefore was not ruled by *Smith v. Baker*¹ and *Wallace*,² since

* "NOTE.— . . . At this stage the pursuer's averments must be assumed to be true, and he avers that it is necessary for the safe conduct of a bottling business, and particularly of the defenders' business (in which a steam filler is used), that gloves and masks should be supplied to the workmen. The averments bring home to the defenders themselves the direct responsibility for the omission to supply this necessity, and therefore, as was observed in similar circumstances in the case of *Wallace v. Culter Paper Mills Co., Limited*, June 23, 1892, 19 R. 915, the claim of the pursuer is one at common law, and does not depend on the Employers Liability Act, 1880. The defenders, however, maintain that the maxim *volenti non fit injuria* applies to the case. I think that the averments I have quoted disclose a case of knowledge of the danger on the part of the pursuer, but the question remains whether, in continuing to work after the defenders had neglected or refused to supply him with gloves, he by doing so accepted the risk in the sense of agreeing to relieve his employers of any injury which might be caused by their fault. The defenders rested their case mainly on the class of cases of which *M'Gee v. Eglinton Iron Co.*, 10 R. 955, may be taken as a type, and but for two subsequent cases I should have felt myself bound, under the earlier authorities, to hold that the circumstances disclosed on record were such as to shew that the pursuer had taken the risk upon himself. It seems to me, however, that the case is ruled by the decision in *Smith v. Baker & Sons*, L. R. [1891], A. C. 325, and the case of *Wallace* above cited. These cases, I think, decide that where such averments are made as in this case,—that is to say, where it is admitted that the danger was known to the pursuer, but where there is nothing to lead to the conclusion that the pursuer agreed to relieve his masters from liability for any injury caused through their fault beyond the mere averment that he went on working after he had asked that safeguards against the known danger should be provided, then the law is that the question whether the workman was merely *sciens* or was also *volens* when he so continued working is a question of fact which must be decided by the Judge or the jury, as the case may be, on the evidence led in the cause. On these grounds I have allowed parties a proof of their averments."

¹ *Smith v. Baker*, L. R. [1891], A. C. 325.

² *Wallace v. Culter Paper Mills Co., Limited*, June 23, 1892, 19 R. 915.

No. 128. a workman who went on working in face of a known danger after his employer had refused to remedy the danger must be held to have accepted the risk as incident to his employment, if the acceptance of such a risk could be inferred from facts and circumstances at all.¹ The defenders did not admit that they had refused to remedy the danger; on the contrary, their averment was that they had provided an ample supply of gloves, but that question could not arise upon relevancy.

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The pursuer maintained that the action was relevant on the grounds stated by the Sheriff-substitute.

At advising,—

LORD JUSTICE-CLERK.—The pursuer avers that in the bottling of aerated waters the bursting of bottles is a “constant occurrence,” and that “it is the usual and proper precaution of the trade to supply the bottlers and other workers with rubber or worsted gloves and masks,” and that this is the “more necessary” where, as in the defenders’ works, a steam filler is used. He avers that it was the duty of the defenders to provide gloves and masks; that they did not do so; that he asked one of the defenders’ firm to supply him with gloves, and that his request was refused or disregarded. It is averred that the accident happened on the second day of the pursuer’s employment.

It appears to me that the pursuer has sufficiently set forth a danger, and the duty of the master to provide against it by appliances, and I think he must be held entitled to proceed to proof of his averments, unless it can be held that his case, as stated, discloses that he worked in face of a seen danger, and so that the maxim *volenti non fit injuria* applies. The trend of recent decisions has been rather favourable to allowing cases to go to proof where there is a question whether the master has not provided proper and usual appliances, and a workman, who is remonstrating because they are not supplied, goes on with his work in the meantime. These decisions proceed upon the view that it is a question of fact to be decided on evidence whether the injured party has so acted that the maxim applies to exclude him from recovering damages because of the original failure of the master to provide a usual and proper appliance for the safety of his servants. I concur with the view the Sheriff-substitute has stated in his note as to the cases recently decided, and that following these decisions the pursuer should have his appeal allowed that the case may be tried.

LORD YOUNG.—I am not desirous of saying anything that will prejudice the case before the Court; but I must express here my individual opinion that there is no relevant case. The case depends upon the simple proposition that it is the duty of soda water manufacturers to provide their bottlers with gloves. That is certainly a startling proposition. Where a manufacturer carries on works in such a manner that there is danger of stones falling or rolling from a height upon workers stationed below, and an accident occurs, it may depend on circumstances whether those below went on with their work not willingly exposing themselves to risk but believing that their master had taken steps to ensure their safety. That is the kind of

¹ Webster v. Brown, May 12, 1892, 19 R. 765.

case which has hitherto been presented, and which the Court has sent to a jury. Other cases have been held to be tenable because the master had violated some duty imposed on him by Act of Parliament. But I know of no statute or rule of common law which requires manufacturers of soda water to provide their bottlers with gloves. I cannot, therefore, concur in the view that this case should be sent to trial.

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LORD TRAYNER.—The pursuer in this case is a bottler of aerated waters, and in that capacity was serving the defenders when the accident in question happened. The accident was of a simple enough character—a bottle which the pursuer was filling burst, and one of the pursuer's fingers was severely cut by a piece of the broken bottle. Such accidents are, according to the pursuer's averments, of constant occurrence in aerated water manufactories like the defenders', and to guard against injury or danger therefrom it is "the usual and proper precaution of the trade to supply the bottlers" with gloves and masks. The pursuer says that he applied to the defenders for gloves and a mask, but his request was refused or disregarded. He continued to work without them, with the consequence that he was injured, as I have already stated. In these circumstances the defenders maintain that the pursuer's case is irrelevant, that he, on his own statement, worked in the face of a known danger, and *volenti non fit injuria*.

If it be true (as must be presumed at the present stage of the case) that it is the usual and proper precaution in works like the defenders' for employers to supply their workmen with a mask and gloves to guard against an event of constant occurrence, which may inflict serious injury, and that the defenders refused or failed to supply such articles, then the defenders are, in my opinion, liable for anything that occurred in consequence of their failure or neglect. In that case they have failed to supply their workmen with the proper appliances for carrying on the work in safety, and have failed in their duty to the workmen. But having so failed or neglected, can they be held liable if the workman, notwithstanding and in the knowledge of the danger, goes on with his work? I think they may; and this appears to me to have been decided by the cases of *Smith v. Baker*¹ and *Wallace*² referred to by the Sheriff-substitute. It is not necessarily to be inferred from the workman going on with his work in knowledge of the danger that he is willing to take upon himself the risk of his proceeding. In the present case the pursuer, at least, indicated that he was not so willing, because he asked to be guarded against the apprehended danger when he asked for the appliances usually provided for that purpose. Lord Kinnear said, in *Wallace's case*,²—"The question whether a man who knows of his danger has agreed to take the risk upon himself is a question of fact, to be determined with reference to all the circumstances of the case." And the same view is distinctly stated by Lord Watson in *Smith v. Baker*.¹ I concur in that view, and think there must, in the present case, be inquiry into the circumstances.

LORD MONCREIFF.—We cannot throw out this action unless we are satisfied that upon his own shewing the pursuer agreed to relieve his employers

¹ L. R. [1891], A. C. 325.

² 19 R. 915.

No. 128. of liability in respect of risk incurred through the employers' fault. I agree with your Lordship in the chair and Lord Trayner that the pursuer's statements do not admit of that construction. There is a distinct statement of the danger of the employment if the work was to be done without masks and gloves, and that it was the employers' duty to supply them. It may be gathered that the pursuer knew of the danger because he was not new to the work, and he says that he asked for a mask and gloves. But without knowing precisely how the facts stand, it cannot be said that in continuing to work without a mask and gloves he agreed to free the defenders from liability. The accident happened only the day after he entered the employment of the defenders.

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Having in view the decisions of *Smith v. Baker*¹ and *Wallace v. Culter Paper Mills Company, Limited*,² I do not think that we can satisfactorily dispose of the case without proof.

THE COURT allowed an issue.

W. K. STEEDMAN, W.S.—SIMPSON & MARWICK, W.S.—Agents.

No. 129. THE HERITORS OF THE PARISH OF KINGHORN (Valued Rent),
First Parties.—*Johnston—Boswell*.
THE HERITORS OF THE PARISH OF KINGHORN (Real Rent),
Second Parties.—*J. B. Young*.
THE MAGISTRATES, &C. OF THE BURGH OF KINGHORN,
Third Parties.—*D. Dundas—Craigie*.

Mar. 12, 1897.
Heritors of
Kinghorn v.
Magistrates of
Kinghorn.

Church—Parish partly landward partly burghal—Repairs to church—Liability for expense of repairs—Real or valued rent—Custom of parish—Res judicata—Burgh.—By decree pronounced in 1761 in an action of declarator brought by the heritors of Kinghorn against the burgh of Kinghorn, it was found and declared "that the community of the burgh of Kinghorn are entitled to retain possession of that proportion of the area of the kirk of Kinghorn presently possessed by them; and that the heritors of the landward parish are also entitled to retain possession of that proportion of the area of the said kirk presently possessed by them . . . and of consent found, and hereby find, that the community of the burgh of Kinghorn has been in use to pay one half of the repairs of the kirk, manse, and office-houses. Therefore that they are liable in the one-half of the present repairs and also in the half of all the repairs on said kirk, manse, and office-houses in time coming." After this decree the burgh paid one half of the cost of repairs on the church down to 1855. In that year the burgh refused to pay one half of the cost of a new manse, and under a compromise with the heritors were assessed in one-fifth only. In 1856, 1869, and 1878, a similar assessment was levied on the burgh in connection with repairs on the church and manse. In all these instances the entry made on the assessment roll was "without prejudice to the right of parties in future similar cases."

In 1894 a question having arisen as to the rebuilding or repairing of the church, the Sheriff found that the church could be repaired, and directed the necessary work to be done. The work executed on the church was of a very extensive character, the expense amounting to about four-fifths of the estimated cost of building a new church.

In a question as to the mode of assessment for the expense, held that there had been no dereliction of the rights and liabilities determined by the

¹ L. R. [1891], A. C. 325.

² 19 R. 915.

decree of 1761; that that decree determined the rule of liability for the repairs of the church so long as the then existing fabric continued; that the Sheriff's judgment being final, the work done was to be regarded as repairs only, and not as rebuilding, and that accordingly the assessment fell to be levied to the extent of one half on the burgh of Kinghorn, and to the extent of the other half on the old valued rent heritors, according to their valued rents.

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Opinions per Lord Adam and Lord Kinnear that in the absence of the decree of 1761 the assessment would have fallen to be levied on the whole heritors according to their real rents.

In October 1892 the Reverend William Jardine Dobie, minister of the parish of Kinghorn, presented a petition to the Presbytery of Kirkcaldy calling their attention to the state of the parish church, and the Presbytery in December 1892 found that the church was incapable of being repaired, and ordained the church to be taken down and a new one built. The heritors, being dissatisfied with this order, appealed to the Sheriff of Fife, under the provisions of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868 (31 and 32 Vict. c. 96). The Provost, Magistrates, and Town-council of the burgh of Kinghorn sisted themselves as parties to the appeal along with the heritors, and were throughout the process separately represented by their own agents.

On 28th January 1893 the Sheriff remitted to Mr Sydney Mitchell, architect, Edinburgh, to report, *inter alia*, whether the church was capable of repair so as to be sufficient and serviceable, and if so, what would be required to effect this result, and what would be the probable cost of such repair.

In March 1894 Mr Sydney Mitchell reported to the Sheriff that the church could be repaired.

On 2d May 1894 the Sheriff found, *inter alia*, "that the church was capable of being repaired so as to be suitable and sufficient for public worship, and that in accordance with the law as at present existing it should be repaired," and remitted to Mr Sydney Mitchell to see to the carrying out of the work.

The repairs to the church having been completed, it became necessary for the heritors to levy an assessment to meet the expense of the repairs.

A question then arose as to the incidence of the assessment, and the parties interested agreed to lay this special case before the Court.

The parties to the special case were,—*First Parties*.—The Heritors of the Parish of Kinghorn, as a body, assessable according to old Scots valuation.

Second Parties.—The Heritors of the Parish of Kinghorn assessable upon their real rents according to the Valuation-roll.

Third Parties.—The Provost, Magistrates, and Town-council of the Burgh of Kinghorn.

The followings facts appeared from the case in addition to those before narrated:—

The repairs executed were of a very extensive description including many structural alterations and additions, the details of which were given.

The parties were agreed that the cost of carrying out the plans of Mr Mitchell would not be less than £2889; that a completely new church could have been erected at a cost of £3500 or thereby; and that the greater portion of the area of the church had been so affected by the repairs and alterations that the sittings would require to be

No. 129. re-divided among parties who held allocated sittings immediately before the work was commenced.

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"The whole area of the said church has never been allocated among the heritors according to their respective valued rents. Prior to the year 1859, and from a period at all events antecedent to 1759, the area of the church was occupied by the landward heritors, and by or on behalf of the burgh respectively, in proportions substantially equal.

"In or about the year 1859, certain alterations and repairs having been executed in 1853 and 1854, including a reseating of the church, a petition was presented by the managers of the royal burgh of Kinghorn, as representing the community thereof, against the valued rent heritors of the landward portion of the parish, praying the Sheriff to divide and allocate the sittings in the church, to make due provision for the minister of the parish and the poor thereof, and to divide the remainder of said sittings into two equal parts, one whereof to be set aside for behoof of the community of the burgh of Kinghorn, to be allocated amongst the members thereof by said managers, and the other to be divided and allocated by the Sheriff amongst the landward heritors in proportion to their valued rents." An extract of the Sheriff-substitute's decree was produced and referred to as part of the case. It shewed that the following statement was made in the petition:—"That the expenses of executing said alterations and repairs were according to use and wont paid as follows, viz., one-half by the petitioners, the said managers of the burgh of Kinghorn, as representing the community thereof, out of the common funds of the burgh, and one-half by the landward heritors of the said parish, appearing on the valued rental books of the county of Fife, in proportion to their valued rents." The Sheriff-substitute made the allocation prayed for.

"The parish of Kinghorn is partly landward and partly burghal, including, as it does, the royal burgh of Kinghorn. The houses, &c., in the town of Kinghorn have in recent years extended beyond the ancient royalty to such an extent that the real rental of the town outside the ancient royalty now exceeds the rental within the ancient royalty, and the district at the eastern end of the parish, known as Bridgetown of Invertiel, is a populous place, and now forms part of the parliamentary burgh of Kirkcaldy.

"The real rental and population of the parish is as follows:—Ancient royalty of Kinghorn—rental, £3075, 18s. 6d—population, 1400; Parliamentary burgh—beyond the ancient royalty, £4278, 19s. 7d.—population, 600; Landward, £10,470, 11s. 2d.—population, 754; Bridgetown, £2612, 4s. 6d—population, 1000. Total rental, £20,437, 13s. 9d.—population, 3754."

The valued rent heritors as taken from the Cess-roll were fifteen in number. The *cumulo* valued rent was Scots £12,742, 13s. 4d.

"The parish church of Kinghorn is a very old one, and the inhabitants of the burgh had, prior to 1759, been in use to occupy a considerable part of the area of the church, and the Magistrates and Town-council of the burgh paid one-half of the expense of repairing the church and manse. In that year, however, the burgh refused to continue to pay one-half of some repairs then ordered, and raised an action of suspension of a charge of payment given by the heritors. An action of declarator on the other hand was raised by the heritors against the burgh that the Town-council were only entitled to the area of the parish church that should correspond to the cess paid by them.

"These two actions, after procedure before the Lord Ordinary, were argued to the Court on a reclaiming bill, with the result that decree was pronounced on 6th February 1761. The extract of said decree, *inter alia*, bears:—'The Lords of Council and Session aforesaid found, decerned, and declared, and hereby find, decern, and declare that the community of the burgh of Kinghorn are intitled to retain possession of that proportion of the area of the kirk of Kinghorn presently possesst by them; and that the heretors of the landward parish are also intitled to retain possession of that proportion of the area of the said kirk presently possesst by them; without prejudice to the heretors of the landward parish Dividing the said proportion of the kirk ascertained to belong to them in common, and to the community of the burgh Dividing the proportion of the said area ascertained to continue with the community; and, of consent, found, and hereby find, that the community of the burgh of Kinghorn has been in use to pay one-half of the repairs of the kirk, manse, and office-houses; Therefore that they are lyable in the one-half of the present repairs, and also in the half of all the repairs on said kirk, manse, and office-houses in time coming.' With reference to said decree, it is explained that the finding of consent therein appears to have been the result of a compromise arrived at after argument had been submitted to the Court.

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"After this decree the burgh paid till 1854 one-half of whatever repairs were made on the church and manse.

"In the year 1855 a new manse was built, and the heritors proceeded to assess the burgh for the half of the cost thereof as they had before done, but the burgh objected to the assessment, and refused to pay it. At a meeting of parties, held on 19th July 1855, a compromise was come to, and embodied in a minute, from which the following is an excerpt:—'It was then stated that the present meeting had been called in consequence of the managers of the burgh of Kinghorn having declined to pay the one-half of the sum assessed at last meeting for the new manse, upon the ground that, in their opinion, although liable for the one-half of the repairs upon church and manse, they were not liable in the one-half of the expense of new buildings. After considerable discussion it was proposed on the part of the burgh that, instead of one-half, it should be agreed that the burgh be assessed in one-fifth part of the total expense of the manse, site walls, and other expenses connected therewith, which proposal the heritors hereby agree to accept, without prejudice to the legal rights of the parties in future similar cases. . . .'"

The assessment of the new manse was therefore levied four-fifths on the landward heritors, and one-fifth on the burgh.

The Assessment-roll contained the following entry:—"Of which payable by the burgh of Kinghorn, without prejudice to the right of parties in future similar cases, one-fifth—£120. Balance assessable on landward heritors, £480."

Three subsequent assessments were laid on, viz., in 1856, for the balance of the cost of the manse, in 1869 for expenses connected both with the church and manse, and in 1878 for repairs on the church. In all these instances the entry on the Assessment-roll was in terms, *mutatis mutandis*, identical with that above quoted.

"In the circumstances above set forth, the first and second parties maintain that the assessment for said alterations and repairs falls to be levied to the extent of one half on the burgh of Kinghorn, and to the extent of the other half on the old valued rent heritors, according

No. 129. to their valued rents ; and the third parties maintain that the said assessment falls to be imposed on the individual owners of lands and heritages in the parish of Kinghorn, according to their real rents as shewn in the Valuation-roll ; but, as alternative contentions to the foregoing, in the event of the first question falling to be answered in the negative, the second parties maintain that the said assessment falls to be levied to the whole extent on the valued rent heritors according to their valued rents, and the first parties, also in the same event, adopt the contention above set forth for the third parties."

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The following were the questions submitted for the opinion and judgment of the Court:—“(1) Whether the said assessment falls to be levied to the extent of one-half on the burgh of Kinghorn, and to the extent of the other half on the old valued rent heritors, according to their valued rents ? or (2) Whether the assessment for said repairs and alterations on said church falls to be imposed on the individual owners of lands and heritages in the parish of Kinghorn, according to their real rents as shewn in the Valuation-roll ? or (3) Whether the said assessment falls to be levied to the whole extent on the valued rent heritors according to the valued rents ?”

Argued for the first parties ;—I. Where there was a custom regulating the proportion in which the heritors were to contribute to the expense of repairing a church, that custom constituted the law of the parish in the matter of assessment. That appeared clearly from the *Peterhead* case,¹ when read with reference to the *Kinghorn*² and *Crieff*³ cases. The custom of this parish, definitely ascertained by the decree of 1761, and the rule of liability thereby enacted, would remain as long as the church remained the same. It was said that the alterations and additions recently effected amounted to a rebuilding of the church, and that the existing church was therefore a new church. That was not so. However extensive the work might have been, the finding of the Sheriff, whose judgment was final on this point, stamped it with the legal character of repairs. Moreover, to make good its contention that this was now a new church, the burgh would have to shew that what had been done to the fabric necessitated a reallocation of the seats according to the legal rights of the heritors,⁴ but it was not suggested that more than a slight rearrangement of the seats was required. It was said that the rule established by the decree had not been consistently followed, and that the custom had lost all legal effect. But a custom could only be destroyed by acts clear and unambiguous, and frequently repeated, whereas here nothing assented to or done by the heritors could be construed as a dereliction of their rights, for the restriction of the burgh's liability to one-fifth was a matter of compromise, and was “without prejudice.” On the other hand, it was to be noted that the petition to the Sheriff in 1859 was at the instance of the burgh, and that in that petition they in terms approbated the custom which they now sought to reprobate.

II. If it were held that the decree of 1761 was no longer in force,

¹ Harlow, &c. (Feuars in Peterhead) v. Governors of Merchant Maiden Hospital, June 24, 1802, 4 Pat. App. 356.

² Heritors of Kinghorn v. Magistrates of Kinghorn, Feb. 6, 1761, M. 7918.

³ Feuars of Crieff v. The Heritors, 1781, M. 7924.

⁴ Stiven v. Heritors of Kirriemuir, Nov. 14, 1878, 6 R. 174.

then the assessment fell to be levied on the real rent heritors.¹ It made no difference that they had not had seats allocated to them.² The proviso in section 33 of the Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. cap. 91),* did not apply, because the whole area of the church had not been allocated among the valued rent heritors.³

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The second parties adopted the first branch of the argument for the first parties, and argued further;—II. This was a case of repairing, and not of rebuilding, and in a question between the valued rent and real rent heritors, the assessment should be levied on the former.⁴ The second parties had no right to any sittings in the church, and it would therefore be inequitable to mulct them in the cost of repairing it. The *Duddingston* case⁵ was identical with and ruled the present. The *Kinclaven* case⁶ was the case of a manse, and involved different considerations. If it were held that the judgment of the Sheriff in 1859 amounted to a reallocation, then the proviso of section 33 of the Valuation Act, 1854,* applied.

Argued for the third parties;—The assessment should be levied on the real rent heritors. The decree of 1761 was of consent, and the parties to it could not bind their successors for all time, or even for the life of the then existing church. It was the result of a compromise, and therefore came to an end when circumstances altered. The parties had so regarded it, and had no hesitation in departing from the rule laid down. That appeared very clearly from the facts stated in the case. Besides, the now existing church was not the same fabric as that in existence in 1761. The old church had practically been removed, and the so-called repairs were really reconstruction. That being so, it did not matter what the Sheriff had called the work if the result of it was a new building. The estimated cost of an entirely new church exceeded by very little the sum which had actually been spent. Even if the church was held to be the old church, there was no precedent for such a custom as was here alleged being allowed to overrule what was otherwise the law. The *Duddingston* case⁷ was too special to be of any value as an authority. The real rent heritors were not parties to the case, and all that it decided was that, looking to the state of possession of the church, the presbytery were entitled to levy the assessment on the valued rent heritors. The general question was, however, reserved. The true rule was that the whole heritors were liable, according to their real rents for repairs and rebuilding, whether of church or manse.⁸ The principle of the rule was founded on the twofold consideration, that to take the valued rent would be inequitable, while to take real rent was equitable. It

¹ Harlow, &c. (Feuars in Peterhead) v. Governors of the Merchant Maiden Hospital, June 24, 1802, 4 Pat. App. 356; Highland Railway Co. v. Heritors of Kinclaven, June 15, 1870, 8 Macph. 858, 42 Scot. Jur. 487.

² Downie v. McLean, Oct. 26, 1883, 11 R. 47.

³ Duke of Abercorn v. Presbytery of Edinburgh, March 17, 1870, 8 Macph. 733, Lord Cowan, p. 740, 42 Scot. Jur. 377 (*Duddingston* case).

⁴ Highland Railway Co. v. Heritors of Kinclaven, June 15, 1870, 8 Macph. 858, 42 Scot. Jur. 487.

* "Provided always when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents as appearing upon the present Valuation-rolls, all assessments for the repair thereof shall be imposed according to such valued rent."

No. 129. would obviously be extremely inequitable in the present case if the valued rent was taken. The proviso of section 33 of the Valuation Act, 1854, did not apply, for there had been no allocation.

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At advising,—

LORD PRESIDENT.—In my opinion, the decree of 1761 is the rule of liability for the repair of the church in question. That decree determined in express terms two matters which were directly related to one another. On the one hand, it gave to the burgh of Kinghorn one-half of the area of the church, and on the other hand, it imposed on the burgh one-half of the expense of repairing, in all time coming, the church, the area of which had been so divided. So long, then, as this church lasts, this and none other is the law of the matter. The decree necessarily applies solely to that fabric which was the subject of the actions and the area of which was divided. It has and could have no application to a new church, which might be built of a totally different size and might be divided in entirely different proportions.

The facts set out in the case, of certain repairs having been paid in different shares, do not constitute a dereliction of the rights determined by the decree. All was done without prejudice to existing rights.

Again, the proceedings before the Sheriff in 1859 did not disturb the right secured to the burgh of having one half of the area, and have no effect in altering its liabilities.

In this view of the law, the only question remaining is whether the existing church is the same building as that to which the decree of 1761 applied. Now, the presbytery had ordered that a new church be built. According to well settled law, heritors are not bound to build a new church to meet the requirements of an increased population, or for any other reason than that the existing church is incapable of repairs. In this case a heritor appealed against the order of the presbytery; their judgment was recalled by the Sheriff, and he ordered the existing church to be repaired. The work which has been done is certainly very extensive; much of the existing structure has been taken down and replaced, and the expense has been about four-fifths of the estimated cost of a new church. Not the less, however, does it seem to me that what stands is not a new church, but the church to which the decree of 1761 applied.

I am for answering the first query in the affirmative.

LORD ADAM.—It was maintained to us on the facts of this case, that looking to the extent of the repairs and alterations on the fabric of the church, the case should be treated, not as one of repairing an existing church, but of building a new one. As your Lordship has pointed out, the case came before the Sheriff, whose decision on this point is by statute final, and he held that it was a case of repairs upon an old church. Accordingly, whatever opinion we may have formed at the beginning of the argument, as to whether so extensive repairs and alterations on the fabric of the church could be described as being simply “repairs,” we must treat the decision of the Sheriff as final, and we must consider the case on that assumption.

Now, the considerations applying to the two cases are quite different, for with regard to repairing an old church, it is only questions of architecture

which have to be considered, while with regard to building a new church the considerations are different, *e.g.*, the extent of the parish and the number of persons requiring to be accommodated. But in view of the Sheriff's decision, there is nothing falling under this second category to be considered in the present case.

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I think, in the second place, that the 33d section of the Valuation Act has no application here, for it only applies where the whole area of a church is allocated among the heritors assessed on their valued rental. That is not the case here, for we see from the facts stated that one-half has been allocated to the burgh of Kinghorn and only the other half to the valued heritors, and accordingly the section does not apply.

I confess that, in my opinion, had there been nothing here to prevent the application of the principle of cases such as *The Heritors of Kinclaven*,¹ we should have thought it right to lay the burden on the real rent heritors, but I agree that we cannot do so in face of the judgment of 1761. That judgment determined, in a competent action raised between competent parties, that the division of the area of the church should be one-half to the burgh of Kinghorn, and one-half to the heritors of the landward parish, leaving it to them to divide their respective parts as might seem right; and it determined further that each should be liable for one-half of assessments for repairs of the church in all time coming. I agree that so long as the then existing church remains we must follow that rule, but in the event of the erection of a new church there may be occasion for rearrangement not only of the area but of the corresponding burden of assessment. I see no reason why that judgment should not constitute *res judicata*, unless because it was departed from by the parties by subsequent proceedings. I do not think that is so. We see from the statements in the case that the old rule of the judgment of 1761 was adhered to down to 1854, the assessment being in every instance one-half on the burgh and one-half on the valued rent heritors.

But then it is said that in 1855 the rule was departed from—that was in connection with the building of a new manse—and the burgh, it appears, while admitting their liability to pay for one-half of the repairs of church or manse, maintained that they were not liable in one-half of the expense of new buildings. However that might be, the matter was settled by a compromise, “without prejudice to the legal rights of parties.” Nothing, therefore, can be founded on that incident as constituting a departure from the old established rule.

Further assessments were laid on in 1856, 1869, and 1878, but in all these cases also, as appears from the scheme of assessment and the Assessment-rolls, there was a reservation of the rights of parties. These assessments cannot, therefore, be founded on at all as instructing a departure from the old rule.

The only other thing founded on is the application in 1859 to the Sheriff. It appears that certain alterations and repairs were made on the church, including reseating in 1853, and it seems that the landward heritors could not agree as to how these seats should be allocated among themselves, and

¹ 8 Macph. 858.

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The facts set out in the case, of certain repairs having been paid in different shares, do not constitute a dereliction of the rights determined by the decree. All was done without prejudice to existing rights.

Again, the proceedings before the Sheriff in 1859 did not disturb the right secured to the burgh of having one half of the area, and have no effect in altering its liabilities.

In this view of the law, the only question remaining is whether the existing church is the same building as that to which the decree of 1761 applied. Now, the presbytery had ordered that a new church be built. According to well settled law, heritors are not bound to build a new church to meet the requirements of an increased population, or for any other reason than that the existing church is incapable of repairs. In this case a heritor appealed against the order of the presbytery; their judgment was recalled by the Sheriff, and he ordered the existing church to be repaired. The work which has been done is certainly very extensive; much of the existing structure has been taken down and replaced, and the expense has been about four-fifths of the estimated cost of a new church. Not the less, however, does it seem to me that what stands is not a new church, but the church to which the decree of 1761 applied.

I am for answering the first query in the affirmative.

LORD ADAM.—It was maintained to us on the facts of this case, that looking to the extent of the repairs and alterations on the fabric of the church, the case should be treated, not as one of repairing an existing church, but of building a new one. As your Lordship has pointed out, the case came before the Sheriff, whose decision on this point is by statute final, and he held that it was a case of repairs upon an old church. Accordingly, whatever opinion we may have formed at the beginning of the argument, as to whether so extensive repairs and alterations on the fabric of the church could be described as being simply "repairs," we must treat the decision of the Sheriff as final, and we must consider the case on that assumption.

Now, the considerations applying to the two cases are quite different, for with regard to repairing an old church, it is only questions of architecture

which have to be considered, while with regard to building a new church the considerations are different, *e.g.*, the extent of the parish and the number of persons requiring to be accommodated. But in view of the Sheriff's decision, there is nothing falling under this second category to be considered in the present case.

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I think, in the second place, that the 33d section of the Valuation Act has no application here, for it only applies where the whole area of a church is allocated among the heritors assessed on their valued rental. That is not the case here, for we see from the facts stated that one-half has been allocated to the burgh of Kinghorn and only the other half to the valued heritors, and accordingly the section does not apply.

I confess that, in my opinion, had there been nothing here to prevent the application of the principle of cases such as *The Heritors of Kinclaven*,¹ we should have thought it right to lay the burden on the real rent heritors, but I agree that we cannot do so in face of the judgment of 1761. That judgment determined, in a competent action raised between competent parties, that the division of the area of the church should be one-half to the burgh of Kinghorn, and one-half to the heritors of the landward parish, leaving it to them to divide their respective parts as might seem right; and it determined further that each should be liable for one-half of assessments for repairs of the church in all time coming. I agree that so long as the then existing church remains we must follow that rule, but in the event of the erection of a new church there may be occasion for rearrangement not only of the area but of the corresponding burden of assessment. I see no reason why that judgment should not constitute *res judicata*, unless because it was departed from by the parties by subsequent proceedings. I do not think that is so. We see from the statements in the case that the old rule of the judgment of 1761 was adhered to down to 1854, the assessment being in every instance one-half on the burgh and one-half on the valued rent heritors.

But then it is said that in 1855 the rule was departed from—that was in connection with the building of a new manse—and the burgh, it appears, while admitting their liability to pay for one-half of the repairs of church or manse, maintained that they were not liable in one-half of the expense of new buildings. However that might be, the matter was settled by a compromise, “without prejudice to the legal rights of parties.” Nothing, therefore, can be founded on that incident as constituting a departure from the old established rule.

Further assessments were laid on in 1856, 1869, and 1878, but in all these cases also, as appears from the scheme of assessment and the Assessment-rolls, there was a reservation of the rights of parties. These assessments cannot, therefore, be founded on at all as instructing a departure from the old rule.

The only other thing founded on is the application in 1859 to the Sheriff. It appears that certain alterations and repairs were made on the church, including reseating in 1853, and it seems that the landward heritors could not agree as to how these seats should be allocated among themselves, and

¹ 8 Macph. 858.

No. 129. accordingly the petition was presented, in which the Sheriff was asked to divide the sittings "into two equal portions, one whereof to be set aside for behoof of the community of the burgh of Kinghorn, to be allocated amongst the members thereof by said managers, and the other to be divided and allocated by his Lordship under this application amongst the said landward heritors of said parish in proportion to their valued rent." It may be questioned what authority the Sheriff had to entertain the application, but however that may be, we find that the Sheriff did exactly what he was asked to do. He set aside one-half of the sittings for the burgh and one-half for the heritors, which he then proceeded to apportion to them. The Sheriff thus gave effect to the old rule of the judgment of 1761.

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I agree with your Lordship that we cannot alter this rule. I think the judgment of 1761 has never been departed from.

LORD M'LAREN concurred.

LORD KINNEAR.—I concur. I agree with Lord Adam that if the rights and liabilities of the parties in this church had not been determined by a final judgment we should most probably have divided the liability, in accordance with the principles laid down in a series of well-known cases, among all the heritors in proportion to their real rents as appearing in the Valuation-roll. But I think that the law in this parish has been fixed by two judgments. By the decree of 1761 it was decided that so long as the church of Kinghorn then in question existed, its area must be divided between the community of the burgh of Kinghorn on the one hand, and the valued rent landward heritors on the other hand, and that the assessments for the repairs of the church must be divided in the same way. I think, further, that, as a result of the judgment of the Sheriff in 1894, the building now in question must be treated as the same church to which the decree of 1761 related, and not as a new and different church. I accordingly agree with your Lordships that the first question should be answered in the affirmative.

THE COURT answered the first question in the affirmative.

MITCHELL & BAXTER, W.S.—DUNDAS & WILSON, C.S.—Agents.

No. 130. WILLIAM HUNTER MARSHALL, Pursuer (Respondent).—*Balfour—John Wilson.*

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THE CALLANDER AND TROSSACHS HYDROPATHIC COMPANY, LIMITED,
Defenders (Reclaimers).—*D.-F. Asher—W. Campbell.*
THE EAGLE PROPERTY COMPANY, LIMITED, Defenders.
JOHN WILSON, Defender.

Process—Decree to erect buildings of certain value—Market Value—Work to be "duly proceeded with" at sight of Reporter—Province of Reporter.—In an action by a superior against a vassal the defender was ordained "forthwith to proceed to rebuild the buildings" of a hydropathic establishment which had been destroyed by fire, "and that to the extent necessary to maintain said buildings as of the total value of £15,000, said rebuilding to be commenced within three months" from 8th May 1896, "to be duly proceeded with to the satisfaction of A, architect, and to be completed to his satisfaction within two years" from 8th May 1896. The defender

having prepared plans commenced to rebuild within the three months, but on 11th January 1897 A reported that the plans had been submitted to him, and that they were not fitted to produce a building of the market value of £15,000, and were in other respects unsatisfactory. No. 130.
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The Lord Ordinary thereupon, following the report, found that the defender had not commenced a building of the kind required by the judgment within the three months. The defender having reclaimed, the Court recalled the Lord Ordinary's interlocutor, *holding* that as the defender had commenced to build within three months, he must be left to act upon his own responsibility, and that the function of the reporter was merely to see that the work was being proceeded with, and when that work was completed to report whether it was what was ordered.

(SEE previous reports, 22 R. 954, 23 R. (H. L.) 55, and *supra*, p. 33.) 1ST DIVISION.
Ld. Kyllachy.

In conjoined actions at the instance of William Hunter Marshall against the Callander and Trossachs Hydropathic Company, Limited, the Eagle Property Company, Limited, and John Wilson, the Lord Ordinary (Kyllachy), by interlocutor dated 1st March 1895, *inter alia*, decerned and ordained "the whole defenders, jointly and severally, forthwith to proceed to rebuild the buildings of the hydropathic establishment, which were erected on the subjects contained in the feu-contract referred to in the summons in terms thereof, and which were, on or about 7th November 1893, destroyed by fire, and that to the extent necessary to maintain said buildings as of the total value of £15,000, said rebuilding to be commenced within three months of the date hereof, to be duly proceeded with to the satisfaction of John Dick Peddie, architect, Edinburgh, and to be completed to his satisfaction within two years from the date hereof. *Quoad ultra* continues the cause."

Sundry procedure followed upon this interlocutor, but the only variation made upon the portion above quoted was to fix the date, within three months of which the building was ordered to be commenced, as at 8th May 1896.

The defenders having commenced the building operations, the plans which they had prepared were sent to Mr Peddie.

On 11th January 1897 Mr Peddie lodged a report, in which he stated,—"In obedience to the above interlocutor the reporter carefully considered to what extent it is necessary to rebuild the buildings of the hydropathic establishment which were destroyed by fire, in order to provide and maintain said buildings as of the total value of £15,000, and after full investigation he came to the conclusion that the rebuilding must be of such extent as to afford bedroom accommodation for 100 visitors, with the necessary public and service departments suitable for that number.

"Since the investigation was made which led to his forming this opinion the reporter has seen the plans of the building which was destroyed, from which it appears that it provided for the reception of practically 100 visitors. Whilst in certain respects the planning and construction of the old building was defective, and it was extravagant in respect of the height of the ground floor rooms, the accommodation provided was of a suitable extent and character, and the reporter is therefore of opinion that the new building must provide similar accommodation, but with such alterations in reference to the matters referred to above as may commend themselves.

"The plans and other documents in connection with the rebuilding which have been submitted to the reporter are not for rebuilding in

No. 130. the sense of providing a building on the lines of that which was destroyed, but are for a building of entirely different design and character.

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"It is possibly open to question whether the terms of the interlocutor would be satisfied were a new building of entirely different design constructed, even assuming it to be well planned, substantially built, and of the required size to be of the market value of £15,000, but the reporter thought it unnecessary to ask for your Lordship's opinion on the point, as the plans submitted fail to meet certain conditions which are alike essential in case of partial restoration of the old building, or the construction of a new one to take its place. The accommodation provided by the plans submitted is deficient, the arrangements are in many respects unsatisfactory, and the methods of construction proposed are not such as are fitted to produce a building which would have a value in the market of £15,000, an essential condition to that end being that the structure shall be of a substantial and durable nature."

He also set out various details which shewed the proposed building to be very different from the original building, and which were in his opinion altogether unsatisfactory.

The following objections were lodged to the report by the Callander and Trossachs Hydropathic Company:—"1. The defenders object to Mr Dick Peddie's report in respect that it proceeds upon the assumption that the building to be erected by the defenders must be of the market value of £15,000. The defenders submit that this assumption proceeds upon a misinterpretation of the interlocutor of 1st March 1895, and of the feu-charter. The defenders maintain that they will fulfil their obligation if they judiciously expend a sum of £15,000 upon the erection of a building suitable for a hydropathic establishment. In point of fact, the building which the defenders propose to erect will, as appears from the estimates, cost upwards of £20,000.

"The defenders maintain that the suggested test of market value is so vague and uncertain that it cannot have been contemplated either by the Court or by the parties to the feu-charter, and that it is impossible to apply it practically. There are no means of knowing what sum would be obtained in the market on the sale of a hydropathic establishment.

"2. The defenders further object to the report in so far as it gives effect to the pursuer's contention that he is entitled to insist upon restoration of the original buildings which were destroyed, and that the defenders will not fulfil their obligation if they erect a building suitable for a hydropathic establishment, and of the value of £15,000, but different in character and design from the original building. The reporter while raising this question states that it is unnecessary for him to ask for an opinion from the Lord Ordinary on the point. It appears, however, to the defenders, from the references which the reporter makes to the accommodation of the old hydropathic, and to the plans thereof, that he has substantially given effect to the pursuer's contention on this point.

"The defenders do not admit that the building which they propose to erect is (as stated in the report) entirely different in design and character from the old hydropathic. The new building, though one storey lower than the old one, will be built on the same foundation, and is similar in design and character. Even, however, if the facts were as stated by the reporter, the defenders submit that the pur-

suer's contention is unwarranted by the interlocutor and feu-charter, No. 130. and ought to be negatived.

"3. The defenders further object to the report in respect that it proceeds upon an erroneous view of the reporter's position and duties under the interlocutor of 1st March 1896. The defenders are advised that Mr Dick Peddie's duties under that interlocutor are merely ministerial, that he is appointed to see that the defenders lose no time in rebuilding, and that the work is properly executed, but that he is not constituted judge on questions of value, or in regard to the plans and design of the work."

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Answers were lodged by the pursuer to these objections:—"1. The pursuer submits that under the judgment of the Lord Ordinary of 1st March 1895, as affirmed by the Inner-House on 18th July 1895, and by the House of Lords on 8th May 1896, he is entitled to have the buildings of the hydropathic establishment, which were erected in terms of the feu-contract, and which were destroyed by fire in November 1893, rebuilt to the extent necessary to maintain the said buildings as of the total market value of £15,000. Explained also that under the feu-contract the obligation on the vassals is, 'to erect in conformity with the plans and elevations to be approved in writing' by the superior 'a building or buildings suitable for a hydropathic establishment, and of not less value than £15,000 sterling,' and that the vassals are taken 'bound and obliged to uphold buildings of that value in good order and repair in all time coming, and to keep the same constantly insured with a good and established insurance company to the extent of not less than £15,000 against loss by fire, and in case the said buildings are, or any part thereof is, destroyed, to rebuild the same, or the part destroyed, so as to maintain the total value of £15,000.' In these circumstances the pursuer submits that the defenders' objections are not well founded, and that the judicious expenditure of £15,000 would not necessarily be full implement of their obligation under the judgment of the Court and the said feu-contract. The pursuer further submits that there is no difficulty in determining the market value.

"2. The pursuer submits that he is entitled to insist upon the reinstatement of the original buildings which were destroyed by fire to the extent necessary to maintain them as of the value of £15,000, in terms of the feu-contract, and of the judgment of the Court to that effect. He acquiesces, however, in the reporter's view that there may be alterations as regards such matters as the height and size of the rooms.

"3. The pursuer submits that the reporter is acting in accordance with the powers and duties conferred upon him by his appointment under the interlocutor of 1st March 1895, and that the reporter's duty is not limited as alleged by the defenders."

On 3d February 1897 the Lord Ordinary (Kyllachy) pronounced the following interlocutor:—"Finds that upon the just construction of the feu-contract, and of the judgment of the Court affirmed by the House of Lords, the defenders are bound to erect in lieu of the building destroyed by fire a building suitable for a hydropathic establishment, which shall be of the value of at least £15,000,—that is to say, shall be capable of realising that value if put into the market along with the ground feued or so much thereof as may be necessary to its most advantageous disposal: Finds that it is sufficiently established by Mr Peddie's report that the building of which plans have been pre-

No. 130. *Mar. 12, 1897.* *Marshall v. Callander and Trossachs Hydropathic Co., Limited.* pared, and which has been or is about to be commenced in accordance with those plans, is not a building which satisfies or will satisfy the above conditions: Finds therefore that the defenders have not commenced the erection of the building required by the judgment of the Court within three months from the date of the judgment of the Court, or of the House of Lords: With these findings, appoints the cause to be put to the roll for further procedure, and grants leave to reclaim." *

* "OPINION.—I think the interlocutor which I have read perhaps sufficiently explains itself. But there are one or two points which are touched upon in the objections and answers, as to which I may say a word.

"In the first place, it does not appear to me that Mr Peddie went at all beyond his province in examining the plans of the proposed building, and in reporting upon those plans as he has done. The judgment of the Court directs that the building shall be commenced within a certain time, and 'duly proceeded with' at the sight of him (Mr Peddie); and that being so, I take it that it was not only his right but his duty to ascertain and report whether the building was being proceeded with in due course,—that is to say, in conformity with the judgment of the Court.

"In the next place, although this point was not specially raised at the discussion, I see no reason why in a matter of this kind—a matter of skilled opinion and ultimately of valuation—the Court, if satisfied as to the correctness of the reporter's principles, should not accept and proceed upon the reporter's conclusions. The alternative would of course be a proof with a number of skilled witnesses on either side, a procedure which I should deprecate. In point of fact neither party moved for a proof. If they should do so elsewhere the point will no doubt be considered.

"In the third place, I see no reason why the requirement of the feu-contract, and of the judgment of the Court, to the effect that the building to be erected shall be of a certain 'value,' should not be construed in its natural sense. The stipulation is not an unusual one in feuing transactions, and as at present advised, I see no particular difficulty in working it out. The suggestion that 'value' means cost—that is to say, outlay judiciously expended—is not to my mind intelligible. I do not understand how money can be judiciously expended if what is produced is worthless, or not worth the money expended.

"It is a different suggestion that the primary obligation of the defenders is to rebuild,—that is to say, to restore the building which was burned down, and that therefore it should be declared that the building to be erected shall not only be suitable for a hydropathic establishment, but shall also—so far as compatible with the allowed limit of value—be erected on the lines of the old building. But it being once admitted that the value to be restored need not exceed £15,000, I do not at present see that there is any practical object in making a declarator of that kind. It appears to me that the terms—and certainly the substance—of the Court's judgment will be satisfied if a building is erected which, if it had been the original building, would have satisfied the feuars' obligation.

"As to what follows from the views I have thus expressed, I do not at present see how the conclusion can be escaped that the defenders have failed to commence the building required by the judgment of the Court within the time allowed. I have accordingly thought it proper so to find. Whether that being found involves as a logical consequence that I should repeat my interlocutor of 18th July 1896, which was recalled, I am informed, as premature, I do not think that I am called upon to determine. I have not been moved to repeat that interlocutor, and I therefore do not in the meantime do so. If the case goes further that question may also be considered under the leave to reclaim, which both parties are agreed that I should grant."

The Callander and Trossachs Hydropathic Company reclaimed. No. 130.
The parties repeated the contentions set out in the objections to Mr Peddie's report, and the answers thereto.

At advising,—

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LORD PRESIDENT.—The only duty incumbent on the Court in the present stage of the case is to see to the carrying out of the interlocutor of 1st March 1895.

Admittedly the defenders have commenced building, and it is not disputed that the building so commenced is to cost £15,000. What is said by Mr Dick Peddie, the architect, to whom certain duties are assigned in the interlocutor of 1st March 1895, is that, if the plans be executed, the building will not be so adapted for the purposes of a hydropathic establishment as to be of the market value of £15,000. To this the defenders reply that there is no such thing as a market for ready built hydropathic establishments, and that the formula of the reporter is meaningless and misleading. They say that they are under obligation to build a hydropathic establishment of the value of £15,000; that they, admittedly, are going to spend that sum; that they have no intention of throwing away the money; and that they know their own business. With more direct reference to the question immediately before the Court, they question the right or duty of the reporter to criticise their plans, and, on some of his objections, they remark that the things objected to were in the original building, the plans of which were approved by the superior.

Now, it is to be observed that the interlocutor which we have to construe and follow, because it is final, bids the defenders begin the building within a certain time, without reference to Mr Dick Peddie at all. His duties begin after a commencement has been made—he is to see that the work is proceeded with. But a commencement can only be made with plans, and after plans have been decided on. Accordingly, the defenders have got to act on their own responsibility, and what Mr Dick Peddie has got to do is to see that they keep at the work. It will be his duty, once the work is completed, to report whether it is what was ordered, and the most obvious prudence will make the defenders very ready to conform to his suggestions made in progress of the work. But I do not think that it is incumbent on him to raise for judicial decision abstract questions of value which it would be very difficult to decide at all and premature to decide until they necessarily arise.

I think it well to note that the pursuer did not found on the fact that his consent had not been obtained to the new plans, or that they did not involve a reproduction of the original building. There are obvious and good reasons for this course being taken.

I am for recalling the Lord Ordinary's interlocutor. It is clear that the last finding could not stand if the building is to go on at all; for it would only be appropriate if the alternative claim of damages were to be now resorted to. The views which I have stated as to the duties of the reporter and the defenders respectively sufficiently explain my difference with the rest of the interlocutor, and it does not seem necessary to express by interlocutor our estimate of the duties of Mr Dick Peddie. Recalling the interlocutor, we may continue the cause. Either party will be at liberty to come to the Court, neither is invited to do so.

No. 130. LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

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THE COURT recalled the interlocutor reclaimed against, and continued the cause.

J. & J. TURNBULL, W.S.—SIMPSON & MARWICK, W.S.—Agents.

No. 131. HENRY SYDNEY AND ANOTHER (Allan's Trustees), Petitioners.—
A. J. Young—Macaulay Smith.

Mar. 18, 1897.
Allan's
Trustees.

Trust—Nobile Officium—Petition by trustees on English trust for authority to sell heritage in Scotland.—Trustees under an English trust, having obtained the sanction of the High Court of Justice in England, petitioned the Court, in the exercise of its *nobile officium* to authorise the sale of certain heritable subjects belonging to the trust-estate, which were situated in Scotland. The Court granted the petition.

1st DIVISION. (SEQUEL of case reported *supra*, Dec. 11, 1896, p. 238.)

This was an application to the *nobile officium* of the Court by Henry Sydney and another, trustees under the marriage-contract of Mr and Mrs Allan, for authority to sell certain houses at Penicuik, which formed part of the trust-estate.

The petitioners had previously applied to the Court for authority to sell under the 3d section of the Trusts Act, 1867, but the Court had refused the application on the ground that that Act only applied to Scots trusts, and that the domicile of the trust under which the petitioners acted was English. (*Vide supra*, p. 238.)

The petitioners stated that since the former application they had applied to the High Court of Justice in England, and they founded upon an order of Mr Justice Stirling, which was to the following effect:—"And the Judge being of opinion that it is expedient, in the interest of the beneficiaries under the said settlement, and further that by the law of England, so far as it controls the said settlement, a sale might be made of the property at Penicuik aforesaid, part of the settled property under the Settled Land Act, 1882, but the said Act does not extend to property in Scotland: It is by consent ordered that the said Henry Sydney and Charles Murray, as such trustees as aforesaid, be empowered to apply to the Court of Session at Edinburgh aforesaid for all necessary relief to enable them to give effect to this direction, and particularly to obtain power and authority to sell the said property; and any of the parties are to be at liberty to apply as to carrying out this order."

LORD M'LAREN.—When the Court was applied to under the former petition, the application was made in terms of the Trusts Act, 1867, and we were all of opinion that the case was not covered by the section of that Act which empowers the Court to authorise the sale of trust-estate. But it was observed, in disposing of that case, that the Court had jurisdiction to authorise the sale of trust-estate, and that before the date of the Trusts Act this jurisdiction was exercised, although sparingly, and only in cases amounting to a legal necessity. As in this case the domicile of the trust was in England, we did not think that this was the proper Court to consider the expediency or necessity of the sale in view of the terms of the trust. The difficulty we felt has now been completely removed, because a Judge of the High Court of Justice in England, having jurisdiction, has considered

the matter and has issued an order pronouncing that a sale is expedient in the interests of the trust. It is added that the sale might have been ordered in the exercise of the powers of the English Court under the Settled Land Act, 1882, if the property had been situated in England. The question accordingly which we have now to consider is, whether we can exercise an auxiliary jurisdiction to enable the order of the English Court to be carried out. There are analogies which support the exercise of our jurisdiction in the way proposed. The nearest, perhaps, is the case of applications by foreign trustees or executors for confirmation in Scotland, or for authority to complete a title to estate coming to them by an imperfect conveyance. In such cases the Court never hesitates to grant trustees the necessary authority for maintaining their title to real or personal property, where it is necessary to explicate a foreign trust. It appears to me that, when the authority of the Court is necessary to enable trustees to convert trust-estate into money, the proceeding is of the same kind,—that is to say, a purely administrative proceeding,—and that the petitioner is entitled to our assistance after the Court of the domicile has decided that the sale is competent and expedient in the interests of the trust.

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LORD ADAM.—I also think this petition should be granted.

LORD KINNEAR.—I agree. As I understand, the only purpose of the present application to this Court is to enable English trustees to give a good title to the purchaser, it being established by the order of Mr Justice Stirling that it is competent under the trust to sell heritable property, and also that it is expedient in the interest of the beneficiaries that the property should be sold. I entirely agree with what Lord M'Laren has said, to the effect that it is proper that we should give our assistance in carrying out that order.

The LORD PRESIDENT concurred.

THE COURT granted the petition.

ROBERT D. KER, W.S., Agent.

FRANCIS OBERS (Paton's Syndic), Pursuer (Respondent).—*Balfour*
—*Chree*.

No. 132.

EASTON GIBB AND ANOTHER (Paton's Trustees), Defenders
(Reclaimers).—*D.-F. Asher—Salvesen*.

Mar. 17, 1897.
Obers v.
Paton's
Trustees.

Bankruptcy—Foreign—Title to Sue—Title of trustee in foreign bankruptcy—Deed in fraud of creditors' rights—Reduction.—Where a domiciled Scotsman carrying on business in a foreign country is declared bankrupt by the Courts of that country, and the administration of his estates is transferred to an official with the right to sue on behalf of the creditors, the Courts of this country will recognise his title to sue in this country.

A Scotsman who carried on business in France was declared bankrupt by the Courts of that country, and a syndic, who, by the law of France, had the exclusive right to sue on behalf of the creditors, was appointed to administer the bankrupt's estates.

Held (aff. judgment of Lord Kyllachy) that the syndic had a title to sue in the Scots Court for reduction of a deed by which the bankrupt gratuitously discharged his right to moveable estate situated in Scotland.

No. 132. *Bankruptcy—Deed in fraud of creditors—Spes successionis.*—A bankrupt is not entitled to do any act in relation to a *spes successionis* to the prejudice of his creditors.

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Held (aff. judgment of Lord Kyllachy) that a gratuitous discharge of legitim granted by an undischarged bankrupt to his father was, after the death of the father, reducible at the instance of the son's trustee in bankruptcy. *Reid v. Morison*, March 10, 1893, 20 R. 510, *distinguished*.

Contract—Discharge—Discharge of legitim.—A bankrupt executed a deed of discharge whereby, on the narrative that he had received various advances of money from his father, and that it was reasonable and proper that "in respect of such advances" he should execute the discharge after written, he exonerated and discharged his father, his heirs and executors, of any legitim which he could claim through the death of his father.

Held that the deed was not to be construed as conditional upon the father's claim for repayment of the advances being discharged, but was a gratuitous discharge of the son's right to legitim.

Writ—Delivery—Registration—Gratuitous Deed.—The granter of a gratuitous deed wrote to the law-agent who had prepared it, requesting him "by way of delivering" the deed to the grantee, to register it in the books of Council and Session.

Held (aff. judgment of Lord Kyllachy) that the registration of the deed was equivalent to delivery.

1st Division.
Ld. Kyllachy.

JAMES MIDDLETON PATON, a native of Scotland, who for a number of years had carried on business at Lille in France, was declared bankrupt by the Tribunal of Commerce at Lille in October 1889, and thereafter Francis Obers was appointed "syndic definitif," i.e., trustee on his estate.

On 25th February 1891, while the French bankruptcy was still proceeding, James M. Paton executed, during his father's life, the following discharge of his right to claim legitim,—“I, James Middleton Paton, residing at The Wild, Broughty-Ferry, second son of John George Paton, merchant, Dundee, Whereas various advances of money have from time to time been made to me or for my behoof by my said father, for my advancement in business and otherwise for my benefit, and that it appears to me to be reasonable and proper that I, in respect of such advances, should execute the discharge hereinafter written: Therefore I have exonerated and discharged, and do hereby exoner, acquit, and *simpliciter* discharge the said John George Paton, his heirs, executors, and successors, and all others his representatives or the intromitters with his effects, of any bairns' part of gear, legitim, portion-natural, and share of executry which I could claim through the death of my said father in the event of me surviving him, excepting as hereinafter mentioned, and of all execution competent to me for the same, and all that has followed or is competent to follow thereon: But excepting from the operation of this discharge any moneys or effects which may be bequeathed to me by my said father in any testamentary deed executed or to be executed by him: And I oblige myself and my heirs and successors to warrant this discharge at all hands: And I consent to the registration hereof for preservation.”

The deed was registered in the Books of Council and Session on 26th February 1891.

On 9th March 1891 John George Paton, the father of James M. Paton, died, leaving a trust-disposition and settlement, dated 19th February 1890, whereby he directed his trustees to divide the whole residue of his estate among his children, but declaring with regard to

the share falling to James M. Paton that they should retain it in their hands, and should pay him the revenue as an alimentary provision, and make over the fee to his children on the youngest survivor being twenty-one years of age. No. 132.

In January 1892 Francis Obers, syndic in James M. Paton's bankruptcy, brought an action against the trustees and beneficiaries under the trust-disposition and settlement of his father John George Paton, concluding (1) for reduction of the discharge of legitim executed by James M. Paton; (2) for declarator that the pursuer had the sole right to claim the share of legitim falling to James M. Paton; and (3) for decree ordaining the trustees under the settlement of John George Paton to produce an account of his personal estate. Mar. 17, 1897.
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The pursuer averred;—(Cond. 1) For a number of years prior to 1889 James M. Paton carried on an extensive business as a merchant in Lille, France, trading under the name of J. M. Paton & Company. By judgment of the Tribunal of Commerce, Lille, dated 29th October 1889, the said J. M. Paton and his said firm were declared bankrupt, the date of the stoppage of payment being declared to be 5th August 1889, and the pursuer was subsequently appointed trustee—syndic definitive—by said tribunal. James M. Paton was a domiciled Frenchman at the date of his bankruptcy. (Cond. 2) By French law a declaration of bankruptcy vested in the syndic as at its date the whole rights of the bankrupt, including prospective rights of succession. Such rights opening to the bankrupt during bankruptcy passed to the trustee, and any discharge of such rights executed by the bankrupt was invalid, and did not affect the right of the trustee. (Cond. 5) The discharge had been granted fraudulently with the object of securing to the bankrupt the alimentary provisions made in his favour by his father's settlement, and defeating the rights of his lawful creditors, whose debts were then, and were still, unpaid, and who were represented by the pursuer. The pursuer further averred,—At the date when the discharge was executed James M. Paton owed his father a large sum for advances made to him from time to time. The discharge was conditional on the claim for repayment of these advances being discharged, and this condition had not been purified. The discharge was undelivered at the date of the death of the bankrupt's father.

Defences were lodged by the trustees under John George Paton's settlement. In answer 1 they averred that James M. Paton was a domiciled Scotsman at the date of his bankruptcy. (Ans. 2) "Not known and not admitted. . . ." In answer 5 they admitted that at the date of the discharge James M. Paton owed his father a large sum for advances made to him, but *quoad ultra* denied the pursuer's averments as above given.

The pursuer pleaded;—(1) The said James M. Paton being a domiciled Frenchman, and his right to legitim out of his father's estate having, by the law of France, vested in the pursuer, as trustee foresaid, the defenders are bound to count and reckon with the pursuer, as concluded for. (2) The said James M. Paton not being entitled by the law of France to discharge his right to legitim, the said discharge is null and void. (4) *Esto* that the said James M. Paton is a domiciled Scotchman, the said discharge being fraudulent at common law, and to the prejudice of the said James M. Paton's creditors, *et separatim*, being struck at by the Act 1621, cap. 18, decree of reduction should be pronounced as craved. (6) The said discharge having been conditional, and the condition on which it was

No. 132. granted not having been acceded to by the said John George Paton, *et separatim*, the said discharge having been undelivered at the date of his death, all the bankrupt's rights to legitim vested in the pursuer as his trustee, and the discharge is accordingly null and void.

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The defenders pleaded;—(1) No title to sue. (2) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action. (3) In particular, the pursuer's averments as to the domicile of J. M. Paton and the law of France are irrelevant.

Proof was allowed of the averments in articles 1 and 2 of the condescendence and answers thereto, the result of which sufficiently appears from the Lord Ordinary's interlocutor of 16th February 1894, and relative opinion.

On 16th February 1894 the Lord Ordinary (Kyllachy) pronounced the following interlocutor:—"Finds (1) that James Middleton Paton was at the date of his bankruptcy, and also at the date of the discharge in question, a domiciled Scotchman; (2) that the pursuers in the action at the instance of Francis Obers and others have failed to prove that by the law of France the principal pursuer, Francis Obers, had, at the date of the said discharge, any title to the legitim, or expectation of legitim which was the subject of the discharge; and (3) that the question as to James Middleton Paton's alleged disability to execute the discharge in question to the prejudice of his creditors, falls to be determined according to the law of Scotland and not of France; and with these findings appoints the cause to be put to the roll for further procedure, reserving in the meantime the question of expenses."*

* "OPINION.—(After dealing with the question of domicile)—It is, I think, quite clear upon the testimony of the French counsel that there is in a French bankruptcy no vesting of the trustee or divestiture of the bankrupt with respect to subjects of the nature of expectation or rights of succession. The French law on this point is in effect the same as our own. When the succession falls in, it of course becomes part of the trust-estate, and the trustee takes it if the bankruptcy still subsists, but until it falls in the trustee has no right in it, and has no power to deal with it. This was in the end admitted by the trustee's counsel.

"The validity therefore of the discharge comes to depend not upon any question as to the bankrupt's divestiture, but upon a quite different question, viz., How far was the bankrupt (a French bankrupt but a domiciled Scotchman) disabled by reason of the rules of French law from transacting with his father with respect to his claim of legitim on his father's death? As to that question, the result seems to be this:—

"In the first place, it must be taken as the result of the French evidence, that according to the law of France a bankrupt is disabled from entering into any transaction of the kind, and is so not only because of the general rule of French law which forbids transactions with respect to hopes or rights of succession, but also because of a separate and independent rule of French bankruptcy law which annuls all transactions by a bankrupt which may affect his estate, present or future, to the prejudice of his creditors. I am not quite sure whether, if this last matter had been pressed, the independence of the rule as applied to rights of succession would have been quite so clear, but, as the evidence stands, I accept as I have said the proposition that, applying the French law, the discharge under challenge is invalid.

"But while this is so, I have not been able to see how French law is to be brought into the matter. The domicile of the bankrupt—and what is probably more important—the domicile of his father, having been Scottish, it is plain, and is indeed admitted, that in estimating the validity of the transaction the rules and doctrines of the general law of France cannot

On 20th July 1894 the Lord Ordinary allowed the parties a proof of their averments, except so far as already remitted to probation. This interlocutor was reclaimed against, but the Court adhered. The evidence shewed that the discharge had been prepared by Mr Heron, solicitor, Dundee, on the instructions of James M. Paton. It was executed with the object of excluding his creditors. At the date when it was executed James M. Paton's father was seriously ill of the illness of which he died a fortnight later.

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With regard to the delivery of the deed, Mr Heron deponed,—“He [James M. Paton] proposed to leave this deed with me, as agent for his father, and I told him I could not retain the deed or take delivery of it as for his father.

“*By the Commissioner.*—I said to him that as his father was in such a state of health he could not take delivery himself, and that the only probable course for making the deed effectual was to put it on record. He thereupon gave me written authority to put it upon record.”*

apply. The question is confined to the application of the rules and regulations of the French law of bankruptcy, and that again depends upon a question of international law, viz., How far do or should the Scottish Courts recognise the foreign bankruptcy of a domiciled Scotchman as affecting his personal capacities and the disposal of his estate within Scotland?

“Now, as to this matter, I am of opinion that, according to the doctrines of international law received in Scotland, a foreign bankruptcy is only recognised as constituting a valid conveyance to the trustee, or other officer under the foreign bankruptcy, of the bankrupt's whole moveable estate wherever situated. With respect to that estate the bankrupt is held divested, as from the date of his bankruptcy, as effectually as he would be by a Scotch sequestration, and accordingly there is no room for subsequent diligence in Scotland, and equally of course no room for a subsequent Scotch sequestration. But that is, so far as I can discover, the full length and extent to which the foreign bankruptcy is recognised in Scotland. More particularly, I do not find that our Courts have ever given effect to the rules and regulations of foreign bankruptcy law with respect to the bankrupt's duties or disabilities, or with respect even to such matters as the equalisation of diligence or the cutting down of preferences. Such rules and regulations are only operative *intra territorium*. As explained by the late Lord President in the case of *Goetze*, 2 R. 150,—‘It is only as operating as a conveyance of moveable estate that the foreign bankruptcy proceedings receive effect. In *Hunter v. Palmer* (Feb. 25, 1825, 3 S. 586, N. E. 402) a question of this kind having arisen, an English commission of bankruptcy competing with an arresting creditor, it was maintained that by the English law all diligence was voided by a prior act of bankruptcy, and that as prior acts of bankruptcy had occurred, the arrestments were not effectual. But the Court refused to give effect to this, and preferred the arresting creditors, on the ground that their title had been completed prior to the English commission of bankruptcy.’

“For these reasons I have come to the conclusion, as I have said, that Mr J. M. Paton, being at the date of this discharge a domiciled Scotchman, the French law has no application, and that if the pursuer has a remedy (as to which I of course offer no opinion) that remedy must be found not under the law of France, but under the law of Scotland. . . .”

* The following letter by J. M. Paton to Messrs Heron & Co. was produced:—“Dundee, 25th Feby. 1891.—Gentlemen,—I hereby request you, by way of delivering the discharge by me in favour of Mr John George Paton, my father, which I have to-day executed and left in your hands, to get the same registered forthwith in the Books of Council and Session.—Your obedient servant, J. M. PATON.”

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Evidence as to the rights of a trustee in bankruptcy, according to French law, was given by Leon Renault, Professor of Law in the University of Paris. The result of that evidence was,—(1) that the pursuer, in virtue of his appointment as syndic on James M. Paton's estate, was entitled, according to the bankruptcy law of France, to raise and prosecute all actions having for their object the setting aside of any deeds executed by the bankrupt to the prejudice of his creditors affecting any estate belonging to him, or that, but for the execution of such deeds, might have fallen to him during the bankruptcy; (2) that in raising such actions he represented the general body of James M. Paton's creditors, and was entitled to avail himself of all grounds of law competent to any of them for setting aside such deeds; and (3) that, while his appointment subsisted, individual creditors had no right to raise and prosecute such actions.

On 16th March 1895 the Lord Ordinary reduced, decerned, and declared in terms of the reductive and declaratory conclusions of the summons, and appointed the defenders to lodge an account of James M. Paton's share of legitim.*

* "OPINION.—In this case the question which I have now to decide may, I think, be stated thus :—An insolvent debtor, having a *spes successionis* in the shape of a claim to legitim, which is about to open by his father's expected death, makes what is in effect a gratuitous alienation of that *spes successionis* in favour of relatives. In the course of a few weeks, and while his debts are still unpaid, the claim emerged by his father's death. It then appears that, but for the gratuitous alienation, a considerable fund would have become open to the diligence of the insolvent's creditors. An action is thereupon brought on behalf of the creditors (I shall consider the particular instance presently) to set aside the alienation under the Act of 1621, and at common law. The question is, whether it is a good defence to that action that the subject conveyed was, at the date of the deed, a mere expectancy, and therefore a subject which was not at that date open to the diligence of the insolvent's creditors.

"I may say, at the outset, that it does not appear to me that any of the cases cited at the discussion touch the question which is thus raised. It has been decided, *Trappes v. Meredith*, 10 Macph. 38, that a *spes successionis* does not fall under a Scotch sequestration. And I have already in this case held, after inquiry, that in a French sequestration the rule is the same. It has also been decided, *Reid v. Morison*, 20 R. 510, that a sequestrated bankrupt cannot be compelled to convey a *spes successionis* to his trustee to the effect of vesting in that trustee all right to the expected succession whether the same may open to the bankrupt before or after his discharge.

"But the present question has nothing to do with the effect of sequestration. There has been no sequestration in this country, and I have already held that the French sequestration, except as a conveyance of the bankrupt's estate at its date, has no effect *extra territorium*. Moreover, the fund here in question is no longer a mere expectancy. The right to it has now vested, and vested while the debtor is still undischarged. It is therefore a fund which, but for the deed challenged, would have been open to the diligence of the insolvent's creditors. In short, but for the deed challenged, it would simply have been part of the *acquisita* of the insolvent during the period of his insolvency. Now, I know of no decision which touches the right of an insolvent debtor to deal *ab ante* with estate which he may acquire during insolvency and before discharge. The cases which have occurred apply, in my opinion, to different facts, and depend on different considerations.

"The question, therefore, must be determined on the general principles of bankruptcy law, and considered in that light, I have not been able to find any answer to the pursuer's demand. The point, it will be observed,

After further procedure, the Lord Ordinary, on 3d December 1896, No. 132. pronounced an interlocutor dealing with objections raised to the account lodged by the defenders.

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The defenders reclaimed, and argued;—The interlocutor of 16th March 1895 should be recalled. 1. *Character of deed sought to be reduced.*—The deed of discharge was not a conditional offer requiring acceptance, but was the discharge of a right valid without acceptance, if delivered.

2. *Delivery of deed.*—The deed had been registered for the express purpose of effecting delivery, and in such a case registration was conclusive.

3. *Effect of foreign vesting order.*—Where a trader was declared bankrupt in a country in which he was not domiciled, the adjudication in bankruptcy only operated as an assignation of the moveables of the debtor which were situated in the country where it was pronounced,¹ but when the adjudication in bankruptcy was pronounced in the country where the debtor had his domicile of succession, it carried his whole moveable estate, wheresoever situated, on the principle expressed in the maxim *mobilia sequuntur personam*. These were the principles of international law recognised in Scotland,² and in no Scots decision had they been controverted. In *Stein's case*³ effect was given to the order of the English Court, because the lead-

is not whether the insolvent may not deal as he pleases with expected successions in so far as the same may fall in after he is discharged. Nothing done in that way would be to the prejudice of his creditors. Neither is the point this,—whether, being still vested in the administration of his estate, he may not sell an expected succession for a fair price. That also would not (at least presumably) be to the prejudice of his creditors. The question is, whether he can voluntarily, and without consideration, deprive his creditors of funds which *ex hypothesi* would, but for his interference, have become theirs.

“Now, that is a proposition which appears to me to be contrary to one of the first principles of our bankruptcy law, and, indeed, to the principles of bankruptcy law in all civilised countries. The Act of 1621 is of course here unnecessary. It merely aids the common law by introducing certain presumptions, and these are not here required. It is our common law of bankruptcy which here applies, and, in my opinion, it must be held to be the fundamental doctrine of that law, that all gratuitous deeds made by an insolvent debtor to the prejudice of his creditors are null and void; or (to express it otherwise, and perhaps better) that ‘all donations are revocable at the suit of creditors, if granted by an insolvent debtor, and to their prejudice.’ There is no doubt that this was the rule of the civil law (Digest, 42, 8, 1, 6, sec. 11), from which, according to Professor Bell, our law has borrowed it. It appears also to be the rule both in France and England—(Bell's Com. ii. 171). And it is a rule which, it will be observed, is quite general. It is not confined to gifts of what is at the time the property of the debtor, or of what his creditors can at the time attach by diligence. On the contrary, it applies to every gratuitous alienation by an insolvent debtor of which, when it takes effect, it can be predicated that it is to the prejudice of his creditors. The test is not whether the creditors could have attached the subject, or whether the insolvent could have been compelled *ab ante* to assign it to his creditors. The test is simply, whether

¹ Artola Hermanos, 1890, L. R., 24 Q. B. D. 640.

² Per Lord President Inglis in Phosphate Sewage Co. v. Lawson & Son's Trustee, July 20, 1878, 5 R., at p. 1138.

³ Royal Bank of Scotland v. Scott, Smith, Stein, & Co., Jan. 20, 1813, F. C. and 1 Rose's Bankruptcy Cases, Appendix, p. 462.

No. 132. ing debtor was the firm which traded both in England and Scotland, and was held to have its domicile in England, where three out of the five partners were domiciled. That decision was recognised in *Goetze*¹ as being an application of the principle *mobilia sequuntur personam*. In *Young v. Buckel*,² although the debtor declared bankrupt in England was a domiciled Scotsman, the case was treated not as raising a question of international law, but one of the effect to be given to an Act of the Imperial Parliament, and it was certainly suggested that the judgment might have been different, if the adjudication in bankruptcy had been pronounced in a foreign country.³

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4. *Title of syndic to sue action of reduction*.—Assuming that the French adjudication in bankruptcy was recognised as operating *extra territorium*, it only did so to the effect of passing property. The title of the syndic was not to be measured by Scots bankruptcy law. He could not claim to be in the same position as the trustee in a Scots sequestration prior to 1856, who was held to have a title to sue for reduction of deeds in fraud of the rights of creditors, provided he represented prior creditors.⁴ It would not avail him to found on the French law by which he represented the whole body of creditors, for the Court would not regard the rules regulating bankruptcy procedure in France. To give him a title he must shew that he had an assignation from creditors who would by Scots law have a right to sue for reduction of the

there has been an alienation, whether the alienation is gratuitous, and whether it is to the creditors' prejudice.

"I am therefore of opinion that the deed here in question is reducible at the instance, perhaps of any creditor, certainly of any prior creditor, of the insolvent. And it only remains to consider whether the trustee under this French bankruptcy has a title to sue on behalf of the body of creditors. On this point I must say I have had some difficulty. There is no doubt that the trustee on the French bankruptcy is a trustee for the whole body of the bankrupt's creditors. He is vested with the whole estate of the bankrupt, including all acquisitions during the bankruptcy as the same fall in. And his duty is to distribute the estate among the whole creditors, wherever resident, who choose to rank. It is certain also that among the creditors who have ranked are various creditors whose debts were prior to the deed now under challenge. On the other hand it may, perhaps, be doubted whether the trustee is in strictness the assignee of the creditors, and vested as such in rights of action competent to the creditors with respect to the bankrupt's estate.

"It does not appear that the French bankruptcy statutes contain any provision corresponding to the provision of section 11 of our Bankruptcy Act of 1856. The question must therefore be determined as if it had arisen with respect to the title of a Scotch trustee prior to the Act of 1856, and if that question were open it might perhaps be doubted how far the position of such a trustee was in this matter distinguishable from the position of a trustee under a voluntary trust for creditors, who, as lately decided (*Fleming's Trustees v. McHardy*, 19 R. 542), has not a sufficient title to sue such an action as the present. It appears, however, to have been settled, at least in practice, that a trustee under our earlier bankruptcy statutes did have a title to sue such actions—(*Bell's Com.* ii. 172, 174; *Edmond*, 15 D. 703). And that being so, I see no reason why the present pursuer should be in a worse position than such trustee. . . ."

¹ *Goetze v. Aders*, Nov. 27, 1874, 2 R. 150.

² 2 Macph. 1077.

³ *Per* Lord Justice-Clerk Inglis, at p. 1080.

⁴ 2 *Bell's Comm.* 172; *Edmond v. Grant*, June 1, 1853, 15 D. 703, 25 Scot. Jur. 425.

deed in dispute. Otherwise, he was in no better a position than a trustee under a voluntary trust-deed for behoof of creditors.¹ It was significant that it was thought necessary to insert in the existing Bankruptcy Acts a special provision conferring upon the trustee in a sequestration the title to sue reductions.² In *Bolden*³ the pursuer's title was not questioned, and being himself a creditor, he had an undoubted title to sue in that capacity, although his title as assignee in the English bankruptcy might have been bad.

5. *Discharge of legitim no fraud on creditors.*—Legitim was a mere *spes successionis* during the father's life, and might be defeated by his spending or converting his moveable estate. In this case it was to be presumed that the father would have converted his moveable estate into heritage if he had not thought the discharge effectual. The discharge was to be judged of as at the date of execution, and so judged of it was unchallengeable, as it dealt with a *spes successionis*—a subject which by Scots law, not being property, did not pass to a trustee in bankruptcy,⁴ and of which the trustee could not demand an assignation.⁵ Further, on the death of his father, the bankrupt had an option to elect either his legal or his conventional rights, and the syndic had no power to compel him to elect to his own detriment.⁶ To hold that a trustee in bankruptcy had this right might operate most unfairly to a bankrupt. In the present case, reduction of the discharge would not restore parties to the position which they occupied when it was granted, and it should not therefore be granted.

Argued for the pursuer;—1. *Character of deed sought to be reduced.*—The discharge was not a unilateral deed, but was conditional upon the claim for advances made to the bankrupt being discharged. Unless and until it was accepted, therefore, it remained a mere offer, and it was not an offer which the father would necessarily accept, for the consideration offered him, viz., the surrender of legitim, was not a benefit to him, but to his children other than the granter.

2. *Delivery of deed.*—Assuming the discharge to have been a gratuitous deed, it was never delivered, and so could not receive effect. Registration was not in all cases equivalent to delivery; the question was always *quo animo* had the deed been recorded.⁷ In this case the evidence shewed that the bankrupt had not intended to put it beyond his power to revoke the discharge.

3. *Effect of foreign adjudication in bankruptcy.*—According to international law, an adjudication in bankruptcy pronounced by the tribunal of one state was recognised by the tribunals of other friendly states; and if by the law of the country where it was pronounced the adjudication had the effect of vesting the trustee in the whole moveable property of the bankrupt it would be recognised as having that effect

¹ Fleming's Trustees v. M'Hardy, March 2, 1892, 19 R. 542.

² 19 and 20 Vict. c. 79, sec. 11.

³ Bolden v. Ferguson, March 6, 1863, 1 Macph. 522, 35 Scot. Jur. 313.

⁴ Trappes v. Meredith, Nov. 3, 1871, 10 Macph. 38, 44 Scot. Jur. 25; Kirkland v. Kirkland's Trustee, March 18, 1886, 13 R. 798.

⁵ Reid v. Morison, March 10, 1893, 20 R. 510.

⁶ Stevenson v. Hamilton, Dec. 7, 1838, 1 D. 181, 11 Scot. Jur. 153; Lowson v. Young, July 15, 1854, 16 D. 1098, 26 Scot. Jur. 592; M'Dougal v. Wilson, Feb. 20, 1858, 20 D. 658, 30 Scot. Jur. 326; Millar v. Birrell, Nov. 8, 1876, 4 R. 87.

⁷ Burnet v. Morrow, March 26, 1864, 2 Macph. 929, 36 Scot. Jur. 444; Tennent v. Tennent's Trustees, July 2, 1869, 7 Macph. 936, 41 Scot. Jur. 530.

No. 132. in friendly states. These principles of international law were accepted by the law of Scotland.¹ There was neither principle nor authority for the view that an adjudication in bankruptcy would not receive extra-territorial effect, unless pronounced where the bankrupt had his domicile of succession. The Courts of Scotland sequestrated the estates of foreigners trading in Scotland, and they would recognise a like power in the tribunals of friendly states. The case of *Artola*,² if construed as contended for by the defenders, was at variance with the whole course of Scots decisions, and also with other decisions of the English Courts.³ The maxim *mobilia sequuntur personam*, as used in relation to this branch of law, meant that the domestic law of the state where the moveables of a bankrupt were situated must not be pleaded against the vesting order. The domicile of the bankrupt could have nothing to do with the question, except to justify the setting up of a *concursum*, but a domicile of succession was not required for that purpose. All that was necessary was a domicile where the debtor might be sued, and that was the sense in which the term "domicile" was used in the Scots cases referred to, the chapter of international law to which the question truly belonged being that concerning the application of foreign judgments. The result of the decisions, accordingly, was that when there could be a congeries of actions, there a *concursum* might be set up by a vesting order. An inquiry into the domicile of succession of the bankrupt would be a cumbrous addition to bankruptcy procedure. In the *Royal Bank of Scotland v. Scott, Smith, Stein, & Co.*,⁴ and in *Goetze v. Aders*,⁵ the persons declared bankrupt were not domiciled in the country where they were adjudicated bankrupt. The result was, if the pursuer was right in contending that the deed of discharge had never taken effect, that the claim for legitim, as moveables of the bankrupt, vested in the pursuer as trustee.

(4) *Title of syndic to sue for reduction of deeds in fraud of creditors' rights.*—Assuming that the deed of discharge had taken effect, it followed from the fact that the pursuer was vested in the whole moveable estate of the bankrupt, wheresoever situated, that he had a title to ingather it, and to prosecute all actions necessary for that purpose. It was true that the title of the trustee in a Scots sequestration was statutory, but the foreign trustee could be in no worse a position than a Scots trustee prior to the date of the Bankruptcy Act of 1856, and such a trustee was entitled to sue for the reduction of deeds in prejudice of creditors' rights if he represented prior creditors.⁶ There could be no question in this case that the

¹ *Strother v. Read*, 1803, M. App. *voce Forum Competens*, No. 4; *Maitland v. Hoffman*, 1807, M. App. *voce Bankrupt*, No. 26; *Royal Bank of Scotland v. Scott, Smith, Stein, & Co.*, Jan. 20, 1813, F. C., 1 *Rose's Bankruptcy Cases*, App. p. 462; *Selkrig v. Davies*, 1814, 2 *Dow*, 230; *Young v. Buckel*, May 17, 1864, 2 *Macph.* 1077, 36 *Scot. Jur.* 527; *Goetze v. Aders*, Nov. 27, 1874, 2 *R.* 150; *Phosphate Sewage Co. v. Lawson & Son's Trustee*, July 20, 1878, 5 *R.* 1125.

² *Artola Hermanos*, 1890, L. R., 24 *Q. B. D.* 640.

³ *Geddes v. Mowat*, 1824, 1 *Glyn and J.* 414; *M'Culloch*, 1880, L. R., 14 *Ch. Div.* 716; *Blithman*, 1866, L. R., 2 *Eq.* 23.

⁴ Jan. 20, 1813, F. C.

⁵ 2 *R.* 150.

⁶ 2 *Bell*, 172-174; *Edmond v. Grant*, June 1, 1853, 15 *D.* 703, 25 *Scot.* 425.

trustee represented prior creditors, for the deed sought to be reduced was granted after the bankruptcy was declared, and the trustee according to the French law represented the whole body of the creditors. His title to sue was derived from the individual creditors, who had a right to sue if he did not.¹ The title of an English trustee in bankruptcy to sue a reduction in this Court had been recognised.² The position of a trustee under a voluntary trust-deed differed entirely from that of the syndic in this case, for the former had no title derived from the creditors. *Fleming's*³ case therefore did not apply.

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5. *Discharge of legitim a fraud on creditors' rights.*—The discharge granted by the bankrupt was a deed in fraud of the rights of his creditors, and was challengeable by the French trustees. The evidence established that according to French law a bankrupt was disabled from entering into any such transaction, and the question of his capacity fell to be decided by that law, in respect that, as bankrupt, he was subject to the jurisdiction of the French Court.⁴ If his capacity were to be judged of by Scots law, the deed was equally challengeable. *Trappes*⁵ and *Reid*⁶ were not in point, for all that they decided was that a *spes successionis* did not vest in the trustee, and that a bankrupt could not be compelled to assign it. But if the succession opened during bankruptcy, it passed to the trustee, and the bankrupt was not entitled to defeat the rights of the creditors by discharging it. The discharge only took effect when the right to legitim vested, and operated simply as a gift of property falling under the sequestration. Such a deed was fraudulent at common law.⁷ There was no necessity for any election, because the right to legitim vested on the death of the father, and had to be given back if a testamentary provision were accepted in lieu of it. But assuming that an election were necessary, the trustee had the right to compel the bankrupt to make it.⁸ The ground of judgment in *Stevenson*⁹ was that a husband's title to his wife's estate was not unqualified, but of a *quasi* fiduciary character, and that he could not be compelled to commit a breach of his curatorial duty in order to benefit his creditors. In *Lowson*¹⁰ the Court merely followed *Stevenson*⁹ without considering the question of principle, and the husband and wife had both elected prior to the sequestration of the husband. In *M'Dougal*¹¹ the husband's title to sue for the wife's legitim had been sustained, because the wife made no objection to it.

At advising,—

LORD PRESIDENT.—On 25th February 1891 James Middleton Paton

¹ *Brown & Co. v. M'Callum*, Dec. 19, 1890, 18 R. 311, *per* Lord Kinnear, at p. 317.

² *Bolden v. Ferguson*, March 6, 1863, 1 Macph. 522, 35 Scot. Jur. 313.

³ *Fleming's Trustees v. M'Hardy*, March 2, 1892, 19 R. 542.

⁴ *White v. Briggs, Thorburn, & Co.*, June 8, 1843, 5 D. 1148, *per* Lord Fullerton, at p. 1159, 15 Scot. Jur. 467.

⁵ *Trappes v. Meredith*, Nov. 3, 1871, 10 Macph. 38, 44 Scot. Jur. 25.

⁶ *Reid v. Morison*, March 10, 1893, 20 R. 510.

⁷ *Ersk. iv.* 1, 44; 2 *Bell's Comm.* 170; *Miller v. Doig*, May 30, 1828, 6 S. 889.

⁸ *Aikman*, March 2, 1893, 30 S. L. R. 804.

⁹ *Stevenson v. Hamilton*, Dec. 7, 1838, 1 D. 181, 11 Scot. Jur. 153.

¹⁰ *Lowson v. Young*, July 15, 1854, 16 D. 1098, 26 Scot. Jur. 592.

¹¹ *M'Dougal v. Wilson*, Feb. 20, 1858, 20 D. 658, 30 Scot. Jur. 326.

No. 132. executed in favour of his father the deed of discharge which is the subject of these actions. His father died a fortnight later. On 29th October 1889 James Middleton Paton had been declared bankrupt by the Tribunal of Commerce of Lille, where he carried on business; his bankruptcy subsisted at the date of the deed, and still subsists.

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Two sets of questions were argued under this reclaiming note—First, the respondent maintained that the deed, whether delivered or not, did not take effect, because while in name a discharge, it was in substance an offer of a discharge on conditions which were not accepted. Second, It was maintained by the reclaimers that assuming the deed to be an operative discharge, and to have been delivered, it is not open to reduction—(1) from the right discharged being one in which no creditors have any interest; and (2) because the French syndic has no title to sue a reduction even assuming that a Scotch trustee in sequestration might have done so. I shall consider these questions in the order stated.

1. The deed itself purports to be a discharge by James Middleton Paton in favour of his father, of any bairns' part of gear, legitim, portion-natural, and share of executry, which he could claim through the death of his father, in the event of his surviving his father, excepting any moneys or effects which might be bequeathed to him by his father in any testamentary deed. It proceeds on the narrative that various advances of money had from time to time been made to him or for his behoof by his father, for his advancement in business and otherwise for his benefit, "and that it appears to me to be reasonable and proper that I, in respect of such advances, should execute the discharge hereinafter written." Then follow the operative words—"Therefore I have exonerated, discharged, and hereby exoner and discharge," and so on.

The argument of the respondent turns solely on the terms of the narrative. He says that the narrative makes the discharge conditional on the father discharging his claim for the advances, and that this was never done. I am entirely unable to assent to this view. The deed purports to be an absolute discharge; and the reasons given for its execution were accomplished facts. There is on the face of the deed nothing contractual about it. Now, when the legal effect of the discharge is considered, is there any encouragement to the search for such an element? When a child discharges his father of legitim, the result is the same as if the child had predeceased his father; the legitim fund is neither increased nor diminished, but there is one participant the less. Accordingly, the benefit really goes to the brothers and sisters, although the deed is executed in favour of the father. Accordingly a bankrupt, if it were legitimate to disregard creditors, might as a family matter very well say, I have already got half my share of legitim; no more will come to me, for, if I do not discharge my father, it will all go to my creditors; therefore I may as well let my brothers and sisters have it instead of my creditors. My father may claim in my sequestration for the advances if he likes—that will mean merely so much the less for the French creditors.

This, and nothing else, is what James Middleton Paton truly did.

2. The next question, whether the deed was delivered, is susceptible of an easy answer. The deed was given in for registration, and it was recorded

in the Books of Council and Session, and the evidence places beyond doubt with what purpose this was done. Mr Heron, the solicitor who prepared the deed, was not the father's agent, and to his knowledge the father himself was not in a state of health to admit of his taking delivery personally. "I said to him," *i.e.*, James Middleton Paton, "that as his father was in such a state of health he could not take delivery himself, and that the only probable course for making the deed effectual was to put it on record. He thereupon gave me written authority to put it upon record." And the letter accordingly runs thus—"I hereby request you, by way of delivering the discharge in favour of Mr John George Paton, my father, which I have to-day executed and left in your hands, to get the same registered in the Books of Council and Session."

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If, as is settled, delivery may be effected by recording in the Books of Council and Session, it is difficult to see how it did not take place in this case.

3. Assuming, then, the deed to have been delivered as a present discharge, the next question may be put in this way—would it be open to reduction at the instance of a trustee representing creditors in a valid sequestration?

Now, the argument in the negative sense is certainly formidable, and is rested on the case of *Reid v. Morison*,¹ and the class of cases of which it is the most recent. A claim of legitim during the life of the father is a *spes successionis*; a *spes successionis* is not carried to creditors by sequestration, and the argument is that therefore they have no interest in it and cannot challenge anything done by the bankrupt which affects it.

After full consideration I have come to be of opinion that this argument is unsound, and that creditors have right to challenge a gratuitous alienation by the bankrupt of a *spes successionis*. The question so far as appears is new. While, in my opinion, the principles which apply to alienation of assets forming part of the estate transferred to the creditors apply equally to alienations of a *spes successionis*, yet I am unable to claim any of the authorities cited by the Lord Ordinary as intentionally applying to both classes of rights the general language used. I think the question is to be decided on principle.

Again, one of the arguments advanced in support of the interlocutor is plainly fallacious. We were told that by the death of the bankrupt's father there vested in the bankrupt a right to his share of legitim, and that this action of reduction is merely a step to ingathering what has thus come to be vested in the creditors. This is not an argument, but a mere statement of the conclusion aimed at. The true question is what were the rights of the creditors at the date of the discharge when nothing had vested in the bankrupt, and he had only a *spes successionis*.

Now, the solution of this question depends on whether it is a logical consequence of a *spes successionis* not being attachable by diligence, and not being included in the sequestration, that the bankrupt has unlimited power of disposing of it, just as if he were solvent. The one thing does not necessarily follow from the other. It may quite well be that the creditors

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have no active rights in the *spes successionis*, and must allow events to bring the succession their way or not to bring it their way. It is another and a very different thing to say that by overt act the bankrupt may of design interfere to intercept and divert a succession from ever by possibility coming to meet his debts. The transfer of his estate by sequestration from himself to his trustee does not in principle absolve the bankrupt from that equitable duty to his creditors which the law has more frequent occasion to recognise in the initial state of insolvency. And while the law will not compel a bankrupt to assign a *spes successionis* to his creditors, it may well, if this be in accordance with the spirit of the other restrictions on bankrupts, forbid them to do any act in relation to a *spes successionis* which is, and is intended to be, to the prejudice of creditors. Now, the facts of the present case are very gross, and while they must not bias the determination of what is a general question, yet they illustrate what are the realities of the question. A bankrupt, partly out of spite to his creditors, and partly to benefit himself and his family, gratuitously discharges a right of legitim worth several thousand pounds, when the father is on his deathbed. No one can doubt that the creditors are prejudiced; and no one can deny that the act is fraudulent—that word being one of morals. I am prepared to hold that given an act of a bankrupt having those qualities and effects, it does not matter whether it operates on what is at the time or only on what may possibly come to be a part of the bankrupt's estate.

4. The remaining question in the case is whether the syndic who sues the reduction so represents the creditors (whom I now assume to be prejudiced) as to have a good instance. The evidence as to French law places it beyond doubt that according to that law the syndic has not merely the rights of the bankrupt, but that he represents creditors in the fullest sense.

This being so, the only objection suggested to his title is that this Court ought not to recognise the sequestration by decree of a French Court of the estates of one, who, although trading in France, is for purposes of succession a domiciled Scotchman. The refusal to recognise a sequestration in bankruptcy which is valid by the law of the country in which it has been granted can only be justified on the ground that it is contrary to the principles of Scotch law when dealing with international rights to recognise the sequestration of a foreigner. But the fact is that our own law takes no account of the domicile of succession when asked to sequester the estates of a trader, but on the contrary habitually and deliberately sequesters the estates of foreigners who carry on business in this country. It seems difficult to the degree of impossibility for this Court to decline on principle to recognise if done abroad what it is itself bound to do and does daily at home. I may add that in the cases cited by the reclaimers, the word domicile does not seem to have been used with reference to succession at all, and accordingly furnishes no support to the reclaimers' argument.

I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM.—I entirely concur.

LORD M'LAREN.—I am of the same opinion, and only desire to add a few words expressing my general view on the chief points of the case.

The first question in the order of the arguments relates to the effect

which the Courts of Scotland are entitled and bound to accord to a foreigner in bankruptcy, and the claim instituted by its administrator.

In considering this question it is well to bear in mind that, under the statutory law of bankruptcy which we administer, a foreigner who carries on business in Scotland, and who is unable to pay his debts, is liable to have his estates put under sequestration, and further that the subject of sequestration is the estate of the bankrupt wherever situated. In the case supposed, it would be the duty of a Scottish trustee for creditors to take proceedings in the native country of the bankrupt for the recovery, with a view to distribution, of any bequest or right of succession that might accrue to the bankrupt during the currency of the sequestration. In this state of our municipal law I think we cannot be wrong in recognising the same right in the French syndic which we should claim for the Scottish trustee in the parallel case.

The principle of international comity has been liberally admitted by our Courts in bankruptcy cases, and I apprehend that in sustaining the title of the French syndic we are maintaining the principle on which this Court has acted in past times. It is of course inevitable that there should be differences of opinion or expression on such a question amongst the writers who profess to treat this subject from a purely philosophic point of view, but these differences are perhaps more apparent than real; and when it is said that the Court of the domicile is the proper Court of bankruptcy, I think this must be understood to mean a trading domicile. In principle, I cannot doubt that every trader who is unable to pay his debts is liable to have his estate seized and divided amongst his creditors by judicial authority in the country where he carries on his business, because every state has the right of enforcing the performance of the obligations of those who enjoy the protection of its laws. When this is done, there is an obvious convenience in giving a wide extension to the powers of the trustee or administrator in bankruptcy, so that the bankrupt may not be harassed by the conflicting claims of separate administrations.

The claim of the syndic is to receive and administer the legitim to which Mr Paton was prospectively entitled in his father's lifetime, and which he contends became vested in the bankrupt on the death of his father. This claim is disputed on the ground that a few days before the father's death the son discharged the legitim. The deed of discharge was not actually delivered, but was recorded in the Register of Deeds for preservation. It is settled law that the delivery of a deed into neutral custody with the intention of putting the deed out of the grantor's power and conferring an irrevocable right on the grantee, is equivalent to the delivery of the deed to the grantee himself. The recording of a deed in a public register satisfies the required conditions, and the only question is, whether in the case before us this was done with the intention of constituting an irrevocable discharge. On the evidence, I cannot doubt that such was Mr Paton's intention, and that the deed of discharge was in legal effect a delivered deed.

It has then to be considered whether Mr Paton had the power to discharge his legitim, and thus to prevent this valuable right coming into the possession of his creditors. Now, there is this difference between a fraud on creditors and fraudulent acts of the ordinary type, that an act may be

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have no active rights in the *spes successionis*, and must allow events to bring the succession their way or not to bring it their way. It is another and a very different thing to say that by overt act the bankrupt may of design interfere to intercept and divert a succession from ever by possibility coming to meet his debts. The transfer of his estate by sequestration from himself to his trustee does not in principle absolve the bankrupt from that equitable duty to his creditors which the law has more frequent occasion to recognise in the initial state of insolvency. And while the law will not compel a bankrupt to assign a *spes successionis* to his creditors, it may well, if this be in accordance with the spirit of the other restrictions on bankrupts, forbid them to do any act in relation to a *spes successionis* which is, and is intended to be, to the prejudice of creditors. Now, the facts of the present case are very gross, and while they must not bias the determination of what is a general question, yet they illustrate what are the realities of the question. A bankrupt, partly out of spite to his creditors, and partly to benefit himself and his family, gratuitously discharges a right of legitim worth several thousand pounds, when the father is on his deathbed. No one can doubt that the creditors are prejudiced; and no one can deny that the act is fraudulent—that word being one of morals. I am prepared to hold that given an act of a bankrupt having those qualities and effects, it does not matter whether it operates on what is at the time or only on what may possibly come to be a part of the bankrupt's estate.

4. The remaining question in the case is whether the syndic who sues the reduction so represents the creditors (whom I now assume to be prejudiced) as to have a good instance. The evidence as to French law places it beyond doubt that according to that law the syndic has not merely the rights of the bankrupt, but that he represents creditors in the fullest sense.

This being so, the only objection suggested to his title is that this Court ought not to recognise the sequestration by decree of a French Court of the estates of one, who, although trading in France, is for purposes of succession a domiciled Scotchman. The refusal to recognise a sequestration in bankruptcy which is valid by the law of the country in which it has been granted can only be justified on the ground that it is contrary to the principles of Scotch law when dealing with international rights to recognise the sequestration of a foreigner. But the fact is that our own law takes no account of the domicile of succession when asked to sequester the estates of a trader, but on the contrary habitually and deliberately sequesters the estates of foreigners who carry on business in this country. It seems difficult to the degree of impossibility for this Court to decline on principle to recognise if done abroad what it is itself bound to do and does daily at home. I may add that in the cases cited by the reclaimers, the word domicile does not seem to have been used with reference to succession at all, and accordingly furnishes no support to the reclaimers' argument.

I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM.—I entirely concur.

LORD M'LAREN.—I am of the same opinion, and only desire to add a few words expressing my general view on the chief points of the case.—

The first question in the order of the arguments relates to the effect

which the Courts of Scotland are entitled and bound to accord to a foreigner in bankruptcy, and the claim instituted by its administrator.

In considering this question it is well to bear in mind that, under the statutory law of bankruptcy which we administer, a foreigner who carries on business in Scotland, and who is unable to pay his debts, is liable to have his estates put under sequestration, and further that the subject of sequestration is the estate of the bankrupt wherever situated. In the case supposed, it would be the duty of a Scottish trustee for creditors to take proceedings in the native country of the bankrupt for the recovery, with a view to distribution, of any bequest or right of succession that might accrue to the bankrupt during the currency of the sequestration. In this state of our municipal law I think we cannot be wrong in recognising the same right in the French syndic which we should claim for the Scottish trustee in the parallel case.

The principle of international comity has been liberally admitted by our Courts in bankruptcy cases, and I apprehend that in sustaining the title of the French syndic we are maintaining the principle on which this Court has acted in past times. It is of course inevitable that there should be differences of opinion or expression on such a question amongst the writers who profess to treat this subject from a purely philosophic point of view, but these differences are perhaps more apparent than real; and when it is said that the Court of the domicile is the proper Court of bankruptcy, I think this must be understood to mean a trading domicile. In principle, I cannot doubt that every trader who is unable to pay his debts is liable to have his estate seized and divided amongst his creditors by judicial authority in the country where he carries on his business, because every state has the right of enforcing the performance of the obligations of those who enjoy the protection of its laws. When this is done, there is an obvious convenience in giving a wide extension to the powers of the trustee or administrator in bankruptcy, so that the bankrupt may not be harassed by the conflicting claims of separate administrations.

The claim of the syndic is to receive and administer the legitim to which Mr Paton was prospectively entitled in his father's lifetime, and which he contends became vested in the bankrupt on the death of his father. This claim is disputed on the ground that a few days before the father's death the son discharged the legitim. The deed of discharge was not actually delivered, but was recorded in the Register of Deeds for preservation. It is settled law that the delivery of a deed into neutral custody with the intention of putting the deed out of the grantor's power and conferring an irrevocable right on the grantee, is equivalent to the delivery of the deed to the grantee himself. The recording of a deed in a public register satisfies the required conditions, and the only question is, whether in the case before us this was done with the intention of constituting an irrevocable discharge. On the evidence, I cannot doubt that such was Mr Paton's intention, and that the deed of discharge was in legal effect a delivered deed.

It has then to be considered whether Mr Paton had the power to discharge his legitim, and thus to prevent this valuable right coming into the possession of his creditors. Now, there is this difference between a fraud on creditors and fraudulent acts of the ordinary type, that an act may be

No. 132. a fraud on creditors which is perfectly innocent in itself, or even laudable if done by a solvent person, because the fraud consists in the violation of the principle that an insolvent is a virtual trustee for his creditors, and is disabled from dealing with his estate so as to defeat or imperil their right to distribution.

Mar. 17, 1897.
Obers v.
Paton's
Trustees.

The Statutes of 1621 and 1696 are only aids to the discovery of and restoration against fraud by means of certain presumptions which these statutes establish. But the right of creditors to restoration against fraudulent alienation is independent of statute, and I think that the principle has sufficient strength and consistency to prevail over any device by which an insolvent person seeks to secure a benefit to himself, his relatives, or other favoured persons, by putting away funds which, but for his interference, would be available for the liquidation of his debts.

The act of Mr Paton in discharging his legitim has been defended on the ground that according to the decision in *Reid v. Morison*,¹ the trustee or syndic could not have sold Mr Paton's expectancy in his father's lifetime. But this statement of the law is incomplete if we do not add to it that the trustee, and the body of creditors whose interests he represents, have a right to the chance of the succession falling in during the currency of the sequestration. The Bankruptcy Act, as interpreted, and I think rightly interpreted, in *Reid v. Morison*,¹ does not treat a *spes successionis* as a saleable subject for division amongst creditors; and it may very well be that it was not thought consistent with the temperate character of modern bankruptcy legislation that a valuable future right should be sacrificed for the purpose of producing a relatively small sum for immediate division. But if this be the motive of the exception, it lends no support to the claim of the defender that he is to be entitled to give away his right of succession in order to defeat the expectancy of his creditors contingent on the succession falling in before he has got his discharge. Now, if it be a fraud, as it certainly is, to give a preference in satisfaction of a just debt to the detriment of other creditors, it cannot be an honest thing to give away a valuable expectancy which in the natural course of events would come to creditors; and I conclude as I began by saying that it is the interference on the part of the insolvent with his creditors' right to a distribution of his estate which constitutes the fraud. I am therefore of opinion that the deed of discharge is ineffectual in a question with creditors, and that the interlocutor of 16th March 1895 ought to be affirmed.

LORD KINNEAR.—I agree with all that has been said by your Lordships.

THE COURT adhered.

JOHN C. BRODIE & SONS, W.S.—J. SMITH CLARK, S.S.C.—Agents.

No. 133.

JAMES M'LACHLAN AND OTHERS, Appellants.—*Hunter*.
ASSESSOR FOR AYR, Respondent.—*Clyde*.

Mar. 17, 1897.*
M'Lachlan v.
Assessor for
Ayr.

Valuation-roll—Consideration other than the rent—Tenant a company of which landlord a partner—Hotel—Adequacy of rent—The Valuation of

¹ 20 R. 510.

* Decided Feb. 17, 1897.

Lands (Scotland) Act, 1854 (17 and 18 Vict. c. 91), sec. 6.—Where a hotel was *bona fide* let to a firm consisting of the owner and two other partners having equal interests in the profits of the hotel, *held* that the mere fact that the owner was one of the partners did not displace the rule that the rent stated in the lease was the measure of value. No. 133.
Mar. 17, 1897.
M'Lachlan v. Assessor for Ayr.

ON 6th March 1896, James M'Lachlan, builder, Ayr, proprietor of the Hotel Dalblair, Ayr, entered into a contract of copartnership with Hugh Buchanan and John Hay O'Beirne, in which the parties agreed to become lessees of the premises to be known as "Hotel Dalblair," with equal rights in the profits. On 18th March 1896 M'Lachlan let the hotel to himself, Buchanan, and O'Beirne as trustees for the company or firm known as "Hotel Dalblair Company, Ayr," for five years, at the yearly rent of £100. Lands Valua-
tion Appeal
Court.
Ld. Kyllachy.
Ld. Stormonth-
Darling.
Case 182.

M'Lachlan, Buchanan, and O'Beirne, as tenants of the hotel in question, appealed against the entry by the Assessor in the Valuation-roll of the hotel, at the rent of £200, and certain accessory buildings at £20.

The appellants craved that the valuation be reduced to £100 a year, at which the subjects were let in the lease.

The Valuation Committee reduced the valuation of the hotel to £155, and dismissed the appeal as regards the other buildings.

M'Lachlan obtained a case. The case stated that the lease and the contract of copartnership had been produced.

"It was admitted in evidence that in the spring of 1895 Mr M'Lachlan had let the subjects then known as Dalblair House for the purpose of a hotel to John Campbell, confectioner, Ayr, at a rent of £150 per annum, provided a licence could be obtained from the magistrates. This arrangement fell through in consequence of the magistrates refusing to license the premises. In autumn of last year Mr M'Lachlan applied for and obtained a hotel licence from the magistrates in his own favour. . . . During the eight or nine months that elapsed between the granting of the licence and the opening of the hotel extensive alterations and improvements were made, and additional accommodation was erected, so as to meet the requirements of a first-class hotel trade. These alterations, improvements, and additions were made at the expense of Mr M'Lachlan as proprietor, but he could not say what they cost. Mr John Hay O'Beirne is a son-in-law of Mr M'Lachlan."

Argued for the appellants;—The rent fixed in the lease must rule the valuation, unless the lease was not a *bona fide* lease, or unless there were considerations other than rent. The only ground on which the *bona fides* of the lease could be challenged was the relationship between the landlord and one of the tenants. That, however, had been held¹ not *per se* to constitute a consideration other than the rent. The hotel was a new venture, and the rent was quite properly low.

Argued for the Assessor;—The relationship between M'Lachlan and O'Beirne, coupled with the fact that the rent was much below the adequate value of the hotel, was sufficient to entitle the Committee to disregard the lease. In an unreported case in 1895—*Stevenson and Others*—a lease had been disregarded as being a family arrangement.

LORD KYLLACHY.—In this case the magistrates have disregarded the lease

¹ *Alexander v. Assessor for Stewartry of Kirkcudbright*, Feb. 19, 1890, 17 R. 836.

No. 133. under which it is admitted that the premises are at present let. Now I think that they can only do that upon one of two grounds. They may hold that the lease is not a *bona fide* lease, or they may hold that there are considerations passing between the parties other than the rent stipulated in the lease.

Mar. 17, 1897.
M'Lachlan v.
Assessor for
Ayr.

The question is, whether we have anything before us to justify a disregard of the lease upon either of these grounds. Now I quite concede that where a lease is impeached as not being a *bona fide* lease it may be so on various grounds. It may be inferred, for instance, from the whole facts—from the amount of the rent stipulated as compared with the previous rent—from the relationship of the parties—from the interest of the landlord in the tenancy, &c., &c., that the lease was not a real and *bona fide* lease. We have had examples of that in this Court, in cases where it appeared that the landlord and tenant were in substance the same person. We had lately a case, where a lease between marriage trustees on the one hand, and the husband and wife on the other, was held to be for the purposes of the Valuation Act no lease at all, the interest on both sides being the same. But I am not aware that we have ever held that the mere fact that the landlord was a partner in the concern to which the lease was granted was sufficient to displace the rent fixed by the lease as the rule of value. The presumption I should think is, that a landlord will exact from his partners the best rent he can get, just as he will probably do so from other people. It may be a different case if his interest in the partnership is such as to make the amount of rent practically immaterial. But the landlord here is one among three, and has only one-third of the profits, and I cannot hold that in such circumstances the mere fact of his partnership is sufficient to displace the lease.

Then, again, is there any evidence that the rent stipulated is not conditioned as a fair rent? In other words, does it appear that there is some consideration other than the rent paid by the firm to the landlord? I can see none. All that appears is that the landlord receives a rent which is somewhat below what the Assessor and the magistrates think adequate. But I am afraid that that often happens, especially in cases like this, where old premises are being converted to a new and experimental use. In any case, mere inadequacy of rent is no sufficient reason for holding either that the lease is not a *bona fide* lease, or that there are considerations payable to the landlord other than the stipulated rent.

I am therefore for sustaining the appeal, and fixing the valuation at the rent stipulated in the lease.

LORD STORMONTH-DARLING.—I concur.

THE COURT were of opinion that the determination of the Valuation Committee was wrong, and that the rent stipulated in the lease fell to be entered.

STURROCK & STURROCK, S.S.C.—JAMES AYTON, S.S.C.—Agents.

JOHN MACKAY, Appellant.—*Dundas*—*W. Campbell*.
 ASSESSOR FOR COUNTY OF SUTHERLAND, Respondent.—*Jameson*—*Kennedy*.

No. 134.

Mar. 17, 1897.*
 Mackay v.
 Assessor for
 Sutherland.

Valuation Acts—Crofter—Fair Rent—Crofter Proprietor—Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. c. 29), sec. 6.—A crofter, the rent of whose farm had been fixed at a fair rent by the Crofters Commission, purchased his holding. The Assessor, assuming that the fair rent represented only the landlord's interest in the croft, added thereto, in fixing the valuation, a sum representing the annual value of permanent improvements on the holding.

Held that the valuation was right.

Question as to the rule of valuation where the crofter has not purchased his holding.

JOHN MACKAY, Aultririe, Brora, appealed against a decision of the Lands Valuation Committee of the county of Sutherland, under the following circumstances, which were stated by the Committee in a case for appeal:—"The appellant is proprietor of subjects in the parish of Clyne, consisting of 16 acres of land, of which about 8 acres are arable and 8 acres pasture outrun; a right to graze a certain amount of stock on the adjacent pasture in common with the surrounding crofters, and also of the following buildings thereon:—Dwelling-house—stone and slated—having two rooms and two attics, barn, byre, and stable—stone and lime, and covered with corrugated iron—all of which he recently purchased from his Grace the Duke of Sutherland for £44.

Case 180.

"The appellant, prior to his purchase of the subjects, occupied them as a crofter under the Crofters Holdings (Scotland) Act, 1886, at a rent of £2, 8s., being the fair rent fixed by the Crofters Commission under the said Act, and the tenancy of the croft had been in the family for several generations.

"The dwelling-house was re-erected by the appellant about twelve years ago, the landlord supplying lime and timber, and the barn, byre, and stable were also re-erected by the appellant about a year ago, the landlord supplying the timber. All the arable land on the croft was reclaimed by the appellant or his predecessors in the same family. . . .

"The Assessor fixed the valuation of the subjects at £8, contending that he was bound to assume that the fair rent of £2, 8s. referred to, fixed by the Crofters Commission under section 6 (1) of the Crofters Holdings (Scotland) Act, 1886, was the rent of the croft in question after deducting from its value all permanent improvements made by the crofter or his predecessors in the same family, but that in valuing the appellant's property he had to do so in terms of section 6 of the Valuation Act of 1854, which provides that 'in estimating the yearly value of land and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year'; that after visiting the premises he had considered that £5, 12s. represented the annual value in the market of the permanent improvements made by the appellant and his predecessors in the same family, and that accordingly he had added that sum to the fair rent fixed by the Crofters Commission; that fair rent, when fixed, merely representing the landlord's interest in the croft.

"The Valuation Committee, having considered the evidence ad-

* Decided Feb. 17, 1897.

No. 134.

Mar. 17, 1897.
Mackay v.
Assessor for
Sutherland.

duced, . . . were of opinion that the principle adopted by the Assessor in valuing the appellant's property was right, but that the rent at which the subjects 'might in their actual state be reasonably expected to let from year to year' was £6, 10s., and they reduced the Assessor's valuation accordingly."

Argued for the appellant;—The Assessor had no sufficient grounds to warrant him in departing from the fair rent fixed by the Commission. There was no allegation of any change of circumstances or of additional buildings having been erected which fell to be taken into account. The Assessor's valuation involved the result that the landlord of a crofting property would be rated at a much higher rental than he actually received. There was no reason why the assessment should be raised because the crofter had purchased his holding.

Counsel for the respondent was not called upon.

LORD KYLLACHY.—I do not think we require to hear anything more in this case. It seems to me the clearest possible case, and it is not necessary to say more than that I entirely agree with the views expressed by the Assessor and by the Valuation Committee.

I may, however, add that I desire to reserve my opinion upon the question whether—but for the purchase of his croft by this crofter—the rule of valuation would, upon the just construction of the Valuation Act, have been the same or different. It may be that that Act cannot be so construed as to subject a landlord to be rated upon a rent or upon a valuation larger than the rent which he receives. But, on the other hand, it may be that, for the purposes of the Valuation Act, the "fair rents," fixed upon special principles by the Crofters Commission, are not yearly rents conditioned as the fair annual value of the subjects,—that is to say, of the subjects as they stand. As I have said, I express no opinion on that question, which, when it arises, will require to be carefully considered with reference both to the provisions of the Valuation Act and of the Crofters Act.

LORD STORMONTH-DARLING.—I entirely agree with your Lordship and with the Valuation Committee.

THE COURT were of opinion that the determination of the Valuation Committee was right.

MACPHERSON & MACKAY, W.S.—FORBES, DALLAS, & Co., S.S.C.—Agents.

No. 135. THE GARTVERRIE FIRECLAY COMPANY, Appellants.—*Graham Stewart*.
ASSESSOR FOR COUNTY OF LANARK, Respondent.—*Party*.

Mar. 17, 1897.*
Gartverrie
Fireclay Co.
v. Assessor for
Lanarkshire.

Valuation Acts—Subjects—Erections by lessee—Lands Valuation (Scotland) Act Amendment Act, 1895 (58 and 59 Vict. cap. 41), sec. 4—Exemptions 2 and 3.—Section 4 of the Lands Valuation (Scotland) Act Amendment Act, 1895, requiring the value of erections or structural improvements made or acquired by a lessee to be entered in the Valuation-roll exempted (2) "erections or structural improvements made or acquired and used exclusively for the purpose of working or cleaning minerals let under such lease or agreement as aforesaid in respect of which minerals rent or lordship is stipulated to be paid"; and (3) "coke ovens or other structures in which coal or other minerals are treated where the rent or lordship stipulated in such

lease or agreement as aforesaid to be paid in respect of such coal or other minerals is by the terms of such lease or agreement calculated upon the coke or other minerals as treated in such ovens or other structures." No. 135.

Mar. 17, 1897.
Gartverrie
Fireclay Co.
v. Assessor for
Lanarkshire.

A tenant of certain seams of fireclay and quarries of rotten rock and freestone rock under a lease which stipulated for a fixed rent or for a royalty on every ton of these minerals carried away, erected certain kilns in which the rotten rock and freestone rock, after being quarried, was dried, and also certain buildings containing two boilers, an engine, and pan-mills, in which the fireclay, rotten rock, and freestone rock were ground.

Held (1) that these erections did not fall within the meaning of exemption 2, in respect that they were used for converting the minerals on which the royalty was payable into a finished product; and (2) that they did not fall under exemption 3, in respect that the royalty was not calculated upon the finished product, but upon the raw mineral.

At a meeting of the Valuation Committee for the Middle Ward of Lanarkshire held on 11th September 1896, the Gartverrie Fireclay Company, Glenboig, appealed against the following entry in the Valuation-roll:—

Lands Valuation Appeal Court.
Ld. Kyllachy.
Ld Stormonth-Darling.

Description of Subject.	Proprietor.	Tenant and Occupier.	Yearly Rent or Value.
Fireclay Works and Houses.	Gartverrie Fireclay Company.	Proprietors.	£50.

Case 183.

and craved that the reference to the Fireclay Works should be struck out of the roll, and the valuation reduced to £13, 10s.

The Committee sustained the valuation, and at the request of the appellants stated a case for the Appeal Court, which contained the following statements:—"By lease entered into between the trustees of the late John Hamilton Colt, Esq. of Gartsherrie, and the Gartverrie Fireclay Company, the said trustees let to the partners of the Gartverrie Fireclay Company, as trustees for their firm, 'All and Whole the beds or seams of fire-clay in parts of the lands of Castleskails, Gartverrie, and Rawmoan . . . as also the quarries of rotten rock or freestone sand and freestone rock, as then being worked in the said lands . . . and that for the space of nineteen years from Martinmas 1876 . . . with full power to the lessees to search for, work, win, raise, manufacture, and carry away the fireclay and rotten rock, or freestone sand and freestone rock thereby let, and for these ends to set down pits and sinks, and to drive levels for working the said fireclay and other minerals foresaid, and to erect machinery for draining and bringing up the same.'

"The rent payable under said lease was a fixed rent of £150 per annum, or, in the option of the lessors, a lordship or royalty of 6d. for each ton of 20 cwt. of fireclay, and 3d. for each ton of 20 cwt. of rotten rock or freestone sand and freestone rock excavated and carried away in virtue hereof. A copy of the said lease, with relative minute of extension, is herewith produced.

"The fireclay works referred to in the entry in the Valuation-roll appealed against consist of (1) certain kilns or stoves in which the rotten rock or freestone sand and freestone rock, after being quarried, are dried; and (2) certain buildings, containing two boilers, an engine, and pan-mills, in which the fireclay and the said rotten rock or freestone sand and freestone rock are ground.

No. 135.

Mar. 17, 1897.
Gartverrie
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Lanarkshire.

"The buildings and machinery in question were voluntarily erected by the lessees, and are used exclusively in connection with the fire-clay and other minerals let under the lease."

Argued for the appellants;—The erections were used exclusively for the purpose, not of converting the minerals into a finished product, but of working and cleaning them.¹ They fell then within the second exemption of section 4² of the Act of 1895, and ought not to be entered in the Valuation-roll. In any view, they fell within the third exemption.² The lordship was only to be paid upon the minerals carried away. That implied "treatment," because they could only be carried away after they had been dried. In order to bring them within this exemption it was unnecessary that a different lordship should be exacted by the lessor on minerals treated in the erections from that exacted on minerals not so treated.

Argued for the Assessor;—The only question decided in the *Portobello* case¹ was whether clay was a "mineral" within the meaning of the second exemption. The case, then, was not in point as regarded the question here. The second exemption referred to erections which were necessary for working and cleaning the minerals before they could become available for assessment at all. Here the erections were used for the purpose of turning the minerals into a finished product, and thus the second exemption did not apply. The third exemption was also inapplicable, because the lordship was calculated on the weight of mineral carried away, and was the same whether the tenant dried and ground the clay and rock or not.

LORD STORMONTH-DARLING.—This company are tenants of certain beds or seams of fireclay, and quarries of rotten rock and freestone rock under a lease for a period of years, "with full power to the lessees to search for, work, win, raise, manufacture, and carry away the fireclay, and rotten rock, and freestone rock, and for these ends to set down pits and sinks, and to drive levels for working the said fireclay and other minerals foresaid, and to erect machinery for draining and bringing up the same." They have erected upon the subjects of the lease certain kilns or stoves in which we are told the rotten rock after being quarried is dried, and also certain buildings containing two boilers, an engine, and pan-mills, in which the fireclay and rotten rock are ground.

The question is whether these erections are liable to assessment under the provisions of the Act of 1895. The purpose of that Act—as I understand it—was to bring within the ambit of assessment erections made by tenants which were not contemplated by the lease, and which had the effect of adding to the value of the subjects. There are certain exceptions from the leading enactment; and the real question here is whether the erections in question fall within either of these exceptions. The first which is founded on is subsection 2 of section 4, to the effect that the section shall not apply to any erections for the purpose of working and cleaning minerals. And we are asked to say that these erections are for that purpose. Now, I think it clearly appears from the statement in the case that they are not. Erections for working and cleaning minerals are very intelligibly excepted from the statute, because they are necessary to make the minerals available for

¹ Assessor for Portobello v. Mitchell & Sons, March 20, 1896, 23 R. 686.

² Quoted in rubric.

the purpose of assessment, and without them it would be impossible to assess the minerals at all. But a totally different rule applies where the erections are made for the purpose of converting the minerals into a finished product, which presumably is more valuable to the lessees. Accordingly, all such erections are now liable to assessment, unless they fall under the exception provided by subsection 3, which relates to coke ovens and other structures in which minerals are "treated," and where the rent or lordship stipulated in the lease is calculated upon the coke or other finished product.

The second question, therefore, is whether the erections with which we have here to deal fall within that description. I am clearly of opinion that they do not. The reason of the exception is that, if the royalty is paid upon the finished product, it would be quite inequitable to add anything to what the tenant had already paid in that shape. But, if the effect of his erections is to turn out a finished product, in respect of which he presumably gets a higher price in the market, but for which he has to pay no higher royalty, then one can understand the purpose of the Act in rendering such erections liable to assessment. Now, I think, the erections here are of the latter description, viz., for the purpose of turning out a finished product for which no higher rent is payable, and, accordingly, I think we ought to find that the determination of the Committee is right.

LORD KYLLACHY.—I entirely agree with everything your Lordship has said, and I have only to add, what was conceded at the bar, that, in the *Portobello* case¹ decided last year, this question was not raised, and was therefore not before the Court.

THE COURT were of opinion that the determination of the Valuation Committee was right.

GRAY & HANDYSIDE, S.S.C.—ASSESSOR—Agents.

MRS MARY RAMSAY OR FORBES IRVINE, Appellant.—*Watt*.
ASSESSOR FOR ABERDEENSHIRE, Respondent.—*W. Brown*.

No. 136.

Valuation Acts—Apportionment of Value—Special District—Farm buildings within Special District—Principle of Valuation—Local Government (Scotland) Act, 1894 (57 and 58 Vict. cap. 58), sec. 45, subsec. 1.—Of a farm of 223 acres, 9 acres, including the farm-house and steadings, lay within a special water supply and drainage district. The Assessor, in valuing the 9 acres, included the value of the buildings thereon. *Held* that the farm, with the farm buildings, should have been valued as an *unum quid*, and the amount distributed proportionally to acreage.

Mar. 17, 1897.
Forbes Irvine
v. Assessor for
Aberdeen-
shire.

THE farm of Kennerty, Aberdeenshire, of which Mrs Forbes Irvine, as tutrix to her son, was entered in the Valuation-roll as proprietor, consisted of 223 acres, and was let to William Reith for nineteen years from Whitsunday 1894 at a yearly rent of £284. Of these 223 acres, 26 were situated in the parish of Drumoak and 197 in the parish of Peterculter. In the special water and drainage district of Culter, newly formed by the Aberdeen District Committee, 9 acres of the farm of Kennerty were included, and upon these 9 acres stood the farm-house, steading, and offices.

Lands Valua-
tion Appeal
Court.
Ld. Kyllachy.
Ld. Stormonth-
Darling.

Case 184.

No. 136. The Assessor entered the 9 acres in the water district of Culter at £70, and the remaining 188 acres in Peterculter at £184, 4s. 6d. Mar. 17, 1897. Mrs Forbes Irvine appealed against these entries, craving that the allocation of £70 of value as within the Culter special district should be altered to £11, 9s. 6d.

Forbes Irvine
v. Assessor for
Aberdeen-
shire.

The Valuation Committee having sustained the valuation, the appellant obtained a case for the Appeal Court.

The facts above narrated were admitted. The case further stated:—

“The appellant contended that the farm-house and offices are ‘necessary adjuncts’ of the farm, and *vice versa*, and therefore for valuation purposes must be regarded as an *unum quid*, and that therefore the proportion of said rent effeiring to said 9 acres included within the said special water and drainage district of Culter falls to be ascertained by the simple proportion question: If 223 acres give £284, 4s. 6d., what do 9 acres give?”

“In answer, the Assessor stated that he admitted the acreage of the farm to be 223, of which 26 were situated in Drumoak and 197 in Peterculter; that the rent applicable to the part within the parish of Peterculter was £254, 4s. 6d., and that the extent of the farm within the Culter special water and drainage district was 9 acres. He maintained, however, that, owing to the formation of the Culter Special District, the part of the farm in Peterculter parish was now to be regarded as if it were situated in two parishes for certain purposes, and that the rental fell to be allocated upon that footing. In making such allocations, the Assessor stated that the system adopted has been to ascertain the value of the farm buildings, to deduct that amount from the gross rent of the farm, and, subject to such deduction, to ascertain the rate per acre of the land, entering the value of the farm buildings within whichever parish they are situated.”

Argued for the appellant;—The Assessor’s principle of valuation was erroneous. He should have taken the farm as a whole and then discovered the value of 9 acres. No one would be willing to pay the value fixed upon for the farm buildings if he were not to have the farm.¹

Argued for the Assessor;—The principle adopted by him had been recognised in the case of a ferry and hotel situated in two counties,² and it was the same in the valuation of water-works.³

At advising,—

LORD STORMONTH-DARLING.—By section 45 (1) of the Local Government (Scotland) Act, 1894, the Assessor is directed to distinguish in the Valuation-roll lands and heritages situated within the boundaries of any special water and drainage district. The question here is,—On what principle he is to do this, where a special district includes part of an ordinary arable farm, and that part contains the farm-house and steading?

What the Assessor has done, and the Valuation Committee have sustained, is to put a value on the farm buildings and to deduct that sum from the gross rent of the farm, leaving the reduced amount to represent the rate per acre of the land. This farm consists of 223 acres, and the rent is about

¹ Henderson, March 11, 1871, 11 Macph. 985; M’Jannet v. Assessor for Stirling, March 1, 1882, 10 R. 32.

² Lord Blantyre, April 2, 1877, 4 R. 1150.

³ Dundee Water Commissioners v. Dundee Road Trustees, Dec. 21, 1883, 11 R. 390.

£284, or a little over 25s. an acre, taking the buildings into account. Of these 223 acres, 26 are situated in the parish of Drumoak and 197 in the parish of Peterculter. But the special district has been carved out of the parish of Peterculter, and it contains 9 acres of the farm, including the farm buildings. There are thus 26 acres in Drumoak, 188 acres in Peterculter proper, and 9 acres in the special district. The effect of what the Assessor has done is to leave the valuation of the portion in Drumoak at or about the overhead rate of 25s. an acre, but to reduce the rate of the portion in Peterculter proper to rather less than £1 per acre, and to make the valuation of the portion in the special district (when tested by acreage) a little over £7, 15s. an acre, the increase in the latter case being accounted for by the arbitrary value put on the buildings. The appellant maintains that this is an erroneous principle of apportionment, and that the proper principle is to treat the farm buildings as adjuncts of the land, and to ascertain the value of the portion in the special district by the overhead rate per acre.

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The subjects being *bona fide* let for a yearly rent, it is obvious that there is no room for the ascertainment of value apart from the rent. Any valuation of a portion of the subjects must therefore be by way of apportioning the rent, which is necessarily a purely hypothetical proceeding where the lease itself contains no such apportionment. It is certain that the tenant would not have given so much rent if there had been no buildings, but how much less he would have given (or, in other words, how much value he put on the buildings) is pure speculation.

I am of opinion that the proper principle is that for which the appellant contends, and which the Assessor himself seems to have followed when the only apportionment required was one between the two parishes. If it could be said that the farm buildings were of exceptional value and unsuited to the farm, the case might be different, but where, as here, the buildings must be presumed to be ordinary and suitable, it seems to me that they ought to be regarded as a mere adjunct of the land, and that there is no more reason for attempting to put a separate value upon them than for putting a higher value on particular fields because they happen to consist of better land than others. The whole farm is truly one subject. Nor do I think that it makes any difference that the necessity for apportionment is caused by the creation of a special water and drainage district.

I am confirmed in this view by the case of *Henderson*,¹ where the Appeal Court overruled a proposal of the Assessor to value the dwelling-house and offices of a farm apart from the land. The farm in that case was all in one parish, but there was a higher classification for dwelling-houses than for agricultural subjects as regards poor-rates, and therefore the proprietor (who was also occupier) conceived that he had an interest to dispute the breaking-up of the value. The ground of decision was applicable to the present case, viz., that the house was a "necessary adjunct" of the farm.

I am therefore of opinion that the valuation within the Culter special district should be altered to £11, 9s. 6d., a corresponding increase being made in the valuation within the parish of Peterculter proper.

LORD KYLLACHY.—I concur.

¹ 11 Macph. 985.

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THE COURT were of opinion "that the determination of the Valuation Committee is wrong, and that the apportionment should be made on the principle contended for by the appellant."

ANDREW URQUHART, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 137. INCORPORATION OF SKINNERS AND FURRIERS IN EDINBURGH, Pursuers.
—Rankine—Irvine.

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THE HEIR-AT-LAW AND REPRESENTATIVES OF JOHN BAXTER AND THE LIEGES, Defenders.

Writ—Disposition of Heritage—Proving the Tenor—Requisite Adminicles.
—Circumstances in which the Court refused to grant decree of proving the tenor of a deed, in respect that no evidence of the particular terms of the essential clauses of the deed was adduced.

1ST DIVISION. THIS was a summons of proving the tenor at the instance of the Incorporation of Skinners and Furriers in Edinburgh. The action was directed against the heir-at-law and representatives of the deceased John Baxter, slater in Edinburgh, and the lieges, and the deed of which the pursuers sought to have the tenor proved was a disposition by John Baxter in their favour of a shop and wareroom in the High Street of Edinburgh, dated in 1812. No testing-clause was included in the deed contained in the summons, the summons simply concluding for decree that the said disposition was duly subscribed and attested in 1812.

The pursuers stated that the description of the property given in the disposition set forth in the summons was taken chiefly from the titles of the property adjoining that of the pursuers.

The Lord Ordinary having made great *avizandum* to the First Division, a proof before answer was allowed. Excerpts were produced from the minute-book of the pursuers' Incorporation, which shewed that they had purchased a shop in the High Street from Mr Baxter in 1812.

A disposition by John Baxter to Thomas Miller of a wareroom flat "immediately above that shop sold by me to the said Thomas Miller, and that other shop sold by me to the Incorporation of Skinners and Furriers in Edinburgh," bore that "the whole writings of the said subjects were delivered up by me to John Bathgate" and others "on behalf of the said Incorporation."

A minute of meeting of the Incorporation of 23d March 1837 stated that the boxes containing the title-deeds and other papers belonging to the Incorporation were in the possession of the boxmaster (Deacon Miller), but from a minute of meeting of 9th February 1849 it appeared that the papers in possession of Mr Miller's successor did not include any title-deeds, and none had been afterwards discovered. The Incorporation had remained in undisturbed possession of the premises.

Argued for the pursuers;—The tenor of the deed and the *casus amissionis* were sufficiently proved. The documentary evidence shewed that the pursuers had purchased the premises, which they had since possessed without disturbance, in 1812, and that the writs, which had been delivered to the officials of the Incorporation, had been lost by them. The Court would dispense with actual proof of the terms of clauses of style, and when a deed had been acted on without dispute for a number of years proof of the testing-clause would not be insisted on.¹ As the deed in question referred to land,

¹ Blackwood v. Hamilton, 1719, Robertson's App. 211; Dickson on Evidence, secs. 1311-1312.

the presumption was that it had been duly executed. The deed No. 137. being a simple disposition, and the rights of third parties not being involved, the Court would not require detailed written adminicles. Mar. 17, 1897. Parole proof had been held sufficient to set up a testamentary deed dealing with heritage.¹ Incorporation of Skinners and Furriers in Edinburgh v. Baxter's Heir.

LORD ADAM.—This is an action for proving the tenor of a disposition alleged to have been executed so long ago as 1812 of certain subjects in the High Street of Edinburgh in favour of the Incorporation of Skinners and Furriers. The deed, if it ever had any existence, was discovered to have gone amissing so long ago as the year 1849, and it is a little to be regretted that the pursuers, when they discovered that their title was not to be found, did not, when matters were comparatively fresh and the deed and documents alleged to have been lost might have been more easily traced, take steps to have it replaced, as one would naturally have expected them to do. However, they have come to the Court now, and it is obvious that evidence both of the tenor of the deed and of the *casus amissionis* might then have been got which are not now available.

Now, it is the fact that ever since the date of the alleged deed the subjects alleged to have been conveyed thereby have been occupied by the Incorporation, and looking to the nature of the deed, I quite agree with the pursuers' counsel that the presumption in favour of its having been duly executed ought to prevail, and also that in such a case we are not bound to require proof of the actual fact of the destruction of the deed, if there is sufficient evidence to shew that it has been searched for in the proper quarters and after due search cannot be found. I would consider such a *casus amissionis*, if proved, sufficient, but the first difficulty is as to whether the deed ever existed. The only evidence of its existence which we have is a statement by the granter in a disposition to an adjoining proprietor, who held his property apparently under the same series of titles, that he had granted such a disposition. That is very slight evidence of the existence of the deed. No doubt the pursuers have possessed the subjects alleged to have been disposed ever since the date of the alleged disposition, and we might consider that sufficient evidence that the disposition was in fact granted, but the evidence would go no further than to prove that the deed once was in existence, and would not shew its terms. Assuming the existence of the deed to have been proved, we might presume that it was executed with the solemnities necessary to its existence as a valid deed, but proof of its existence would carry us no further than this. It would not tell us what the terms of the deed were, and would bring us a very small way towards proof of the tenor of the deed set forth in the summons. Now, there are no adminicles in this case at all. The deed was not put on record, and from first to last the deed in the summons is a construction of the pursuers' imagination. I should not hesitate to agree with Mr Rankine that, if we have proof of the essential clauses of a deed, we may supply mere clauses of style, but then we have no proof of the essential parts of this deed; and accordingly I come to the conclusion—though I would be willing to assist the pursuers in the matter—that we cannot grant the decree they crave.

¹ Leckie v. Leckie, July 12, 1884, 11 R. 1088.

No. 137. **LORD M'LAREN.**—The corporation, who are the pursuers in this action, need have no apprehension that they will be disturbed in the occupation of this hall, of which they have been in possession since 1812, because if any competitor chooses to set up an ancient title against them, he will be barred by the negative prescription. It does not follow because it is proved that the pursuers have been in possession for this period of years under some title, that the Court has jurisdiction to reconstruct a title, virtually to grant a title which shall serve as a foundation of prescriptive right. Parties may do this for themselves—the simplest way would be for the corporation to grant a disposition to trustees giving a title which would become indefeasible in twenty years. Another possible way would be adjudication on a trust bond. But it appears to me that the method adopted here is insufficient, for, while we might conclude that there had been some title, and might even hold the *casus amissionis* established, because the deed was traced to the possession of an office-bearer, after whose death nothing further was heard of it, the case fails because no proof has been offered of the terms of the deed. I must altogether dissent from Mr Irvine's proposition that in all cases it is unnecessary to prove the testing-clause of a deed whose tenor is in question. I may say, with all respect to the case in Robertson's Appeals, that we have no means of knowing from the report whether the reversal was on law or on fact. It may be that slight evidence will be sufficient to set up a testing-clause. If a lawyer who had the custody of a deed should say that he remembers that it was a duly executed deed, because he had occasion to examine it for some purpose, but that he cannot remember the names of the instrumentary witnesses, we should most probably consider the evidence sufficient. Or if an instrument of sasine set forth that a dispositive deed was presented for the purpose of sasine being given in terms of the warrant, we might take this as evidence that the warrant was duly attested. I am not prepared to say that, where the purpose of an action is to set up a deed whose execution is in dispute we could dispense with the evidence of execution which is furnished by a testing-clause. But I need not elaborate this point, because there is no evidence as to the existence of other essential clauses in the deed supposed, nothing even to shew that it contained dispositive words. There is neither draft, nor copy, nor excerpt to enable us to find in fact that a deed existed expressed in the terms set forth in the summons.

LORD KINNEAR.—I agree with what has been said. I think that in dismissing this action we are doing nothing to throw any doubt on the right of the corporation to the property of the subjects which have been so long in their possession; and it is, as your Lordships have indicated, very probable that there may be means available to them for making a good title, though it is not for us to suggest or consider what is the most appropriate method for that purpose. But however that may be, I agree that there is no evidence to justify our granting decree of declarator that the disposition was duly executed and delivered, that it has been lost in such circumstances as to justify a proving of the tenor, and that its terms were those set forth in the summons. The evidence as to the execution and delivery of the disposition is very imperfect, though I think it probable that it was so exe-

cuted and delivered. But that would not be enough to support a decree of proving the tenor. Even assuming the execution of a deed in some terms suitable for the conveyance of a property, there is no evidence of the particular terms of the deed, and no sufficient ground for a decree in terms of the conclusions of the summons.

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The LORD PRESIDENT was absent.

THE COURT dismissed the action.

AULD & MACDONALD, W.S., Agents.

MRS TERESA MALCOLM, Pursuer (Respondent).—*W. Campbell—W. Thomson.*

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WILLIAM DUNCAN, Defender (Reclamer).—*Balfour—Guy.*

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Reparation—Apprehension without a warrant—Police-Constable.—A married woman living in Edinburgh brought an action against a detective in the Edinburgh police for damages on account of his having wrongfully compelled her to accompany him to the police-office. The pursuer averred that her son, a boy of twelve, having found some clinical thermometers in the street, brought them to her; and that while she and her husband were taking means to discover whether the thermometers were of any value the defender came to her house, and after charging her with having come by the thermometers dishonestly, forcibly, and without a warrant, compelled her to accompany him to the police-office, where, after a short examination, she was discharged; and that the defender had acted wrongfully, maliciously, and without probable cause.

The Lord Ordinary (Low) had held that the pursuer was entitled to an issue laid upon malice and want of probable cause.

The Court (*rev. the judgment*) *dismissed* the action as irrelevant.

Reparation—Slander—Police-Constable—Privilege.—In an action of damages for alleged slander, brought by a woman against a detective-officer, the pursuer averred that the defender came to her house and insisted on her accompanying him to the police-office, and repeatedly, and in a loud voice, in the presence and hearing of another detective and of her two sons, called her a "resetter" of certain articles which one of her sons had found in the street.

The Court (*rev. judgment of Lord Low*) *dismissed* the action as irrelevant.

In January 1897 Mrs Teresa Kussick or Malcolm, wife of and residing with James Malcolm, cabman, 10 Brown Square, Chambers Street, Edinburgh, with consent of her husband, raised an action against William Duncan, detective-officer in the Edinburgh police, concluding for £500 as damages.

2^d Division.
Lord Low.

The pursuer averred;—(Cond. 2) "About ten o'clock on the night of 18th December 1896 the pursuer's son, John Malcolm, a boy aged twelve, found in Guthrie Street, Edinburgh, among some refuse, a number of clinical thermometers. Several of them had been broken, but there remained ten whole ones. These he picked up and carried home. On the way home he gave one to a girl, Emily Sutherland, who also resides at said No. 10 Brown Square, and after he got home he handed the remaining nine to the pursuer, who shewed them to her husband. The pursuer and her husband did not know what the articles were or whether they were of any value, but it was arranged that the pursuer's husband should on the following day take them to Mr Hume, instrument-maker in Lothian Street—the said James Malcolm's stance being in College Street adjoining—to ascertain whether they were of any value. It was the intention of the pursuer and her

No. 138. husband, if the found property were of any value, to take steps to restore same to the rightful owners thereof."

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(Cond. 3) "On the following afternoon, viz. 19th December, the pursuer, as she had not received any message from her husband in regard to the said articles which he had in terms of said arrangement taken away with him about two hours previous, sent her daughter Annie Malcolm to Malcolm's stance in College Street to see her father about the matter. The girl there ascertained that her father had gone to Powderhall with a 'fare,' and returning home told the pursuer so. The pursuer accordingly obtained from the said Emily Sutherland the said thermometer which had been given to her, and thereafter sent her son Robert Malcolm, a lad about fifteen years age, to Mr Stevenson, instrument-maker in Forrest Road, Edinburgh, with it, to make the same inquiries as it had been arranged her husband should make at Hume's, in order to have information before the shops would be closed on Saturday afternoon. She also gave her son a note or line to hand to Mr Stevenson, which was in these terms:—'Please would you be kind enough to let me know if this article is of any value, as my boy found a parcel containing some of them, if they are worth advertising, and oblige, yours respectfully, T. MALCOLM.' The boy Robert Malcolm took the thermometer and the note to Mr Stevenson. Mr Stevenson having read the note and examined the thermometer sent for a policeman. After the policeman came Mr Stevenson gave him the said note and the thermometer, and informed him that he believed the said article was part of property reported to have been stolen. The said Robert Malcolm told them how the same had come into his brother's possession. The policeman, notwithstanding, took the boy in charge, and marched him to the police-office in High Street, holding him by the wrist all the way. While going to the police-office they passed Chambers Street, where the pursuer lives, and the boy asked the policeman to go with him and see his mother, telling the constable that he would there receive a full explanation. The policeman refused to do so."

(Cond. 4) "After arriving at the police-office the policeman and the boy were interviewed by two detectives, namely, the defender and another detective named Strachan. The defender was then told of the circumstances under which the thermometers had been found, where they were, how the boy had taken one of them to Stevenson's, and he was given the said note from Mrs Malcolm, which is herewith produced. The defender, accompanied by Strachan and the boy, then proceeded to the pursuer's house. The pursuer was not at home when the defender arrived. She was out in quest of her son Robert, the report of his arrest having been brought to her by a boy who knew her son. On arriving at the house the defender saw the pursuer's mother, Mrs Teresa Kussick. The defender said something to her about some thermometers having been stolen. Mrs Kussick expressed surprise. 'Yes, stolen,' the defender said, 'and you know all about them.' He was asked to sit down to await the pursuer's return, but he refused to do so. He proceeded to search the house, and the pursuer's repositories, including three drawers. He then turned over a bed and carpet, and searched an oven, after which he proceeded to search Mrs Kussick's bedroom. This searching of the pursuer's house was done illegally and without any warrant, and was unnecessary and uncalled for, as the defender had received full information in regard to the thermometers, and where they were. There was no reason to suspect that any stolen property was hidden in the said house and

repositories. The defender then sent out Strachan to search for the pursuer, who, however, returned to her house before Strachan did. The defender then accused the pursuer of knowing that the thermometers had been come by dishonestly, and said,—‘She would very shortly know that, for she would be locked up in the police-office.’ The pursuer again explained to the defender how the property had been come by, how she had one in her possession, where the others were, and the reason why her husband had taken them away, and she offered to go to Powderhall for them, but the defender nevertheless told her that she must go with him to the police-office, and that he was going to take her there. The pursuer asked to be allowed to walk alone, and not under charge of the defender. Notwithstanding this, the defender assaulted the pursuer by pushing her violently from the kitchen in her house into the house passage, and again from the house passage into the staircase. He then forcibly and against her will compelled her to accompany him to the police-office, and conducted her there along George IV. Bridge and High Street. This occurred between three and four o’clock on the afternoon of Saturday, the said 19th December. The defender and the said detective Strachan are well known to the public as members of the Edinburgh Police Force.”

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(Cond. 5) “On the way down the stair from the pursuer’s house the pursuer, the defender, and the said Robert Malcolm and John Malcolm were met by Strachan. The defender then falsely, calumniously, maliciously, and without probable cause, said to the said Strachan, of and concerning the pursuer, and in the presence and hearing of the said Strachan, of the pursuer and of her said two sons, *i.e.*, John Malcolm and Robert Malcolm, or one or more of them, ‘This is the lady that has caused all the trouble, and this’ (John Malcolm) ‘is the boy that stole the articles. He is the thief and she is the resetter,’ or used words of the like import and effect of and concerning the pursuer. The defender, on the way to the police-office, frequently repeated the said false and calumnious accusation, and said that the pursuer was a resetter, and would be put in the lock-up. This he said in a loud voice in the presence and hearing of the persons above mentioned, or one or more of them, and also of persons passing along the street. He spoke in the same fashion all the way along to the police-office, and he kept continually telling the pursuer of what she would receive in the lock-up.”

(Cond. 6) “At the said police-office the pursuer gave her name, address, and age, and again told the circumstances connected with the possession of the property. The defender then proceeded to take the boy John Malcolm apart from his mother and examined him. The boy told him the same story about the finding of the thermometers. The defender thereupon asked him ‘if his mother had not told him to make this story up.’ The defender then threatened the boy with a birching if he would not admit the false accusation of theft and reset made against him and his mother.”

(Cond. 7) “The pursuer was thereafter told she might go, but before she was finally released the detective Strachan took her and her son John to Guthrie Street. There Strachan was shewn by John Malcolm the place where the thermometers had been found by him. On looking about the spot there was found a piece of a broken one, and Strachan took possession thereof. The pursuer was then allowed to return home. The pursuer thereafter saw her husband, and got from him the rest of the thermometers which he had taken to Mr Hume’s,

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and about which he had made due inquiry, and all the thermometers which the boy John had found were handed over to the police at the said police-office between six and seven o'clock on the same Saturday evening. At the same time, on the pursuer's request, the said note herewith produced, which had been sent to Mr Stevenson, and which had since been in the defender's possession, was redelivered to the pursuer."

(Cond. 8) "The defender acted unreasonably, wrongfully, illegally, maliciously, and without probable cause towards the pursuer. Before going to the pursuer's house he was told the whole facts about the said thermometers, and had possession of the said note. In these circumstances his proceeding to search the pursuer's house without a warrant was unreasonable, wrongful, illegal, malicious, and oppressive. The accusation which he made against the pursuer, to the effect that she was a resetter, was slanderous, malicious, and untrue, and was known to him to be so, and was made without probable cause. In assaulting the pursuer and compelling her to go to the police-office, the defender acted unreasonably, wrongfully, and oppressively, and also maliciously and without probable cause. Further, he had no warrant. The pursuer was a law-abiding citizen with a fixed residence, and the defender had no reason to believe that the pursuer was about to abscond. By the wrongful and unwarrantable actings of the defender, she has suffered grievously in her feelings, and has been damaged in her reputation among her friends and neighbours. Her being marched by the defender to the police-office as condescended on, was witnessed by her neighbours and the public, and the matter has been the cause of talk in the vicinity of her abode. The defender has been called upon to make reparation, but he declines to do so, and thus the present action has been rendered necessary."

In his answers the defender stated that (Ans. 2) "on 16th December 1896 it was reported to the Edinburgh Police that a parcel containing six dozen clinical thermometers of the value of between £8 and £9 had been stolen that morning from a barrow belonging to and in charge of a servant of" certain carriers. "Following upon said report a notice was placed in the information-book, for constables to make inquiry at all chemists and other likely places, with a view of tracing the property reported to be stolen."

The defender further stated,—(Ans. 3) "Admitted that the pursuer sent her son, Robert Malcolm, to Mr Stevenson, instrument-maker in Forrest Road, Edinburgh, with a clinical thermometer, which is believed to be one of those reported to have been stolen, and with a note signed 'T. Malcolm,' but without giving any address, asking whether the article was of any value. Said note is referred to for its terms. Admitted that the boy Robert Malcolm took the thermometer and the said note to Mr Stevenson, and that he having read the said note and examined the thermometer sent for a policeman, to whom he gave the note and the thermometer, and stated that he believed the thermometer to be part of the said property reported to have been stolen. Admitted that the said Robert Malcolm gave an account as to how the thermometer came into his brother's possession. Admitted that the policeman took the boy to the police-office to give an explanation. *Quoad ultra* not known, and not admitted. . . ." (Ans. 4) "Admitted that on arriving at the police-office the boy was asked for an explanation about the thermometers, and stated that they had been found, and that he had taken one with the note to Stevenson's. Admitted that with the view of making further inquiries

the defender and another detective named Strachan proceeded No. 138, along with the boy Robert Malcolm to the pursuer's house; that on arriving at the house the pursuer was not in the house . . . Mar. 17, 1897. Malcolm v. Duncan. and that in a few minutes thereafter the pursuer returned to the house Admitted that the defender explained to pursuer the object of the visit, and asked for an explanation as to the thermometers, and where they were. Admitted that the pursuer stated that her husband had taken away the remainder of the thermometers with him. Admitted that the defender requested the pursuer to go to the police-office and make her explanation there, and that she expressed her willingness to go. Admitted that the defender and Strachan are known to some as members of the Edinburgh Police Force. *Quoad ultra* denied. Explained that the pursuer's story given at her house differed in important respects from the boy's story. . . . Explained further that, as the pursuer was unknown to the defender, and lived in one of the most disorderly localities in the city . . . and behaved in a very excited and intemperate manner, he thought it desirable that the pursuer should accompany him to the police-office. The neighbourhood is one where disturbances are common, and many of the residents have frequently to be dealt with by the police. It was utterly impossible in such a neighbourhood for the defender to make the necessary inquiry after the stolen property, which was still amissing, in the midst of the disturbance created by the pursuer, a disturbance which at the time bore all the appearance of having been created for the purpose of obstructing him in the discharge of his duty. The defender's whole object in asking the pursuer to accompany him was in order that he might in the most expeditious manner ascertain the real state of matters in so far as the pursuer and her son's connection with the stolen articles was concerned. She had committed a breach of the peace, and all his efforts to calm her having proved ineffectual, he was left no alternative but to take her to the police-office. She at first expressed her willingness to go, but on reaching the top of the landing outside of her house she again broke out in a violent temper, used abusive language to the defender, seized hold of the side of the staircase and refused to go. The defender then released her hand and said that she must go, and she did. The defender used no violence to her, and could not have behaved with more consideration to her. Any public attention that was called to her on the street was the result of her own behaviour. The defender entertained, and entertains, no malice whatsoever towards the pursuer, and he had probable cause for acting as he did."

The defender further (Ans. 6) admitted that in the police-office "the pursuer and the boy were again questioned as to the thermometers"; and averred (Ans. 8) that the pursuer was "detained only about ten minutes or thereby altogether."

On record the defender founded on the Police Act, 1857 (20 and 21 Vict. cap. 72), sec. 12, and the Edinburgh Municipal and Police Act, 1879 (43 and 44 Vict. c. cxxxii.), secs. 56 and 327; but at the hearing on the reclaiming note he admitted that these statutes did not give him higher powers than he possessed at common law.

The pursuer pleaded;—(1) The pursuer having been injured by the wrongful and illegal actings of the defender, she is entitled to reparation as craved, with expenses. (2) The defender having unreasonably, wrongfully, illegally, and maliciously and without probable cause,

No. 138. searched the pursuer's house and repositories, assaulted her, and forcibly conducted her to the police-office, as condescended on, she is entitled to damages as concluded for, with expenses. (3) The defender having maliciously and without probable cause slandered the pursuer as condescended on, she is entitled to damages as concluded for.

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The defender pleaded;—(1) No relevant case. (2) The pursuer's averments, so far as material, being unfounded in fact, the defender ought to be assoilzied. (3) Privilege. (4) The defender having acted without malice, and with probable cause, and his actings not having been illegal, he ought to be assoilzied, with expenses.

On 5th March 1897 the Lord Ordinary (Low) approved of the following issues for the trial of the cause * :—

“Whether, on or about 19th December 1896, the defender malici-

* “OPINION.—I am of opinion that the pursuer's averments are sufficient to entitle her to have the case sent to trial, and the main question appears to me to be whether she is bound to put malice and want of probable cause in issue.

“The pursuer argued that the defender, by apprehending her and taking her to the police-office without a warrant, acted illegally and altogether beyond his powers as a police-constable, either at common law or under the Police Statutes, and could not therefore plead privilege. The proper issue, the pursuer contended, was one of wrongful apprehension, leaving it to the Judge who presided at the trial to deal with a case of privilege if it arose.

“Now, I think that it is impossible to distinguish with precision the cases in which a police-officer may apprehend without a warrant from those in which he may not do so. The question was very carefully considered in the case of *Peggie v. Clark*, 7 Macph. 89, which in many respects was not unlike the present, and the Lord President there said,—‘I am of opinion that, under special circumstances, a police-officer is entitled to apprehend without a warrant, and it will always be a question whether the circumstances justify the apprehension.’

“The circumstances, as averred by the pursuer, under which the defender came to take her to the police-office are shortly these :—Upon the night of 18th December the pursuer's son John found in the street a number of clinical thermometers. On the following day the pursuer's husband, who is a cabman, took all the thermometers except one away with him when he went to his work, with the intention of asking an instrument-maker, who had a shop near his stance, about them. In the afternoon of the same day the pursuer, not having heard from her husband, sent another son, Robert, a lad of fifteen, to Mr Stevenson, instrument-maker in Forrest Road, with the remaining thermometer, and a note in the following terms :—‘Please would you be kind enough to let me know if this article is of any value, as my boy found a parcel containing some of them, if they are worth advertising.’

“Mr Stevenson had heard that there had been a theft of clinical thermometers, and accordingly he called a policeman, who took the boy, the note, and the thermometer to the police-office. The defender and another detective named Strachan were on duty there, and having examined the boy, they took him along with them to the pursuer's house. The pursuer was out at the time, and Strachan went to look for her. The pursuer, however, returned to her house before Strachan did, and after an interview with her, the defender took her back with him to the police-office. The pursuer was examined at the police-office, and Strachan then went with her and her son to the place where the thermometers were said to have been found, and a piece of a broken thermometer was there discovered. The pursuer was then allowed to go home.

“Now, in going to the pursuer's house and making inquiries there, I think that the defender was plainly acting within the scope of his duty. There seems to have been, in fact, a theft of clinical thermometers, and the circumstances under which Robert Malcolm came to Mr Stevenson's shop

ously and without probable cause apprehended the pursuer in her house at No. 10 Brown Square, Edinburgh, and thence took her to the police-office of Edinburgh, to the loss, injury, and damage of the pursuer? Damages laid at £300." No. 138.
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"(2) Whether, on or about 19th December 1896, at or near No. 10 Brown Square, Edinburgh, in the presence and hearing of pursuer's sons, Robert Malcolm and John Malcolm, or one or more of them, the defender falsely and calumniously said,—‘This is the lady’ (meaning thereby the pursuer) ‘that has caused all the trouble, and this is the boy’ (meaning thereby the said John Malcolm) ‘that stole the articles. He is the thief, and she is the resetter,’ or words to a like import and effect, to the loss, injury, and damage of the pursuer? Damages laid at £100."

The pursuer had also lodged an issue for assault, but abandoned this in the Inner-House.

with a thermometer of the kind which had been stolen were suspicious. The defender therefore began the proceedings complained of in a capacity in which he was privileged.

"The pursuer, however, contended that it was so plainly illegal for the defender to take the pursuer to the police-office without first obtaining a warrant from a magistrate, that he lost the protection of his privileged position. Even upon the pursuer's own statement, I think that it is impossible to say that the defender's act was so plainly illegal that he is not to be treated as being, *prima facie*, a police-officer in the discharge of his duty. If it appears from the evidence that the defender was not justified in taking the pursuer to the police-office without a warrant, that will be an element for the consideration of the jury upon the question of malice.

"I am therefore of opinion that the issue upon the apprehension and taking to the police-office must be laid upon malice and want of probable cause.

"The pursuer also asks a separate issue for assault. Now, the alleged assault consisted simply in the defender's using some force to compel the pursuer to go to the police-office. It is therefore only an incident in the alleged wrongful apprehension, and although it may be material upon the question of malice, it does not, in my opinion, entitle the pursuer to a separate issue.

"The pursuer further asks an issue of slander. That matter is in a different position from those with which I have been dealing.

"The pursuer's averment is that after the defender apprehended her, and when he was taking her downstairs, he met Strachan and the pursuer's two sons, Robert and John, and that he said that the pursuer was the lady who had caused all the trouble, and that her son John was the thief, and she was the resetter. The defender, the pursuer avers, frequently repeated the accusation in a loud voice on the way to the police-office, and in the hearing not only of Strachan and her sons but of passers-by.

"Now, if that is true, as I must at this stage assume it to be, I do not think that the defender can plead privilege. No charge had been made against the pursuer by anyone, no duty lay upon the defender to announce his opinion of her criminality, and nothing was to be gained by his doing so. He would have been quite entitled to tell Strachan that he considered it to be necessary to take the pursuer to the police-office, and he might have explained to Strachan his reasons for coming to that conclusion, but according to the pursuer's averments he went very far beyond anything of that sort.

"I therefore think that the pursuer is entitled to an issue of slander in ordinary terms. Of course it will be open to the Judge before whom the case is tried to direct the jury that in this case also malice must be established, if the result of the evidence is to disclose a case of privilege."

No. 138. The defender reclaimed, and gave notice of a motion to vary the second issue by inserting the words "maliciously and without probable cause" between the words "calumniously" and "said" in the issue.

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The pursuer also gave notice of a motion to vary the first issue, in accordance with which it would read as follows:—"Whether, on or about 19th December 1896, the defender wrongfully compelled the pursuer to go with him from her house at No. 10 Brown Square, Edinburgh, to the police-office of Edinburgh, to the loss, injury, and damage of the pursuer? Damages laid at £300."

Argued for the defender;—There were no averments on record warranting either an issue of wrongous apprehension, or an issue of slander. (1) As regarded the alleged wrongous apprehension, it was not, and could not well be, disputed by the pursuer that apprehensions might legally be made although without a warrant, and with respect to police-officers it might be said that in making apprehensions, even without a warrant, they were *prima facie* privileged—their office was their warrant. Cases might occur in which, on the pursuer's averments, the constable had so entirely gone beyond the line of his duty as *prima facie* to deprive him of the privilege which he ordinarily possessed. Such a case was *Leask v. Burt*,¹ where the arrest was made six months after the alleged offence, and there was no reason why a warrant should not have been obtained. So also in *Pringle v. Bremner and Stirling*,² where the constables, having a warrant to search the pursuer's house for certain articles, were alleged to have proceeded to search his repositories for other articles, and it was held that having gone beyond the warrant which they actually possessed, they had *prima facie* exceeded their duty, and so had committed a legal wrong. *Peggie v. Clark*,³ did not arise upon relevancy, but upon a concluded proof, and the Court there held that the defender was justified in arresting the pursuer, although he had no warrant to do so, and although he liberated the pursuer without bringing him before a magistrate. The pursuer here did not appear to dispute that if she had been brought before a magistrate and then liberated she could not have resisted an issue of privilege. But it was absurd to say that a police-officer lost his privilege merely because, having come to be satisfied that the arrest was groundless, he had liberated the person arrested at once, and without bringing him before a magistrate. The question therefore came to be whether, the defender being privileged, the pursuer had relevantly averred malice. A mere general averment of malice was not enough; there must be a specific averment of facts and circumstances from which, if proved, the jury might infer malice. There was no such averment here. In *Young v. The Magistrates of Glasgow*,⁴ where there was no question as to the constable's power to arrest without a warrant—the local Act expressly giving them that power—it was held that there was a relevant averment of malice; but the case there averred was a case of gross and persistent persecution of the pursuer—a girl—by the constables. Nothing of that sort was averred here. Then (2) as to the alleged

¹ *Leask v. Burt*, Oct. 28, 1893, 21 R. 32.

² *Pringle v. Bremner and Stirling*, May 6, 1867, 5 Macph. (H. L.) 55, 39 Scot. Jur. 414.

³ *Peggie v. Clark*, Nov. 10, 1868, 7 Macph. 89, 41 Scot. Jur. 52.

⁴ *Young v. Magistrates of Glasgow*, May 16, 1891, 18 R. 835.

slander, no relevant case on that ground was set forth. The slander founded on in the second issue was not a separate and distinct occurrence; it was part of the *res gestæ* of the apprehension, and so did not found a separate claim to damages. The Court would not permit a single legal wrong to be split up into separate issues in this way, and just as the pursuer had abandoned her issue for assault, so now the issue for slander ought also to be disallowed.¹ The pursuer had a vague averment as to repeating the alleged slander in the street. If that had been a relevant averment, a question similar to that in *Douglas v. Main*² might have arisen; but, in the first place, the averment was irrelevant for want of specification, and secondly, the pursuer did not propose to put it in issue. She put her case on slander entirely upon what the defender said on the stair of the house, in presence of the other detective-officer and the pursuer's sons, and this was simply an incident of the arrest.

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Argued for the pursuer;—(1) *Prima facie* a police-constable, or anyone else, was not privileged in apprehending a person without having a warrant from a magistrate to do so; and therefore, unless the pursuer's averments disclosed a case of privilege the Court would allow an ordinary issue, leaving the question of privilege to be determined by the facts as they came out at the trial.³ The pursuer here went further, and maintained that upon the defender's averments it was plain that he was not privileged. For he stated (ans. 8) that his "whole object in asking the pursuer to accompany him was in order that he might in the most expeditious manner ascertain the real state of matters in so far as the pursuer and her son's connection with the stolen articles was concerned." That was to say, he did not apprehend the pursuer because he had reasonable grounds for believing her to be guilty, and in order to bring her before a magistrate, or because he thought she might abscond, or put away some of the articles; he simply took her to the police-office in order that he might examine her himself with greater comfort and convenience to himself. That was entirely illegal; the purpose of apprehension was to bring the person apprehended before a magistrate.⁴ If, however, the case were held to be privileged, there was a sufficient averment of malice to warrant an issue. Whether or not the averments founded on in relation to the second issue warranted a substantive issue for slander, they were sufficient to shew malice in relation to the apprehension, and to bring the case within *Young v. Magistrates of Glasgow*.⁵ (2) An issue for slander ought also to be granted. The defender, upon the pursuer's averments, in his language went far beyond what was necessary in making an arrest.²

LORD JUSTICE-CLERK.—The defender in this case received information from his superiors at the police-office of a theft of certain articles, and was informed that a message had come from the pursuer's house stating that she was in possession of part of the stolen property, and he was sent to the house in the course of his duty and service as a detective-officer. At the

¹ *Hassan v. Paterson*, June 26, 1885, 12 R. 1164.

² *Douglas v. Main*, June 13, 1893, 20 R. 793.

³ *Peggie v. Clark*, 7 Macph. 89; *Leask v. Burt*, 21 R. 32; *Pringle v. Bremner and Stirling*, 5 Macph. (H. L.) 55.

⁴ *Peggie v. Clark*, *per* Lord Kinloch, 7 Macph. at p. 94.

⁵ *Young v. Magistrates of Glasgow*, 18 R. 825.

No. 138. house he made inquiries, and as the result of these inquiries made up his mind that the pursuer ought to be apprehended in connection with the theft. Whether she was to be charged with participation in the theft or with reset of the stolen articles was a separate question with which he had nothing to do. Now, it is said that in these circumstances he acted maliciously and without probable cause. As regards probable cause, the defender here, being a police-officer, and having instructions from his superiors, was, I think, quite entitled to arrest that person if the result of the inquiries at the house were not satisfactory, and as regards malice, unless there is something averred of a distinct kind, separate from the mere fact that he did arrest the woman, I do not think she can be entitled to an issue. Here there are averments that he was rather rough in his action in getting her to leave the house. That, of course, may happen in such cases, but there would need to be some very distinct averments beyond the mere fact of pushing the person outside her door in order to get her to go to the police-office before malice could be held to be relevantly averred. It is said that she wanted to go to the police-office alone, but that he insisted upon accompanying her. That is a matter entirely in the discretion of the officer if he thinks there is any risk of his prisoner escaping, or if he thinks that the prisoner, on the way to the police-office, may get rid of property on her person. It is entirely in his discretion whether or not he should keep his prisoner so near him as to prevent the risk of either of these things happening. There may be many cases in which a detective-officer may allow a person to go to the police-office at some distance in front of him, or even on the other side of the street. But he takes the risk, and if anything does happen, he will be reproved by his superiors for having done such a thing. But in this case, where the woman was ostensibly charged with reset of certain stolen articles, or at least being connected with articles which had been taken dishonestly, I cannot hold that it is a sufficient averment entitling the pursuer to an issue involving malice, to say that he insisted on accompanying the woman, or on her accompanying him to the police-office. I think, on the whole matter, as regards the first issue, that the pursuer has not stated a relevant case entitling her to such an issue.

The second issue is one of slander, and is to the effect that at a certain time and place, in the presence and hearing of Strachan, a brother detective, and the pursuer's two sons, the defender charged her with being a resetter. Now, Strachan was another police-officer who was engaged in inquiries into the same matter. It is quite to be expected that when the defender met his brother officer engaged upon an inquiry into the same matter as himself, he should make a statement to him regarding the person he had in custody, and that statement was made, taking the words of the issue, in an offensive form, and accusing the person of being a resetter. But that is just what a police-officer in such circumstances might do. "Here is the woman, I have got her now, and I accuse her of reset." That seems to me to be not a statement in the circumstances which can be held to have been of the nature of slander. It is said to have taken place in the hearing of the pursuer's sons Robert and John Malcolm, but these were two boys who themselves were mixed up with the affair that was being dealt with, and there is no relevant allegation that these words were said in such a way as to be heard

by any other people than the police-officer and the two boys, who knew perfectly what she was being taken for. There is a vague statement on record that it was said loud enough to be heard by people in the street, but that is not a relevant statement. Had anything of that kind been distinctly averred, with names stated, it might have required consideration. But the statement made was one by a police-officer to another in the course of carrying out his duty in the detection of crime, and taking it as described in the record I am unable to hold that any relevant case for an issue of slander has been averred. I see no ground for inferring that the defender was doing anything more than as an officer making a charge in the execution of his office. There is no precedent for treating such a case as one of slander. Upon the whole matter I have come to the conclusion that the pursuer has not stated a relevant case.

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LORD YOUNG.—I am of the same opinion. It is certainly our duty to see that the liberty of the subject is not unlawfully invaded by the police, but in performing that duty, and considering cases which are brought before us with a view to the discharge of it, we must also be careful not to pronounce conduct on the part of the police to be an unlawful invasion of liberty which would substantially prevent the police from doing their duty in the interests of the public. In this case I think there are not allegations upon the record against the police-officer who is said to have unlawfully invaded the liberty of the subject to shew that he did so, or that he exceeded his duty to the public as a police-officer in anything he did. The policeman was sent for to the shop in Forrest Road and got the information from Mr Stevenson, the shopkeeper, upon which he, in the discharge of what he thought to be his duty, without any warrant from the magistrate, took the boy from the shop to the police-office. It is not alleged that in doing so he exceeded his duty, or unlawfully invaded the liberty of the subject, so that the pursuer may be taken to admit that the police-officers may have occasion to interfere with the liberty of the subject—boy, man, or woman—without any warrant from the magistrate, and still be pronounced to have been proceeding only in the discharge of a police-officer's duty. Now, after the information was given at the police-office upon the subject by the boy, and by the policeman reporting what he had been informed by Mr Stevenson, it was thought to be a proper police duty, in the interests of the public, to send the defender, a detective, to make inquiries upon the subject at the father's house. He went there and made inquiries, and got the information which he is said upon record to have got. The question we have to consider is, whether he unlawfully invaded the liberty of the pursuer (the boy's mother)—exceeded his duty to the public as a police-officer—in requiring her to accompany him to the police-office, and, I suppose, intimating that he would really compel her to go if she was not prepared to go without the use of force. I am of opinion that, upon the statement on record, his conduct was not in excess of his duty, but according to his duty. It would be his duty in considering the matter, with or without the aid of consultation with brother police-officers, or superior police-officers at the office, to determine whether it was reasonable and proper to detain her with the view of being brought before a magistrate next morning, if that could not be

No. 138. done sooner, or whether the proper and reasonable thing to do was to set her at liberty at once. It was conceded by counsel for the pursuer that if the police had come to the conclusion that it was proper to bring her before a magistrate next day there would be no objection to taking her from her house to the police-office without any warrant from a magistrate; but as the police came to the conclusion upon consideration that the reasonable thing to do, in her interest, and consistently with their duty to the public, was to discharge her without detention, and without taking her before the police magistrate, the pursuer's counsel said that made their conduct in taking her to the office without a warrant illegal. I cannot assent to that, and the only thing that has seriously to be considered is whether the circumstances are such that we cannot account reasonably for the officer's conduct in taking her to the office and reporting the whole facts there for consideration, and that we must attribute his conduct to improper motives and malice; or whether in taking her there he acted in such an outrageous and violent manner as to be in that respect violating his duty as a policeman. I do not think, taking the case as stated by the pursuer, that there is anything to make a case of that kind, and I am therefore of opinion that we would be interfering with the police in the proper and reasonable exercise of their police duty in the interest of the public if we were to hold that the averments here are such as to shew any violation or excess in the performance of that duty by the present defender.

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With regard to the second issue, I agree with your Lordship that there is here no relevant averment of a charge of slander. I cannot say that I ever heard of a case of a policeman being charged with slander, and an action for slander being brought against him, for mentioning to the person himself whom he was taking to the police-office,—“I am taking you there because you are a resetter, and your little boy stole the things.” I suppose most policemen would tell a brother officer what they were taking a person to the police-office for. I asked if there were any precedent, and was informed there was none. If it had been supposed that this was slander we should before this year 1897 have had some actions against policemen for slander of the kind, and if we were to hold this case relevant we should probably have a considerable number of them in the future.

LORD TRAYNER.—I am not so clear as your Lordships on the second issue, but my doubts are not sufficient to make me dissent. On the first issue I am quite clear, and have nothing to add.

LORD MONCREIFF was absent.

THE COURT dismissed the action as irrelevant.

CHARLES GEORGE, S.S.C.—PETER MACNAUGHTON, S.S.C.—Agents.

No. 139. IRVINE, HODGES, & BORROWMAN, AND OTHERS, Pursuers and Real Raisers.—*Younger*.
Mar. 18, 1897. ROBERTSON & BAXTER, Claimants (Respondents).—*Salvesen—Younger*.
Robertson & Baxter v. ROBERT WILLIAM INGLIS, Claimant (Reclaimant).—*Balfour—Ralston*.
Inglis. *Foreign—Arrestment—Competition as to right in moveables in warehouse in Scotland.*—Goldsmith, a domiciled Englishman, resident in London, was

the owner of certain whisky lying in a bonded warehouse in Glasgow, and held a warrant for the whisky granted by the warehouse-keepers, bearing that they held the whisky to order of Goldsmith "or assigns by indorsement hereon." By contract executed in London, Goldsmith borrowed £3000 from Inglis, also a domiciled Englishman, on the security of the whisky, and indorsed and delivered the warrant to Inglis. Thereafter, Robertson & Baxter, creditors of Goldsmith, arrested the whisky in the hands of the warehouse-keepers.

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In a competition between Robertson & Baxter and Inglis who maintained that by the law of England the indorsement and delivery of the warrant gave him a right to the whisky which was preferable to that of any creditor of Goldsmith doing diligence subsequently, *held* by a majority of the whole Court (*diss.* Lord Young) that the competition fell to be determined by the law of Scotland.

Right in Security—Pledge of documents of title—Delivery-orders—Factors Act, 1889 (52 and 53 Vict. cap. 45), sec. 3—Factors (Scotland) Act, 1890 (53 and 54 Vict. cap. 40), sec. 1.—The Factors Act, 1889 (extended to Scotland by the Factors (Scotland) Act, 1890), enacts, sec. 3, that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods"; and sec. 1—"For the purposes of this Act—(5) the expression 'pledge' shall include any contract pledging or giving a lien or security on goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability."

Goldsmith, the owner of certain whisky in a bonded warehouse, for which he held the warrants of the warehouse-keeper, bearing that the whisky was held to the order of Goldsmith "or assigns by indorsement hereon," borrowed a sum of money from Inglis, and granted him a letter bearing that he deposited the whisky with him in security of the loan, with power of sale. At the same time he indorsed and delivered the warrants to Inglis. Thereafter Robertson & Baxter, creditors of Goldsmith, arrested the whisky in the hands of the warehouse-keeper, who had received no intimation of the indorsement and delivery of the warrants to Inglis.

In a competition for the whisky between Inglis, who founded on sec. 3 of the Factors Act, 1889, as giving him *vi statuti* constructive possession of the goods and a real right therein as pledgee, and Robertson & Baxter, founding on their arrestment, *held* (by a majority of the whole Court) that the claim of Robertson & Baxter, as arresting creditors, fell to be preferred, in respect (a) that at common law the indorsement and delivery of the warrants to Inglis, without intimation to the warehouse-keeper, left the property of the goods in Goldsmith, and so liable to the diligence of his creditors; and (b) that, assuming that sec. 3 of the Factors Act, 1889, applied to pledging by owners of goods as well as by agents, and assuming that the transaction between Goldsmith and Inglis was to be regarded as a pledging of documents of title to goods, the section did no more than confer on Inglis a personal right to have the goods delivered in pledge—*diss.* Lord Young, on the ground that both at common law and under the Act the indorsement and delivery of the warrants effectually transferred the whisky to Inglis in competition with any creditors of Goldsmith doing diligence thereafter.

Opinions (per the Lord Justice-Clerk, and Lords Kinnear, Trayner, Kyllachy, Stormonth-Darling, and Low) that sec. 3 of the Factors Act, 1889, does not apply to pledges of documents of title to goods by the owners thereof.

Opinions contra per the Lord President, and Lords Young, Adam, M'Laren, and Kincairney.

ON 14th December 1893 Robertson & Baxter, wine and spirit-merchants, Glasgow, sold to Walter C. Goldsmith, wine-merchant, London, certain parcels of whisky, which were duly delivered to Goldsmith, and thereafter lay at his order in the bonded store in Glasgow,

2D DIVISION.
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No. 139. belonging to the Clyde Bonding Company, conform to warrants or delivery-orders in the following terms, issued by the Clyde Bonding Company to Goldsmith:—

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"Office, 56 Hope Street,
"Glasgow, 17th December 1894.

"Warrant for ten hhds. whisky transferred in our books and held to the order of Walter C. Goldsmith or assigns by endorsement hereon.

"Rent commences 3/6/95.

"~~£31~~ \$31/40 Ten hhds. whisky.
(F) (O)

"p. CLYDE BONDING CO.
(3d. Stp.)

"JNO. W. MATHIESON."

In December 1894 Goldsmith entered into an agreement of deposit or hypothecation with Mr Robert William Inglis, of Bigods Hall, Dunmow, in the following terms:—

"London, December 18th, 1894.

"To Robert William Inglis, Esq.

"In consideration of your advancing to me the sum of £3000, I hereby deposit with you (having full power and authority to do so) the wines and spirits specified in the schedule hereto, as a security for the payment of the said sum of £3000, with interest thereon until the date of payment at the rate of £7 per centum per annum, with full power for you to sell the same without further consent from me, either by public or private sale, at your option, in the event of my not paying the said amount and interest when demanded; and after reimbursing yourself out of the proceeds, all charges, commissions, and expenses of every description attending such sale or sales, and consequent upon my making default in payment of the said principal and interest, you are to apply the remainder of such proceeds in payment of the principal and interest for the time being owing on this security; and in case of deficiency I will make up and pay to you such deficiency on demand: And I agree to pay all charges of every description in connection with the said wines and spirits and the deposit thereof until redeemed by me." [Then followed the schedule referred to, which included the whisky sold by Robertson & Baxter.]

"WALTER C. GOLDSMITH.

"Witness—W. J. Bruty, solr.,
40 New Broad Street, E.C."

Goldsmith also indorsed and transferred to Inglis the warrants or delivery-orders granted by the Clyde Bonding Company for the whisky sold by Robertson & Baxter. The indorsation bore no date.

On 11th February 1895 Robertson & Baxter arrested the whisky in the hands of the Clyde Bonding Company, to found jurisdiction against Goldsmith, and thereafter raised an action against him, on the dependence of which they arrested the whisky on 18th February 1895. In this action Robertson & Baxter obtained decree against Goldsmith for £1000, 10s. 6d., with interest and expenses.

By memorandum of agreement, dated 3d and 5th April 1895, entered into between Robertson & Baxter and Alfred Cotton Harper, chartered accountant in London, as trustee under a deed of assignment for behoof of Goldsmith's creditors, it was arranged that the whisky should be released from the arrestment upon consignment upon deposit-receipt with the British Linen Company Bank, Edinburgh, in name of Irvine, Hodges, & Borrowman, solicitors, London, and Muirhead &

Guthrie Smith, writers, Glasgow, of the sum of £1000, to be held as a surrogatum for the whisky itself, and as subject to the arrestments and claims of all parties interested in the same way as the whisky itself might have been before the agreement was entered into.

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In October 1895 Irvine, Hodges, & Borrowman, and Muirhead & Guthrie Smith, raised the present action of multiplepounding for determination of competing claims to the £1000 lodged on deposit-receipt, which was the fund *in medio*.

Robertson & Baxter, founding upon their arrestments and the decree in their favour, claimed the whole fund *in medio*.

A condescendence and claim to the whole fund *in medio* was also lodged for Inglis, who averred, *inter alia* ;—

(Cond. 1) "In the month of September 1894 Mr Walter Charles Goldsmith, of No. 40 Great Tower Street, London, wine-merchant, applied to the claimant for a loan of £3000 upon the security of certain wines and blended spirits. The claimant accepted the proposal submitted to him, and advanced the said sum in loan to the said Mr Goldsmith, from whom he received an agreement of deposit or hypothecation, dated December 18th, 1894." The substance of the above agreement was then set forth, "and at the time the said advance was made and the letter of deposit or hypothecation delivered, there were also delivered and endorsed to the claimant by Mr Goldsmith, who held the same, the warrants for the several parcels of whiskies or blended spirits which had been issued by the said bonding company. The transaction in question was entered into between the claimant and the said W. C. Goldsmith in England, both parties being domiciled in that country. The said agreement was executed in England, and the warrants endorsed and delivered in England. By the law of England the said agreement, endorsement, and delivery effected a transfer of the ownership of the whiskies to this claimant, or otherwise pledged the said goods to this claimant, so as to give him a right to said goods preferable to any arrestments subsequently used by creditors of the said W. C. Goldsmith, or otherwise transferred to this claimant a right in security preferable to any right or claim founded on the arrestments used by the said Robertson & Baxter. . . ."

Robertson & Baxter made the following answer to the foregoing averment :—(Ans. 1) "Admitted that the claimant Inglis advanced to Goldsmith the sum of £3000 on loan, and that both he and Goldsmith were domiciled in England, and this loan transaction was entered into in that country. The agreement and warrants mentioned are referred to for their terms. Admitted that the fund *in medio* consists of the proceeds of whisky referred to in said agreement. *Quoad ultra* denied. Explained that the claimants Robertson & Baxter, who claim the fund in priority to this claimant, are domiciled in Scotland, and that they claim in respect of arrestments duly used by them against the said whisky according to the law of Scotland. Explained that the claimant Inglis did not get delivery, and was never in possession of the whisky referred to in the said agreement. These spirits remained in the possession of Goldsmith, and lay in his name in the custody of the Clyde Bonding Company in their stores in Glasgow, until sold on or about the month of June 1895, by arrangement under the agreement referred to in the condescendence of the fund *in medio*. Explained further . . . that although these 'warrants' for the spirits in question were endorsed by Goldsmith and handed to the claimant Inglis when the loan was made, the claimant Inglis gave no

No. 139. intimation thereof to the Clyde Bonding Company, and did not claim or receive delivery or possession of said goods under said warrants, nor were the same and the spirits at any time deposited with him as stated in the agreement founded on. . . . Explained that a 'warrant' is only an authority to the holder to claim and receive possession of the goods mentioned therein. The claimant Inglis neither claimed nor received possession of these goods, and failed duly to complete his title thereto."

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Robertson & Baxter admitted that under the agreement of deposit or hypothecation founded on by Inglis there remained a balance due by Goldsmith to Inglis of £1394, 4s. 4d.*

* The Factors Act, 1889 (52 and 53 Vict. cap. 45), enacts,—

"Sec. 1. For the purposes of this Act—

"(1) The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:

"(2) A person shall be deemed to be in possession of goods or of the documents of title to goods where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf:

"(3) The expression 'goods' shall include wares and merchandise:

"(4) The expression 'document of title' shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise either by indorsement or by delivery the possessor of the document to transfer or receive goods thereby represented:

"(5) The expression 'pledge' shall include any contract pledging or giving a lien or security on goods whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability:

"Dispositions by Mercantile Agents.

"Sec. 2. (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale pledge or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

"(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale pledge or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent; provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

"(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

"(4) For the purposes of this Act, the consent of the owner shall be presumed in the absence of evidence to the contrary.

"Sec. 3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

"Dispositions by Sellers and Buyers of Goods.

"Sec. 8. Where a person having sold goods continues or is in possession

Robertson & Baxter pleaded;—(1) The claimants are entitled to be ranked and preferred to the whole fund in respect of said arrestments and decree. (2) The rights of the claimants fall to be determined by the law of Scotland. (3) The agreement of deposit and delivery and endorsement of the warrants mentioned created no right of property, pledge, or security over the goods in question, either at common law or under the Factors Act, 1890. (4) The claimant Inglis not having claimed and received delivery or possession of the spirits in question prior to the arrestments used by Messrs Robertson & Baxter, the claim of the latter falls to be preferred *primo loco*. (5) The said “warrant” being only an authority to the holder to obtain delivery of the goods, and the claimant Inglis having failed to exercise that authority by claiming and taking delivery, the claimants Robertson & Baxter, in virtue of their arrestments, are entitled to be ranked and preferred *primo loco* in terms of their claim.

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of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale pledge or other disposition thereof, or under any agreement for sale pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

“Sec. 9. When a person having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale pledge or other disposition thereof, or under any agreement for sale pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

“Sec. 10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.”

By section 14, the Factors Acts, 1823 (4 Geo. IV. cap. 83), 1825 (6 Geo. IV. cap. 94), 1842 (5 and 6 Vict. cap. 39), and 1877 (40 and 41 Vict. cap. 39) are repealed.

The Factors (Scotland) Act, 1890 (53 and 54 Vict. cap. 40), section 1, enacts as follows,—“Subject to the following provisions, the Factors Act, 1889, shall apply to Scotland:—

“(1) The expression ‘lien’ shall mean and include right of retention; the expression ‘vendor's lien’ shall mean and include any right of retention competent to the original owner or vendor; and the expression ‘set-off’ shall mean and include compensation.

“(2) In the application of section five of the recited Act a sale pledge or other disposition of goods shall not be valid unless made for valuable consideration.”

The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), section 25 (1), is verbatim the same as section 8 of the Factors Act, 1889, and section 25 (2) is verbatim the same as section 9 of the Factors Act, 1889, with this exception, that in both these subsections of the Sale of Goods Act, 1893, the words “or under any agreement for sale pledge or other disposition thereof” occurring in sections 8 and 9 of the Factors Act, 1889, are omitted.

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Inglis pleaded;—1. The claimant is entitled to be ranked and preferred *primo loco* to the whole fund *in medio*, in respect (1) the rights of parties fall to be determined by the law of England, and by said law (a) the ownership of said whiskies was transferred to this claimant by the agreement of deposit and hypothecation and the endorsement and delivery of the warrants, (b) or otherwise by said agreement, endorsement, and delivery, the whiskies were pledged or otherwise transferred in security to this claimant so as to give him a right preferable to any claim or right founded on the arrestments used by Robertson & Baxter; (2) the rights of parties fall to be determined by the law of England as *lex loci contractus*, in respect said agreement of deposit and hypothecation was executed and endorsement and delivery of said warrants were made in England and the parties thereto were domiciled in England; (3) by the law of Scotland the said agreement of deposit and hypothecation and the endorsement and delivery pledged or otherwise transferred the said whiskies to this claimant so as to give him a right preferable to any claim or right founded on the arrestments used by Robertson & Baxter; (4) neither of the arrestments used by Robertson & Baxter attached or covered any right or property in the said whiskies belonging to the said W. C. Goldsmith. 2. This claimant is entitled to be ranked and preferred in terms of his claim in respect of the transactions condescended on in condescendence 1, and of section 3 of the Factors Act, 1889, and section 1 of the Factors (Scotland) Act, 1890.

On 20th March 1896 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Repels the claim for Robert William Inglis: Sustains the claim for Robertson & Baxter, and ranks and prefers them to the whole fund *in medio* in terms thereof: Further approves of the condescendence of the fund *in medio*, and decerns: Finds the pursuers entitled to the expenses of," &c.*

Section 25 (3) of the Sale of Goods Act, 1893, enacts as follows,—“In this section the term ‘mercantile agent’ has the same meaning as in the Factors Acts.” Section 62 of the same Act adopted the definition of “document of title” given in section 1 (4) of the Factors Act, 1889.

The Factors Act, 1842 (5 and 6 Vict. cap. 39), sec. 4, enacted as follows,—“And be it enacted that any bill of lading, India warrant, dock warrant, warehouse-keepers’ certificate, warrant, or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise either by indorsement or by delivery the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this Act, and any agent intrusted as aforesaid and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such agent’s having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been intrusted with the possession of the goods represented by such document of title as aforesaid; and all contracts pledging or giving a lien upon such document of title as aforesaid shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relates, and such agent shall be deemed to be possessed of such goods or documents whether the same shall be in his actual custody or shall be held by any other person subject to his control, or for him or on his behalf. . . .”

* “OPINION.—The fund *in medio* here is a sum of £1000, the *surrogatum* by arrangement for a certain parcel of whisky which was lately warehoused

Inglis reclaimed.

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After a hearing the Second Division, on 8th July, pronounced an interlocutor appointing the parties to prepare and box "mutual minutes of debate, in order to the opinion of the whole Judges being obtained on the question raised by the record."

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In his minute of debate the claimant and reclamer Inglis argued;—I. This claimant was entitled to be ranked and preferred to the whole fund *in medio*, because the rights of parties fell to be determined by the law of England, in respect that the agreement of deposit or hypothecation was executed, and endorsement and delivery of warrants were made, in England, and the parties thereto were domiciled and resident in England. It was indisputable that by the law of England the agreement and the endorsement and delivery to the present

in Glasgow, and belonged to one Mr Goldsmith, a merchant in London. The competing claimants are two creditors of Mr Goldsmith, viz., Messrs Robertson & Baxter and Mr Robert William Inglis. The former claim a preference in virtue of an arrestment of the whisky used in the hands of the warehouse-keeper on the dependence of an action in which they (Messrs Robertson & Baxter) have now obtained decree. The latter claims in virtue of a transaction prior in date to the arrestment, by which transaction he obtained delivery, blank indorsed, of the warehouse-keeper's certificates, which Mr Goldsmith held for the whisky.

"It is not suggested that prior to the arrestment any intimation of this transaction had been made to the warehouse-keeper. If it had been, there could, I suppose, have been no doubt as to Mr Inglis' preference. But, as matters stand, that gentleman's case seems to depend on his shewing that the property of the whisky was transferred to him, or at all events a valid pledge constituted in his favour, by the mere indorsation and delivery of the warehouse-keeper's certificate. The question accordingly is, whether that is a proposition which can be made good in law.

"Now, there can, I think, be no doubt that this is a question which must be determined according to the law of Scotland—the law of the country where the goods in dispute were situated. Neither can it, I think, be doubted that, according to the common law of Scotland, the mere indorsation of a warehouse-keeper's certificate operates nothing by way of transfer either of property or possession. Until followed by intimation, it confers only a personal right, and cannot compete with the *nexus* created by a valid arrestment. These are propositions which perhaps hardly require authority, but reference may be made to the case of *Connal & Co. v. Loder*, 6 Macph. 1095, where the law on both points is explained at length.

"The suggestion, however, is made that all this has been altered by recent statute, and that, as the law now stands, warehouse-keepers' certificates, dock warrants, and such other documents of title are, for the purposes of the present question, now in the same category with bills of lading. I must say that this strikes one as rather a startling proposition, but the statutes appealed to are—(1) The Sale of Goods Act, 1893, sections 25 and 47; (2) The Factors Act of 1889, sections 9 and 3; (3) The Factors Act of 1890, extending the last-mentioned Act to Scotland.

"The Sale of Goods Act of 1893 no doubt introduces this innovation into the law of Scotland, that in the case of a sale the property of goods now passes without delivery. Accordingly, if the transaction between Mr Goldsmith and Mr Inglis had been a sale, the latter must, I suppose, have prevailed against any subsequently arresting creditor. But the transaction was not a sale, but a loan on security, the security being sought to be constituted by a contract of hypothecation of this parcel of whisky. There is nothing, therefore, which can help the pursuer in the change which has been made

No. 139. claimant of the warrants formed an effectual transfer of the whiskies to him in security of the advances made by him in respect of whiskies. It was submitted that this case was on the same footing, and was to be ruled by the same law, as it would be if Goldsmith had transferred in England to Inglis a right to a debt which was localised in Scotland, and Robertson & Baxter had thereafter arrested the debt in Scotland. The law of England would, on the authorities, undoubtedly have to be given effect to by the Scots Courts in a competition in regard to such a transaction—*Mobilia situm non habent* and *Mobilia sequuntur personam*.¹ It was admitted in the present case that the whisky belonged to Goldsmith. Any transfer of it by him must therefore be ruled by the law of the place where the transfer was made, viz., by the law of England. A sequestration of his property in England, or bankruptcy proceedings there prior in date to an arrestment of part of it in Scotland, would have been looked at in proceedings in the Scots Courts

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on the Scotch law of sale. And with respect to the enactments of the 25th and 47th sections of the Act referred to, and the 9th and following sections of the Factors Act of 1889, all that I need say is, that I have not been able to understand how they have any bearing on the case. They relate not at all to the completion of the right of the purchaser or transferee of goods, but to a quite different matter, viz., the rights as against the owners of goods which may be obtained under transactions with persons who, although not the true owners, are either apparent owners, or have apparent authority to represent the true owners.

"The argument for Mr Inglis was, however, mainly rested on the 3d section of the Factors Act of 1889, which provides as follows:—'A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.' It is said that literally this covers the case, and that, whether intended or not, the enactment now applies to Scotland.

"It must be admitted that, in a statute which applied, or was intended to be applied, to Scotland, the language of this section is open to misconstruction. In England it is, I believe, the law that a security (known as an equitable mortgage) may be constituted by deposit or pledge of any document of title—even a policy of insurance or a share certificate. But in Scotland the law is different, and if the enactment in question had occurred in a statute which dealt generally with the constitution of securities, the result would have been certainly a notable innovation in Scotch law. As it is, however, the difficulty is more apparent than real.

"In the first place, this 3d section of the Factors Act of 1889 is merely a repetition of a clause which occurs in the 4th section of the Factors Act of 1842, an Act which always applied to Scotland, but as to which it has never, so far as I know, been suggested that it operated any change in the Scotch law as to the completion of securities depending upon possession. Otherwise the case of *Connal & Co. v. Loder* could not have been

¹ Wallace v. Davies, May 27, 1853, 15 D. 688, 25 Scot. Jur. 415, per Lord Rutherford, Ordinary, pp. 691 and 693; Goetze v. Aders, Nov. 27, 1874, 2 R. 150, per Lord President Inglis, at p. 153, and Lord Ardmillan, at p. 156; Strother v. Reid, 1803, M. App. *Forum Competens*, No. 4; Royal Bank of Scotland v. Scott, Stein, Smith, & Co., Nov. 28, 1812, Buchanan's Justiciary and other cases, p. 320, per Lord Robertson, at p. 329; Sill v. Worswick, 1 H. Blackstone's Cases, per Lord Loughborough at p. 690; Liverpool Marine Credit Co. v. Hunter, 1868, L. R., 3 Ch. App. 479, per Lord Chancellor Chelmsford, at p. 483; Story's Conflict of Laws (8th edit.), 384, 385; Dicey's Digest of the Laws of England with reference to the Conflict of Laws (1896), pp. 535 and 536, and cases there cited.

subsequent in date in the light of what would have been carried to the trustee under bankruptcy according to the law of England. It was therefore submitted that the transfer of the goods by the agreement and endorsement referred to was effectual in a competition with a subsequent arrester.¹

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In answer to the arguments advanced by the respondents for the proposition that the question between the parties could only be determined by the *lex situs*, it was submitted that the passage quoted from Bell's Comm., 5th edition, ii., pp. 18 and 19, referred to assignations. The transaction between Goldsmith and the reclaimer was more than an assignation. Goldsmith was actually in possession as owner of the parcel of whisky, and he, by the agreement of deposit or hypothecation, actually deposited and pledged the parcel of whisky to the reclaimer. The transfer of possession and ownership to Goldsmith by the respondents was admitted by the respondents. By the endorsement of the delivery warrants, and delivery of these warrants by Goldsmith to the reclaimer, and the agreement of deposit or hypothecation, the parcel of whisky was constructively delivered to the reclaimer. It was not a case of a debt being assigned, or of corporeal moveables being assigned, but one of corporeal moveables being constructively delivered. But assuming that the transfer of ownership of corporeal moveables situated in Scotland was, according to Scots law, on the same footing as a transfer of the *jus exigendi* of a debt due in Scotland, it was submitted that such debts might be conveyed otherwise than by assignation, and so might corporeal moveables, no intimation at all being required. In support of this contention reference was made to the passage in Bell's

decided as it was. That, however, is perhaps merely an observation. The conclusive consideration is that the enactment in question must be read in connection with its context, and with reference to the object of the Act in which it occurs. Now, that Act is one which relates exclusively to the powers of factors or mercantile agents, and its sole object is to give validity to securities granted by such factors or agents over the property of their principals, with respect to which property they have ostensibly full powers of disposal. In this view, all that is meant by the enactment now in question is that, for the purposes of the Act—that is to say, as between factor and principal—a pledge by a factor of documents of title to goods shall be as effectual as a pledge of the goods themselves. In other words, the factor's pledge, whether of the goods or of the documents, shall have the same effect as if made by the principal. Now, this obviously does not touch the question as to the requirements of an effectual pledge in a question with arresting creditors or other third parties. That is left, as before, to the common law.

"It might perhaps be added that in this case the transaction with Mr Inglis was not (at least according to Scotch law) a pledge at all. The warehouse-keeper's certificate was indorsed—not merely delivered. There is, therefore, a transfer of title, not merely a transfer of possession, and that distinction is material (*Hamilton v. Western Bank*, 19 D. 152). It is not, however, necessary to pursue that matter. On the whole, I think the case is a clear one, and I am of opinion that Mr Inglis' claim must be repelled, and Messrs Robertson & Baxter ranked and preferred to the whole fund *in medio*, in terms of their claim."

¹ Scottish Provident Institution v. Cohen, Nov. 20, 1888, 16 R. 112; North-Western Bank, Limited, v. Poynter, Son, & Macdonalds, Nov. 16, 1894, 22 R. (H. L.) 1, *per* Lord Chancellor Herschell, at p. 6, and Lord Watson, at p. 12.

No. 139. Comm., 5th edition, ii., immediately succeeding that relied on by the respondents, where it was stated that "debts may be conveyed otherwise than by assignation (as by drafts or by indorsation of bills, or by the debtor giving a new document of debt payable to the assignee) . . . the document of debt itself may be transmitted by indorsation, to the effect of enabling the indorsee to make a valid claim in bankruptcy, or to follow forth a new course of diligence." Now, it was contended by the reclaimer that, on this view of the law, the documents of title to the whisky, having been not only transmitted by endorsation, but also delivered along with the agreement of deposit or hypothecation to the reclaimer by Goldsmith (Goldsmith having had these documents of title in his possession in respect of the order given by the respondents to the Clyde Bonding Company), were on the same footing in law as a new document of debt, given by the debtor payable to the assignee; and that the reclaimer was in the position of an assignee who had received from the debtor a new document of debt payable to the assignee.

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The case of *Gray*¹ referred to by the respondents might be discarded, as it was apparent from the note to Bell's Comm., p. 18, that there was a difficulty in determining what that case decided. *Carrick v. Dickie's Assignees*,² quoted by the respondents, was over-ruled by *Goetze v. Aders*,³ and *Strachan v. M'Dougle*⁴ and *Donaldson v. Ord*,⁵ also cited by the respondents, were over-ruled by *Scottish Provident Institution v. Cohen*.⁶ *Connal & Company v. Loder*,⁷ relied on by the respondents, did not apply, and was not an authority for the necessity of intimation of the transaction between Goldsmith and the reclaimer. Even if it were such authority, and if intimation, or "something equivalent to intimation," to quote from the passage cited by the respondents from Bell's Comm. ii. by the respondents, had been necessary, "something equivalent" to intimation had taken place. For it was by order of the respondents that the warrants for delivery of the goods were issued by the Clyde Bonding Company to Goldsmith. The respondents thus clearly shewed that they intended to divest themselves of all property in the parcel of whisky, and therefore never could have expected that subsequent transaction with reference to the goods should either have to be intimated to them or to the Clyde Bonding Company. The presentation to the Clyde Bonding Company by the holder of the warrants for the whisky when delivery of it was required was the only intimation necessary that the goods had changed hands. This contention was borne out by the terms of the delivery-order, which prescribed simple endorsement of the order. Reference was also made to *Lee v. Abdy*.⁸

It was therefore submitted that the conclusion to which the Lord Ordinary had come, "that this is a question which must be deter-

¹ *Gray v. Duke of Hamilton*, 1708, Robertson's Reports, 1.

² *Carrick v. Dickie's Assignees*, May 30, 1822, 1 S. 414.

³ 2 R. 150.

⁴ *Strachan v. M'Dougle*, June 19, 1835, 13 S. 954.

⁵ *Donaldson v. Ord*, July 5, 1855, 17 D. 1053, 27 Scot. Jur. 625.

⁶ 16 R. 112.

⁷ *Connal & Co. v. Loder*, July 17, 1868, 6 Macph. 1095, 40 Scot. Jur. 624.

⁸ *Lee v. Abdy*, 1886, 17 Q. B. D. 309.

mined according to the law of Scotland," was erroneous, if by that it was meant that the rights of parties under the law of England were to be disregarded. No. 139.

On the contrary, the present claimant contended—(1) That he was entitled to be ranked and preferred *primo loco* to the whole fund *in medio*, in respect that the agreement of deposit and hypothecation, and the endorsement and delivery of the warrants, pledged or otherwise transferred the whiskies to him, so as to give him a right preferable to any claim or right founded on the arrestments subsequently used by Robertson & Baxter; and (2) that he was entitled to be ranked and preferred in terms of his claim, in respect of the transactions condescended on, and of section 3 of the Factors Act, 1889, and section 1 of the Factors (Scotland) Act, 1890. Mar. 18, 1897.
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It would be convenient to discuss these two pleas together.

The agreement entered into between Goldsmith and the present claimant Inglis was not only an agreement of deposit or hypothecation of the whisky, or of pledge of the whisky, but it also gave Inglis full power to sell it without further consent from Goldsmith, in the event of Goldsmith failing to repay the advance of £3000, with interest, to Inglis. It was more than an agreement of pledge. The warrants for delivery of the whisky were at the same time endorsed and delivered by Goldsmith to Inglis. This endorsement and delivery of the warrants, coupled with the agreement, constituted a pledge of the documents of title to the whisky, and also gave Inglis a power to sell the whisky in the event of his advance to Goldsmith not being repaid. It was to be kept in view that, as above stated, it was admitted by Robertson & Baxter that the property in the goods had been transferred to Goldsmith. The goods, they admitted, had been delivered to him. It therefore followed that Goldsmith could transfer the property by sale or otherwise to a third party, viz., Inglis, and the right of this third party must have prevailed against any subsequently arresting creditor. This proposition was affirmed by the Lord Ordinary in his opinion.

The law of Scotland, as affecting the question at issue in this case, was the same as the law of England, and was to be found in the Factors Act, 1889, which was made to apply to Scotland by the Factors (Scotland) Act, 1890, section 1. The Lord Ordinary's view that the Factors Act, 1889, related exclusively to the powers of factors or mercantile agents was erroneous. Reference was made to sections 8, 9, and 10 of the Act, which formed a department of the Act, entitled "dispositions by sellers and buyers of goods." It was submitted that, under section 9 of the Factors Act, 1889, and of section 25 (2) of the Sale of Goods Act, 1893, which were in the same terms, Goldsmith was in the position of a person who, "having bought or agreed to buy goods, obtains with consent of the seller possession of the goods or the documents of title to goods." That was admitted by Robertson & Baxter. They also admitted that Goldsmith did deliver or transfer the delivery-orders or warrants to a third party, the present claimant Inglis, and Inglis received "the same in good faith and without notice of any lien or other right of the original seller in respect of the goods." This was not denied by Robertson & Baxter, and it was borne out by the statement in the agreement, that Goldsmith had full power and authority to transfer the goods, and hence also the documents of title to the goods. Now, it was submitted that the delivery-orders or warrants which Goldsmith endorsed and delivered over to

No. 139. Inglis came within the definition of "document of title" given in section 1 (4) of the Factors Act, 1889, which was adopted as the definition of the term in the Sale of Goods Act, 1893, section 62. By these delivery-orders or warrants the Clyde Bonding Company held the whisky "to the order of Walter C. Goldsmith or assigns by endorsement." This was an acknowledgment that the Bonding Company held the whisky for Goldsmith, and subject to his control, and a proof of Goldsmith's possession of the whisky, and it prescribed the mode in which that possession and control should be transferred. In the words of the definition in section 1 of the Factors Act, 1889, it was a "document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented." The warrants or delivery-orders being documents of title, were, in terms of section 9 of the Factors Act, 1889, delivered or transferred, and their delivery or transfer passed the property of the goods to Inglis; they were delivered or transferred under a "pledge or other disposition thereof," or under an "agreement for . . . pledge or other disposition thereof." The agreement was more than one of pledge—it gave a power of sale. No intimation of it was required to anyone. Section 9 prescribed the effect of such delivery or transfer. It "shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner," in the sense of section 1 (1) (2) and (3), and section 2 (1). Goldsmith delivered or transferred, in terms of section 9, the documents of title to the goods, under a pledge of or an agreement to pledge the goods, within the meaning of section 1 (5), or under a pledge of the documents of title, and this, under section 3, operated as an effectual and complete pledge of the goods.¹

In answer to the respondents' argument upon the Factors Acts, the reclaimer submitted the following view of these Acts, and Sale of Goods Act of 1893, so far as applicable to the present case :—

The Factors Acts of 1823, 1825, and 1842, related exclusively to the powers of factors or other mercantile agents intrusted with possession of goods or documents of title to goods. It was only in the case of *Vickers v. Hertz*² that it was ascertained that the Factors Acts applied to Scotland. But it was settled by decisions in England that "agent" did not include "vendee," and that a vendee could not give as good a title as an agent.³ This anomaly was removed by the 4th section of the Factors Act, 1877 (40 and 41 Vict. c. 39), which dealt with the case, not of agents, but of buyers or sellers left in possession of the documents of title to goods. Section 8 of the Factors Act, 1889 (seller remaining in possession), was substituted for section 3 of the Factors Act, 1877, and was now reproduced in section 25 (1) of the Sale of Goods Act, 1893. Section 9 of the Factors Act, 1889 (buyer

¹ *Browne & Co. v. Ainslie*, Nov. 28, 1893, 21 R. 173, *per* Lord Well-wood, Ordinary, at p. 180, and Lord Young, at p. 184.

² *Vickers v. Hertz*, March 20, 1871, 9 Macph. (H. L.) 65, *per* Lord Chancellor Hatherley, at p. 68, 43 Scot. Jur. 346; *Pochin v. Robinows & Marjoribanks*, March 11, 1869, 7 Macph. 622, *per* Lord Ardmillan, at p. 636, 41 Scot. Jur. 334.

³ Benjamin on Sale (4th edn. 1888), p. 831.

obtaining possession), was substituted for section 4 of the Factors Act, No. 139. 1877, and was now reproduced in section 25 (2) of the Sale of Goods Act, 1893. The Factors Act of 1877 only applied to documents of title, but sections 8 and 9 of the Factors Act of 1889 applied to goods as well as to documents of title. Section 25 (2) of the Sale of Goods Act, 1893, created in effect a statutory reputed ownership where, notwithstanding delivery, the passing of the property was suspended. Section 61 (4) of the Sale of Goods Act, 1893, excluded pledge from the scope of the Act; but an exception to this exclusion was made by sections 25 and 47. It was therefore clear that the question now submitted could not have arisen under the Factors Act of 1842, or any of the prior Acts, but that the enactments upon which it was raised occurred only in the recent statutes mentioned.

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It was submitted, on the whole matter, that the right in the claimant Inglis, constituted as above stated, being prior in date to the arrestment used by the claimants Robertson & Baxter, should be given effect to by the Court by ranking and preferring him to the whole fund *in medio*, and that the Lord Ordinary's interlocutor should be reversed.

In their minute of debate, Robertson & Baxter argued;—There could be no doubt that according to the common law of Scotland the agreement of deposit and the endorsement and delivery of the delivery-orders without intimation were ineffectual in competition with the respondents' arrestment and decree. But the reclaimer pleaded (1) that the rights of parties fell to be determined by the law of England, and had made certain averments with regard to that law of which he asked probation; and (2) that, assuming the law of Scotland to be applicable, the rule of the common law had been altered by section 3 of the Factors Act, 1889, and section 1 of the Factors (Scotland) Act, 1890, and that by virtue of these enactments he was entitled to the preference claimed.

I. The averment which the reclaimer made with reference to the law of England was irrelevant on account of its vagueness. It stated as the law of England three alternative propositions (1) that the agreement and endorsement effected a transfer of ownership; (2) that they effected a pledge preferable to subsequent arresting creditors; or (3) that they constituted a right in security preferable to the respondents. The first of these propositions was contradicted by the terms of the agreement itself, besides being inconsistent with the second and third, and the latter were not statements of any legal proposition but of the result which would follow from the application of the law of England, which was not stated, to the particular case. An averment of foreign law in order to be remitted to probation must be clear and precise. It was to be ascertained as a fact, and the party relying on it ought to be in a position to state it distinctly, and was bound to do so. If he failed to do so, not only did he fail to give sufficient notice to the other party of the law on which he founded, but he failed to put the Court in a position to judge of the admissibility of the evidence. If, for example, the third alternative stated by the reclaimer were examined, it was apparent that it did not state the law on which he founded, and that the result stated might conceivably be arrived at on various grounds which, if stated, would not be admitted to probation. For example, it might be arrived at on the view that a pledge made in England was preferable to any diligence used in Scot-

No. 139. land, whether prior or subsequent, or on the view that a decree and diligence proceeding upon an arrestment to found jurisdiction against an Englishman could not compete with a security granted in England. Such averments, if made, would be irrelevant as in direct contradiction to the principles upon which Scots law was governed. But the reclaimer in his third alternative did not give the Court the opportunity of judging upon what propositions he relied. To remit this averment to probation would be to refer the whole case to the determination of English counsel or of the English Court, a course which was plainly inadmissible.

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But, assuming that the reclaimer's averment was not open to this objection, the respondents contended that the rights of parties in this competition must be determined by the law of Scotland, and that any averment that, by the law of England, the right of the reclaimer to the whisky in question was complete, without the necessity of intimation or of actual or constructive delivery, was irrelevant. Where, as here, a question arose as to the competing rights of security holders or creditors doing diligence with reference to corporeal moveables situated in Scotland, the competition ought to be determined by the law of Scotland as the *lex situs* of the goods and the *lex fori* of the competition. The question depended upon whether or not a real right had been completed in the person of the creditor, and that question could not be determined except by the law of the place where the *res* was situated, and where the preference was claimed. It might be true that where a contract was made in England with reference to moveables in Scotland, the rights of the parties to the contract would fall to be determined by the law of England as the *lex loci contractus*, but where the party having right under the contract sought to vindicate his right in and to the thing itself against third parties, then the question depended not upon his contract, which affected only the contracting parties, but upon whether or not he had obtained a real right in the thing itself which he could vindicate against all the world. This question could be determined only by the *lex situs*. The personal rights of the various competing parties might depend upon contracts made or transactions taking place in different countries, and according to different laws, but when these parties sought to vindicate their rights in the subject, and to determine their preferences, they must appeal to the law of the country in which the subject was situated to determine which of them was, or in what order of priority they were, in fact vested with real rights in the subjects; and the law of that country, when so appealed to, could give answer only according to the rules and principles which it recognised and administered within its borders. Accordingly, where a competition arose between different parties as to the priority of their securities over corporeal moveables situated in Scotland, the question must be determined according to the law of Scotland, and where delivery, actual or constructive, was necessary, according to the law of Scotland, to complete the real right, the claimant who could not qualify such delivery must give way to the claimant whose right was complete.

The law of Scotland was settled to this effect by decision, and was in accordance with the opinions of the more numerous and weighty authorities upon private international law. The authorities about to be cited referred in some cases to competitions with reference to the right to debts due in Scotland, but as these had always been dealt with on the footing that they had a local situation in Scotland just as

corporeal moveables which were actually situated there, their applicability was obvious. In Bell's Comm. 5th edition, ii. 18, 19, the law was thus stated:—"An assignation made in England requires not the ceremony of intimation to complete the transfer of a debt due there. But such an assignation of a debt due in Scotland produced in a competition with creditors arresting the fund will be ineffectual without intimation or something equivalent"; and in a note it is explained that the decision of the House of Lords, in the case of *Sir J. Gray*¹ proceeded on the view that there had been intimation. In *Carrick v. Dickie's Assignees*,² it was held that an assignation made in England by one English merchant to another, of certain consignments of goods made by the cedent to a Glasgow firm carrying on business in Jamaica, but not intimated, was invalid in competition with the cedent's assignees in bankruptcy, the goods, as in the custody of the Glasgow firm and under their control, being viewed as locally situated in Scotland. In *Strachan v. M'Dougle*³ an arrestment was held preferable to an unintimated assignation of a policy of life assurance, although the policy had been delivered along with a letter of assignation to the assignee in England. In *Donaldson v. Ord*⁴ the question arose in a competition between a lady, who had arrested funds in Scotland belonging to her debtor, and persons claiming that these funds had been assigned to them by an English creditor deed prior to the arrestment. It was held that the competition must be determined according to the law of Scotland, and that, as the facts and circumstances proved did not come up to intimation, the arrestments must prevail.

In *Connal & Co. v. Loder*⁵ the following propositions, as stated in the rubric, were decided, viz.:—" (1) That the iron being locally situated in Scotland, the question whether the right to the iron was carried by indorsation of the warrants, or by indorsation and intimation, fell to be determined by the law of Scotland; (2) that the right to the iron was not completed by indorsation alone; (3) that the right was completed by indorsation and intimation." In that case Lord Justice-Clerk Inglis dealt by way of illustration and argument with the precise question which was raised in the present case, his opinion being in favour of the respondents' contention. The only opinion, so far as the respondents were aware, which conflicted with these authorities was the opinion of Lord Rutherford in the case of *Wallace v. Davies*.⁶ In the Inner-House it was held that intimation had been made, and no opinion was expressed on the question discussed by Lord Rutherford. The case was prior to *Donaldson v. Ord*,⁴ and was cited in that case, and referred to by the Lord Justice-Clerk in his opinion; the decision in *Donaldson v. Ord*⁴ must be held to overrule the opinion of Lord Rutherford, with which it was inconsistent.

The Scottish Provident Institution v. Cohen,⁷ cited by the reclainer, decided no more than this—that, as by the law of England, where the

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¹ *Gray v. Duke of Hamilton*, 1708, Robertson's Rep. 1.

² *Carrick v. Dickie's Assignees*, May 30, 1822, 1 S. 414.

³ *Strachan v. M'Dougle*, June 19, 1835, 13 S. 954.

⁴ *Donaldson v. Ord*, July 5, 1855, 17 D. 1053, *per* Lord Deas at p. 1060, and Lord Justice-Clerk Hope at p. 1068.

⁵ *Connal & Co. v. Loder*, July 17, 1868, 6 Macph. 1095, 40 Scot. Jur. 624.

⁶ *Wallace v. Davies*, May 27, 1853, 15 D. 688, 25 Scot. Jur. 415.

⁷ *Scottish Provident Institution v. Cohen*, Nov. 20, 1888, 16 R. 112.

No. 139. transaction took place, the personal right was complete, intimation following upon it was sufficient to complete the security according to the law of Scotland. It was plain that if no intimation had been proved the decision would have been the other way. In the *North-Western Bank, Limited, v. Poynter, Son, & Macdonald*,¹ also cited by the reclaimer, no question of conflict arose between the laws of England and Scotland, but opinions were expressed by the Lord Chancellor and Lord Watson that had there been such conflict the question would have fallen to be determined by the law of England. What the Lord Chancellor and Lord Watson said was that the transactions having taken place in England, their meaning and effect ought in conflict to be determined by the law of England. But this did not touch the question here. There was no question in that case of the completion of the right to the debt in Scotland. The right of one or other of the parties was complete and indubitable. The only question was which party had the right. The reclaimer also relied upon the undernoted cases.² They were all cases as to the effect to be allowed to a foreign sequestration or commission of bankruptcy. The rule applied in such cases, both in England and Scotland, was that, where sequestration or its equivalent had been awarded by the Court of the debtor's domicile, no second sequestration would be awarded. The principle upon which the rule was founded was that bankruptcy was, in its nature, of universal application. There could be no partial sequestration. Accordingly a principle must be found which would determine in a case of conflict which Court had the power of effecting such a compulsory transfer of the *universitas* of the bankrupt's estate, and the principle adopted here and in England was that the appropriate *forum* was the *forum* of the debtor's domicile. The law of his domicile was that which regulated his succession, his personal rights, status, &c., and it appropriately followed that the Courts of that *forum* had a right to divest him of the *universitas* of his estate, and that all his creditors ought to resort there as the proper *forum concursus*. The rule was special to the case of bankruptcy, and was dictated by the expediency of recognising one *forum concursus*, and the propriety of recognising the most convenient.³ To apply the law of the domicile to the ordinary transfer of moveables would involve an inquiry in every case into the domicile of the transferor before the validity of a transfer could be affirmed, and would lead to anomalous results. It would follow, for example, that a domiciled Englishman resident in Scotland could give a bill of sale over his furniture in Scotland, while a domiciled Scotsman resident in London could not give a bill of sale over his furniture there. The respondents also referred to the undernoted authorities.⁴

II. The reclaimer's second plea against the respondents' right under

¹ *North-Western Bank, Limited, v. Poynter, Son, & Macdonald*, Nov. 16, 1894, 22 R. (H. L.) 1.

² *Strother v. Reid, M. Forum Competens*, App. No. 4; *The Royal Bank of Scotland v. Scott, Smith, Stein, & Company*, Nov. 23, 1812, *Buchanan's Justiciary* and other cases, p. 329, 1 Rose, 462; *Gill v. Worswick*, 1 H. Bl. 690; and *Goetze v. Aders*, Nov. 27, 1874, 2 R. 150.

³ *Bell's Comm.* ii. 569, 570, M'L's edn.; *Donaldson v. Ord*, 17 D. 1053, per Lord Deas at p. 1062; *In re Artola Hermanos*, 1890, 24 Q. B. D. 640, per Fry, L. J., at pp. 648, 650.

⁴ *Alcock v. Smith* [1892], 1 Ch. 238, Kay, L. J., at pp. 267-268; *Savigny's Droit Romain*, Brussels (vol. viii. 182); *Savigny's Private International Law* (Guthrie's translation, pp. 183, 184); *Foelix Traité du*

their arrestments and decree was founded upon section 3 of the Factors Act, 1889, and section 1 of the Factors Act, 1890. The Act in which the section founded on occurred was an Act which repealed all the previous Factors Acts, and the purpose of which was to consolidate the law upon the subjects dealt with in those Acts in one Act. The subject-matter of the Act might be generally stated to be the presumed powers of factors or mercantile agents or others put in possession of goods or documents of title by the true owners, to deal with such goods or documents of title, and the object of the Act was to render such transactions valid in certain cases in a question with the true owner. The division of the Act in which the section relied on occurred was headed "Dispositions by Mercantile Agents." The first section under this heading, viz., sec. 2, defined (subsec. 1) the powers of mercantile agents in possession of goods or the documents of title to goods, and provided (subsec. 2) that these powers should continue, notwithstanding the determination of the owner's consent to the agent's possession, (subsec. 3) that possession presumed consent, and (subsec. 4) that this was to be presumed in the absence of evidence to the contrary. Then followed the section founded on. Now it was to be observed that these sections were substantially re-enactments of the provisions of the repealed Factors Acts. In particular, sec. 2, subsec. 3, and sec. 3 (the clause founded on) were substantially a re-enactment of sec. 4 of the Factors Act, 1842, the words of sec. 3 being copied from it almost verbatim. That the Act of 1842 was applicable to Scotland was settled by *Vickers v. Hertz*.¹ If the reclaimer's contention therefore be sound it followed that the common law of Scotland, which required intimation in order to complete the transference of goods held under a delivery-order, had been abrogated by a statute which purported to deal, not with the completion of real rights in moveables, but only with the powers of mercantile agents in dealing with the property of their principals. The result was sufficiently startling, but it was rendered all the more so if it was considered that in the reclaimer's view this had been the law of Scotland since 1842. Many cases had arisen since then in which it would have been in the interests of one of the parties to have put forward such a contention, but there was no record of any attempt having been made to found on the Factors Acts in similar competitions. Nor, so far as the respondents were aware, had it ever been suggested in any case in England, to which the Factors Acts also applied, that this clause had any such effect as the reclaimer contended for.² Such a reading of the statutes of 1842 and 1889 was not admissible; the words relied on by the reclaimer must be read in connection with the statutes in which they occurred; their meaning was that for the purposes of the Act,—that was to say, in questions between the principal and persons acquiring right from a factor, or person entrusted with documents of title,—a pledge of the documents of title should be deemed to be a pledge of the goods. The enactment, so read, consisted with the scope of the statutes in

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Droit International Privé, section 62 and note; *Westlake's Private International Law*, 3d edition, pp. 119, 168, 169, 179; *Bar, International Law*, Gillespie's edition, 602-3; *Story, Conflict of Laws*, sections 395, 524, and 525; *Wharton, Conflict of Laws*, 2d edition, section 353; *Dicey, Conflict of Laws* (1896), p. 530, rule 140, and note.

¹ *Vickers v. Hertz*, March 20, 1871, 9 Macph. (H. L.) 65, 43 Scot. Jur. 346.

² *Benjamin on Sale*, 4th edition, pp. 827 to 838.

No. 139. which it occurred, and with the understanding of merchants and of the profession during the whole time in which it had been upon the statute-book.

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Further, the transaction in question was neither a pledge of documents of title nor a pledge of goods. That it was not a pledge of documents of title was clear from the terms of the agreement, which bore that the transaction was a deposit of the goods themselves. Further, according to the law of Scotland, the endorsement and delivery of the order to the reclaimer, even if intimated, did not constitute a pledge, but a transference of the proprietary right to the goods, available not only for the specific advance for which the transfer was made but for all other advances.¹ Accordingly, if the language of the section was to be read literally, and regarded as of universal application, its scope was restricted to contracts of pledge, and so did not cover the transaction in question.

The reclaimer founded an argument upon section 9 and section 2 (1) of the Factors Act, 1889. It was difficult to understand the application of these sections to the present case. Goldsmith was the owner, and it was hard to see how his title to transfer could be strengthened by enactments which would make him in certain circumstances as good as an owner. The question was not as to Goldsmith's power to deal with the goods. He had ample power—the power of an owner. The question was whether he validly exercised his power and effectually transferred the goods. The reclaimer had wholly mistaken the effect of the Factors Acts upon the negotiability of documents of title. At common law such documents lacked the two essentials of negotiability (with the exception of bills of lading, which lacked only the first), viz. (1) possession of them was not conclusive of the title to transfer; and (2) the property they represented was not transferable by their mere delivery or indorsation without intimation. With reference to the former of these requisites, the Factors Acts introduced a change, and in certain defined cases the possession of the document was declared to be conclusive of the title to transfer. With reference to the second, the *modus transferendi*, no change was made, with one exception—that contained in section 10 of the Act of 1889. Had the Factors Acts had the effect for which the reclaimer contended, of rendering documents of title in all respects equivalent to bills of lading, the special provision of section 10 would have been unnecessary. Its insertion shewed that in other respects the law as to the transfer of goods held upon documents of title was unchanged. The opinions of Lord Young and Lord Wellwood, Ordinary, in *Browne & Co. v. Ainslie*,² were *obiter*, and were not concurred in by the other Judges.

The respondents submitted that they were entitled to be ranked and preferred in terms of their claim, and that the interlocutor of the Lord Ordinary should be adhered to.

The consulted Judges returned the following opinions:—

LORD PRESIDENT and LORD ADAM.—We concur in Lord M'Laren's opinion.

LORD M'LAREN.—My first impression after considering the arguments

¹ Hamilton v. The Western Bank, Dec. 13, 1856, 19 D. 152, 29 Scot. Jur. 77.

² Browne & Co. v. Ainslie & Co., Nov. 28, 1893, 21 R. 173.

was that unless the 3d section of the Factors Act, 1889, were limited in its application to the case of pledges by "mercantile agents," and did not apply to the contracts of principals, the title of the indorsee of the delivery-order would be preferable to that of the arresting creditor.

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On further consideration I have come to be of opinion that the decision of the case does not depend on whether the 3d section applies to pledges by principals. I think that the language of the enactment is so general that it may be taken to include the case of a pledge by a principal, but then I think that when so applied it makes no change in the law of title. The turning point of the case, in my view, is the meaning of the word "pledge" as used in the 3d section.

But for the interpretation of the word "pledge" contained in the 1st section it would be very difficult to attach any meaning to the 3d section.

Pledge in our law is a real security over moveables constituted by delivery of the goods to the pledgee or his order, to the effect that he may detain the goods until paid. It is plain that there can be no pledge of a document of title in this sense, because this would only mean a real security over the piece of paper. But according to the 1st section the word "pledge" is to include "any contract pledging or giving a lien or security on goods."

Reading this definition into the 3d section, the result is that a contract giving a lien or security on goods may be made by a holder of documents of title, and also that an actual pledge or real right in security may be made by a holder of documents of title. It is not explained what is to be done with the documents of title in order to constitute such contract right or real right, as the case may be. I therefore assume that this is left to the operation of the general law of contracts and rights in security, under which a transfer of the document of title gives a contract right effectual against the grantor and any principal whom he may represent, while intimation to the warehouse-keeper is necessary to the constitution of a real right.

All that we know of the history of the development of this branch of the law is consistent with the proposed construction: in particular the case of *M'Ewan v. Smith*,¹ which stamped the doctrine I refer to with the approval of the House of Lords, was decided seven years after the passing of the Factors Act of 1842. Now, the Factors Act of 1842 contains an enactment equivalent to the 3d section of the Act of 1889, and, if the meaning of the enactment was that a right in security might be constituted by the mere transfer of a document of title without intimation to the warehouse-keeper, then the judgment in *M'Ewan v. Smith*¹ was wrong. But I must hold that judgment to be good law, and I attach little weight to the circumstance that the Factors Act of 1842 is not considered in the judgment, because this only proves that in their Lordships' view the Factors Act had no effect in altering the mode of acquisition of a real right.

I do not enter upon the other points in the case, because they have been treated by other members of the Court in entire accordance with my opinion. I think that Mr Inglis only acquired a contract right to the whisky under the agreement of 18th June 1894 and the relative indorsed but unin-

¹ March 20, 1849, 6 Bell's Appeals, 340, 21 Scot. Jur. 369.

No. 139. *Robertson & Baxter v. Inglis.* Mar. 18, 1847. *Robertson & Baxter v. Inglis.* timated delivery-order. I assume that this is a good contract right by the law of England; and then applying the law of Scotland to the case of competition of real rights, my opinion is that the right of Robertson & Baxter, the arresting creditors, being followed by intimation, is preferable to the right of Inglis.

LORD KINNEAR.—I am of opinion that the interlocutor of the Lord Ordinary is right.

1. I think the question in dispute must be determined by the law of Scotland. The validity and effect of an arrestment of goods in Glasgow cannot be determined by any other law, and the competing claimant, who alleges a right preferable to that of the arrester, relies upon an Act of Parliament which has been made applicable to Scotland, and which we are bound to construe in the same way as if it had been intended to apply to Scotland from the first. But he founds upon the indorsement of a warrant issued by the warehouse-keeper in Glasgow, and he maintains that, as the agreement under which the warrant was indorsed and delivered to him was executed in England between two domiciled Englishmen, the question between him and the arresting creditor must be treated as one of English law. I agree that the law of England must regulate the effect of the English agreement, as between the parties to that agreement. But the question is not whether the claimant Inglis has acquired a good right against the owner of the goods, but whether his right, assuming it to be effectual against the party with whom he contracted, has been so completed as to put the Glasgow warehouse-keeper in the position of holding no longer for the owner of the goods deposited in his store, but for his transferee. I find no averment on record that the mere indorsement and delivery of a warehouse-keeper's certificate, without notice to the warehouse-keeper, has this effect by the law of England; but if it were so averred it would not, in my opinion, be relevant to the question. In so far as it is a question of contract, it depends upon a contract made and to be performed in Scotland. There is no new contract between the warehouse-keeper and the indorsee of the certificate. The latter is substituted for the indorser, but the warehouse-keeper remains under the original contract which he made in Scotland, when he issued the certificate by which he undertakes to hold for the owner or his assigns. If the transferee, therefore, had brought a direct action in this Court against the warehouse-keeper for delivery of the goods, I cannot see any ground on which the law of Scotland could have been displaced. The *lex loci contractus*, the *lex loci solutionis*, the *lex domicilii* of the debtor, and the *lex fori* would have been the same; and the circumstance that the pursuer had acquired right by an English transaction would not have excluded the law of the place where the contract upon which he sued was made, where it was to be performed, and where the action was brought—*Robertson v. Burdekin*.¹ But if this were doubtful, it would still be clear, in my opinion, that in a case which resolves into a competition of diligence, the real right in the goods in dispute must be determined by the law of the place where the goods are situated, and where the remedy is sought—*Donaldson v. Ord*.²

2. If the case is governed by the law of Scotland, Messrs Robertson &

¹ Nov. 14, 1843, 6 D. 17, 16 Scot. Jur. 65.

² 17 D. 1053.

Baxter must in my opinion be preferred. Were it not for the controversy No. 139.
as to the meaning and effect of the Factors Acts of 1842 and 1889, the
question would be very simple.

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Goods belonging to an Englishman were lying in a warehouse in Scotland. The owner holding the warehouse-keeper's certificate made a contract of hypothecation, whereby he declared that he delivered the goods to a lender in pledge for an advance. At the same time he indorsed the warehouseman's certificate to the lender; but the contract made no reference to the certificate or its indorsement. The lender gave no intimation to the warehouse-keeper, and a creditor of the borrower arrested the goods in the warehouse-keeper's hands. There can be no doubt that, independently of the Factors Act, the arrestment excludes the lender, because the warehouseman, having no notice of any transference of the owner's right, was still holding for him, and not for his transferee, when the arrestment was effected. But it is said that the law of Scotland has been altered by the Factors Acts, so that warehouse-keepers' certificates, and similar documents of title, must now have all the effect of bills of lading, and a pledge of the document is for all purposes equivalent in law to a pledge of the goods.

So far as this depends on the Act of 1842 the argument seems to me very clearly untenable. The enactment in that statute that "all contracts pledging or giving a lien on documents of title shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relate," forms part of a clause which deals exclusively with contracts made by agents intrusted with documents of title which are used in the ordinary course of business as proof of the possession or control of goods, and its purpose is to validate contracts of such agents as binding upon the true owners of the goods. That it was not intended to alter the general law is sufficiently established by the decision in *M'Ewan v. Smith*,¹ where it was held, some years after the passing of the statute, that a delivery-note to the order of the vendee is not tantamount to a bill of lading, and will not transfer a right of property to the transferee. Again, in the case of *Cole v. The North Western Bank*,² where the effect of the Factors Act of 1842 was very elaborately discussed, its effect is thus stated by Lord Bramwell:—"Speaking generally, the statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed." I cannot think it doubtful that the clause relied on applies to such cases only, and has no relation to transactions in which the true owner is himself the granter of the security.

It may be a more difficult question whether the third section of the Act of 1889 may not have a wider application. It appears to me, however, that, occurring as it does in an Act to amend and consolidate the previous Factors Acts, it merely reproduces the provisions of the Act of 1842, and that its only effect, like that of the corresponding provision in the earlier Act, is that, as against the owner of the goods, a pledge by an agent intrusted with documents of title is as effectual when made by pledging the document as it is when made by pledging the goods themselves.

¹ 6 Bell's App. 340.

² 1875, L. R., 10 C. P. 354, at p. 376.

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It must be admitted that in construing a statute, the literal and grammatical meaning of the words is not to be restrained by any conjecture as to the probable intention of the Legislature, which may be founded on previous legislation. But when the clause in question is read with the aid of the interpretation clause, I think the construction which I adopt completely satisfies the words. On this point I concur in the opinion of Lord Kyllachy, whose reasoning I think it unnecessary to repeat. But even if the enactment were applicable to pledges by the real owners of goods, I should still dissent from the construction by which it is held to alter the law with reference to the completion of the title of a pledgee. There can be no question as to the law as it stood before the passing of the Act. The law of Scotland was entirely in accordance with the doctrine laid down by Baron Parke in *Farina v. Home*,¹ with reference to a wharfinger's warrant, very similar in its terms to the warehouse-keeper's certificate now in question. "This warrant is no more than an engagement by the wharfinger to deliver to the consignee or anyone he may appoint. And the wharfinger's possession is that of the consignee until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession is that of the assignee, and then only is there a constructive delivery to him. In the meantime the warrant and the indorsement of the warrant is nothing more than an offer to hold the goods as the warehouseman of the assignee." The claimer's argument is in effect that this law is now entirely altered, because the enactment he relies on means that a pledge of goods may be effectually carried out, and the pledgee's title completed by mere indorsement and delivery of a warehouseman's certificate or other similar document, without notice to the custodian of the goods, and without attornment by him to the pledgee. If this had been the intention of the Legislature, I think it would have been so enacted in terms.

In considering the particular facts of this case with reference to the provisions of the statute, it appears to me to be doubtful whether the delivery of the warehouse-keeper's certificate can be properly described as a pledge of documents of title. It appears to me to have been delivered as an instrument for carrying out a contract to impledge the goods to which it relates. But at all events it is not by the law of Scotland a pledge of the goods; because there can be no completed pledge without transfer of possession, and the pledgee has not been put in possession, inasmuch as the transfer of the warrant was not intimated to the warehouse-keeper. It follows that the goods were still open to be attached by an arrestment used by creditors of the owner.

LORD KYLLACHY.—I am of the same opinion which I some time ago expressed as Lord Ordinary. But I desire to add a few sentences by way of further explanation, and, in the first place, to state a little more fully the view which I take as to the general scheme and scope of the Factors Act of 1889.

I hold that that Act—like the previous Factors Acts which it consoli-

dates and amends—deals exclusively with a limited class of transactions, No. 139. viz., those by which rights over goods are constituted in favour of *bona fide* third parties, by persons who are not themselves the real owners of the goods, but are *interposed* persons who have *apparently* full powers of disposition, and are so placed by reason of something done or permitted by the real owners.

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The earlier Acts did not go beyond the more common and conspicuous types of such transactions. These were (1) *Liens* (1st Act, Geo. IV. c. 83 ; Act of 1889, sec. 7) obtained by consignees for advances to consignors, who, as agents for the true owners or otherwise, had been permitted by the latter to ship goods in their own names ; (2) *Sales* (2d Act, 6 Geo. IV. c. 94 ; Act of 1889, sec. 2) by mercantile agents who had been entrusted by the true owner with the possession of the goods or documents of titles to the goods ; (3) *Pledges* (3d Act, 5 and 6 Vict. c. 39 ; Act of 1889, sec. 2),—that is to say, contracts or agreements by such mercantile agents pledging or constituting a lien over the goods or documents of title entrusted to them.

The later Act—that of 1889—carried the principle a step further ; extending it to a fourth and cognate class of transactions, viz., contracts of sale or of pledge by vendors or vendees of goods, who, having either no power or only a qualified power of disposition, have yet been left or put in possession of goods, or document of title to goods, in such circumstances as to confer an *apparently* absolute power of disposal. Such persons transacting whether by way of sale or of security, with *bona fide* third parties, are assimilated by the Act of 1889 to mercantile agents ; so that rights granted by them cannot be challenged or defeated by vendors or vendees, who (by virtue of lien or ownership) would, but for the Act, have had right to do so.

This, I apprehend, is the full extent to which the ground covered by the Factors Acts extends ; and if I am right in this, it follows that under the later, as under the earlier Acts, the operation of the enactments is confined to transactions where there are three parties, whom, for shortness, I may call (1) the owner ; (2) the apparent owner ; (3) the *bona fide* buyer or security holder deriving right from the apparent owner. It also follows that the enactments operate, not by creating rights of the nature of real rights good as against all the world, but contract or personal rights, good against the true owner, on the principle of implied authority or personal bar.

That, speaking generally, appears to me to be the scheme and scope of the Factors Acts, including the Act of 1889. It may be affirmed, I think, with certainty, that unless on the now suggested construction of section 3 of the Act of 1889, there is not a single enactment of that Act, or of the previous Acts, which professes to touch transactions in which the true owner is himself the consigner, the seller, or the granter of the security.

Neither is there a single enactment which touches the general law with respect to the completion of title either in sales or securities. On the contrary, the rights constituted are throughout personal rights as distinguished from real rights—rights taking effect not by any assumed completion of title, but by being declared good as against true owners on the principle I have above expressed.

Now, if this be so, it must, I think, be acknowledged that there is at

No. 139. least a considerable presumption against the suggested construction of section 3 of the Act of 1889. It becomes *ex hypothesi* a section which introduces matter wholly foreign to the whole scope and purpose of the Factors Acts. It becomes so in two respects—(1) as establishing a rule of general law with respect to transactions where there is no interposition of an apparent owner; and (2) as establishing a rule of general law with respect, not to the constitution of personal rights (*iura ad rem*), but to the constitution and perfection of real rights (*iura in re*). It is of course possible that such may have been the intention of the Legislature, but it is scarcely probable. At all events, a construction of the section must, it is thought, be preferred which—giving due force to its terms—confines its operation (1) to dispositions by way of pledge *by mercantile agents*; and (2) to the constitution by such agents of *personal* rights as against their principals.

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What, then, is the true construction of section 3? The answer, I think, is that the construction is just the same as that of the corresponding clause in the 4th section of the previous Act of 1842. In other words, section 3 neither declared nor introduced any doctrine or rule of general law; but provided only that, for the purposes of the Act, a pledge of goods—that is to say, a contract of pledge of goods—may be constituted by a contract impledging the document of title representing the goods. The contract assumed is of course a contract by a mercantile agent, or by one of the persons assimilated by the Act to mercantile agents; for, *ex hypothesi*, the Act only applies to the contracts of such persons. It is also necessarily a contract and nothing more; for as against the owner nothing more is needed, and the Act aims at nothing more. But the effect and substance of the enactment just is, that the owner shall not escape because the transaction takes the form of an impledgment of documents in place of a direct impledgment of goods. Section 3 in this view is truly an interpretation clause; and its purpose would have been equally served if in section 1 (the interpretation clause of the Act) there had been added, say to the definition of pledge, these words, “and (for the purposes of the Act) a contract pledging or giving a lien or security on documents of title to goods shall be deemed and taken to be a contract pledging or giving a lien or security over the goods themselves.”

I am not sure that such an exegesis was strictly necessary under the Act of 1842. It may there have been introduced (section 4) *ob maiorem cautelam*. But it is a material observation that, in the Act of 1889, it *was* necessary. In particular, it was absolutely necessary to the completeness of section 2, subsection 1, and also of sections 4 and 5. Applying, as it did, to sale as well as pledge, section 2, subsection 1, omitted altogether the case of an impledgment of documents; and sections 4 and 5 (though not for the same reason) did the same thing.

It is no doubt true that the language of section 3 of the Act of 1889 differs somewhat from the language of the corresponding clause in section 4 of the Act of 1842. The last named clause provided that “all *contracts* pledging, &c., documents of title, shall be deemed and taken to be pledges, &c., of the goods to which the same relates.” Section 3 of the 1889 Act, on the other hand, provides shortly, “a *pledge* of documents of title to goods shall be deemed to be a pledge of the goods.” But it has never, so

far as I know, been suggested that this change of expression made any difference in the construction. The truth, I apprehend, is that the interpretation clause of the Act of 1889 (section 1) *voce* Pledge, has been held, and rightly held, to supply what was required to make the old clause and the new clause strictly coincident. No. 139.
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I therefore conclude that the reclaimer's case fails, so far as it rests upon the supposed effect of section 3 of the Act of 1889.

With respect to sections 8 and 9 of that Act, I adhere to the opinion that they have no application. Baxter and Goldsmith did not stand in the relation of vendor and vendee; nor was Baxter exercising any rights of vendor in arresting for his debt. His contract of sale to Goldsmith had been long before executed; and the case is exactly the same as if the arrestment had been laid on by some fourth party—*e.g.*, a creditor of Goldsmith in some wholly extrinsic debt.

As to section 10, it has no application, for the same reason, and also because as between Goldsmith and Inglis (they being the original transferor and transferee of the documents of title), the common law is unaltered. And the common law both in England and Scotland is that a transfer of documents of title (other than Bills of Lading) has no effect without intimation and attornment.—*Connal v. Loder*,¹ *Farina v. Homa*.²

I may also point out two, as it seems to me, startling results of the reclaimer's argument.

1. As already stated, section 10 of the Act leaves the common law operative with respect to documents of title passing (on an original sale) between vendor and vendee. If, therefore, Goldsmith had sold to Inglis, and transferred the document of title to him as under a *sale*, there could have been (without intimation) no divestiture of possession. The vendor's lien and right to stop *in transitu* would have remained intact. But, according to the reclaimer's construction, section 3 makes a transfer by way of *pledge* operate a divestiture of possession without intimation at all.

2. It must be remembered that documents of title are of two kinds. They may be warehouse-keepers' certificates, or they may be mere delivery-orders emanating from the owner, and of which the warehouse-keeper may know nothing. This was decided in the case of *Vickers v. Hertz*,³ where it was also decided that documents of title may apply even to non-specific goods. It might therefore on the suggested construction happen that goods might be pledged by transfer of delivery-orders of which the warehouse-keeper knew nothing, and that he might deliver under a subsequent delivery-order, or to an arrestee under a forthcoming, and yet long afterwards might be confronted by a statutory pledge, constituted without intimation, and having of course the effect of making him responsible as from its date to a pledgee of whom he never heard.

I have only to add that I have been content to assume for the purposes of the question, that the contract of hypothecation between Goldsmith and Inglis, taken along with the indorsation of the warehouse-keeper's certificate, constituted a *pledge of documents* in the sense of the Act. I am not, however, satisfied that there was in the present case any pledge of documents

¹ 6 Macph. 1095.

² 16 M. & W. 119.

³ L. R., 2 Sc. Appeals, 113.

No. 139. at all. I refer on this point to the opinion of Lord Low, and also to the last paragraph of my opinion in the Outer-House.

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LORD KINCAIRNEY.—The question regards certain hogsheads of whisky which belonged to Walter C. Goldsmith of London, and were deposited in the warehouse of the Clyde Bonding Company, who issued a warrant or delivery-order bearing that the whisky was “held to the order of Walter C. Goldsmith, or assigns, by indorsement hereon.”

The competition for the whisky is between Inglis, who advanced money to Goldsmith, and received from him the agreement dated 18th June 1894, and also the delivery-order indorsed, but who did not intimate this transaction to the keeper of the warehouse, and Robertson & Baxter, who, as creditors of Goldsmith, arrested the whisky on 11th February 1895. As it happens, Goldsmith had bought the whisky from Robertson & Baxter. But they have put forward no claim as unpaid sellers, but have maintained their case as arresting creditors only. The question is, whether Inglis acquired a complete real right to the goods by the agreement and by the indorsement and delivery of the delivery-order without intimation or delivery of the whisky, or whether intimation of the transaction to the warehouse-keeper was essential to the completion of his right. The Lord Ordinary has held that his right was incomplete, and has therefore preferred the arresters.

The first question discussed is whether the decision of the case depends on the law of England, as maintained by Inglis, or on the law of Scotland, as maintained by Robertson & Baxter. I am of opinion that a question of English law might be involved. The nature of the right acquired by Inglis from Goldsmith falls to be ascertained in accordance with the law of England, seeing that both parties were Englishmen, and that the transaction between them took place in England; on the other hand, the nature and quality of the arrester's right must depend on the law of Scotland; and I have no doubt that the competition for the goods warehoused in Scotland raises a question of Scotch law. I think that is a point settled by decisions in which unintimated assignations in England have been held ineffectual in competition with arrestments in Scotland. I am, however, of opinion that Inglis has made no relevant averments about the law of England. I assent on this point to the argument for Robertson & Baxter. I am therefore shut up to consider this case as depending on the law of Scotland, on the footing that there is no special English law to which it is necessary to refer.

There can be no doubt that, at common law, Robertson & Baxter, the arresting creditors, would certainly be preferred, on the principle that a real right to moveables cannot be acquired by writing without intimation or such delivery as the circumstances admit of; that is to say, such intimation to the holder of the goods as will convert him from a holder for the grantor of the writing into a holder for the grantee. This is a rule settled, elementary and important, because otherwise the holder could not know to whom he was bound to pay or to deliver. At common law, this principle applies as much to goods held by documents of title as to other goods. Although a document of title may bear that the goods are held for the owner or his indorsee, yet the grantor will not be converted into a holder for the indorsee

without intimation. On that point it is sufficient to refer to the cases of No. 139. *M'Ewan v. Smith & Co.*,¹ *Melrose v. Hastie*,² and *Connal v. Loder*.³

In *M'Ewan v. Smith & Co.*,¹ the distinction was clearly drawn between documents of title such as delivery-orders and bills of lading, to the effect that the latter did, and the former did not, pass a real right to the goods without intimation. Although *M'Ewan v. Smith & Co.*¹ was a case from Scotland, I understand that the judgment has always been treated as in accordance with the law of England.

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It is still more clear that, at common law, Inglis could not acquire a security over the goods of the nature of a right of pledge, as that right is understood in the law of Scotland. For it is plainly impossible that there can be a pledge without possession, either by the pledgee personally or by his agent. It is sufficient on that point to refer to the cases of *Hamilton v. The Western Bank of Scotland*,⁴ and *M'Kinnon v. Nanson*.⁵

Neither the agreement nor the indorsation could confer any possession on Inglis, either by himself or his agent; although it is in accordance with our law to hold that, if he intimated his right to the warehouse-keeper, he, after that intimation, would hold as his agent and on his account.

If, then, our common law knows no right of completed security or of completed pledge which, without intimation or possession, can compete with an arrestment, the question is, what difference has been effected by recent legislation? and the only Act to which, on this point, it is necessary to refer is the Factors Act, 1890, applying to Scotland the English Act of 1889. That is a consolidation Act, and it repeals the prior Factors Acts. At the same time, it re-enacts several of the provisions of the prior Acts. For example, the enumeration of documents of title is much the same as in the prior Act, and the third section of the last Act, about to be quoted, does not seem materially different from a clause in the fourth section of the Act of 1842.

The 10th section of the Act of 1889 modifies to a certain extent the law as decided in *M'Ewan v. Smith*,¹ for it provides that the transfer of documents of title shall have the same effect as the transfer of a bill of lading, but only to the extent of defeating a vendor's lien or right of stoppage *in transitu*, which are matters not here in question. But, except to that extent, the recognised distinction between a bill of lading and other documents of title seems to remain.

I do not see the bearing of sections 8 and 9 on the present question. I concur on that point with the Lord Ordinary, and will say no more about those sections.

The question, however, turns on section 3, which is thus expressed,—“A pledge of the documents of title shall be deemed to be a pledge of the goods”; and this, as has been noticed, is a re-enactment of a provision in the Act of 1842.

It is maintained that this section, or the corresponding clause in the Act of 1842, has the effect of altering the law to the effect of providing that a

¹ 6 Bell's Appeals, 340.

² March 7, 1851, 13 D. 880, 23 Scot. Jur. 398.

³ 6 Macph. 1095.

⁴ 19 D. 152.

⁵ July 2, 1868, 6 Macph. 974, 40 Scot. Jur. 560.

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completed right of security and of pledge over goods will be acquired by delivery of the documents of title without intimation to the holder of the goods and without possession, which will prevail against a subsequent arrestment, contrary to what has hitherto been held to be the settled law of Scotland. That, indeed, is not enacted expressly, but it is said that it must be inferred.

The Lord Ordinary designates this a startling proposition, and I agree that it is. It might have been expected that if it was intended to alter a settled rule of law, that would have been done expressly, and not left to a mere inference from a clause in an Act which relates to totally different matters. It is, I think, antecedently highly probable that no such effect was intended. Nevertheless, startling or not, if such be the necessary import of the words, they must of course receive effect.

I am unable to adopt the view that this section can be read as applicable only to mercantile agents. The words seem to me too unequivocal to permit of that limited construction, and I feel bound to read section 3 as involving the proposition that a pledge by an owner of goods of documents of title to the goods shall be deemed to be a pledge of the goods.

I am unable to see why, if that be the meaning of the section, any limitation should be put on its scope and effect merely for the reason that it occurs in a Factors Act and is associated with provisions about factors; indeed, I have difficulty in realising what limitations are suggested.

Now, if that be the meaning of the clause, and if the clause so interpreted be applied to the present case, this conclusion is unavoidable, that if there was a pledge of the delivery-order or warrant for the whisky by Goldsmith it must be deemed to be a pledge of the whisky in the sense of the Factors Act. Up to this point I go along with the argument for the claimant Inglis, the indorsee of the delivery-order. But when it is said that this is conclusive of the case, I venture to think that this is not so, and that more than one question remains over. I shall mention only these two,—(1) Whether the transaction between Goldsmith and Inglis was a pledge of a document of title, that is, of the delivery-order; and (2) whether, if it was, and if it effected a pledge of the goods in the sense of the Factors Act, such a pledge was preferable to the arrestment.

1. Did the transaction amount to a pledge of the delivery-order, which I assume to be a document of title? The transaction was effected by the execution of the agreement, dated 18th December 1894, and also by the indorsation of a delivery-order. I have considerable difficulty in understanding the agreement, which bears that Goldsmith thereby deposits with Inglis the wines and spirits specified, which is not so much a legal fiction as an obvious untruth. It refers to the spirits and wines in a schedule. Whatever may be its effect, it would not be incorrect to describe it as a contract giving security on goods. The delivery-order (also printed in the appendix) relates only to one item in the schedule; whether there were delivery-orders applicable to the other items of the schedule does not appear. But considering this deed in the first place, and supposing there had been no indorsed delivery-order, I think it clear that it would not of itself confer a security which would compete with a subsequent arrestment; but that, if it were intimated to the warehouse-keeper, it would. It might not enable

Inglis to obtain the goods from the warehouse-keeper, who would be entitled to demand his delivery-order indorsed, but it would convert the warehouse-keeper from a holder for Goldsmith into a holder for Inglis. It is to be noticed that this deed does not purport to pledge the documents of title, but the goods themselves. It bears no reference to any delivery-order or delivery-orders. Of itself, it would be such a title as might possibly be complete in England, but would require intimation for competition with a Scotch arrestment.

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The indorsation of the delivery-order bears no date. It might have been important to know whether it was written before or after the agreement. The Lord Ordinary notices that the indorsation was inappropriate to effect pledge. *Prima facie*, it conveyed an absolute right of property and not a pledge, as was held in *Hamilton v. The Western Bank*.¹ Certainly neither the indorsation of the delivery-order nor the agreement considered separately imported a pledge of the document of title. That the indorsation operated as effecting a pledge could only be maintained on the view that the agreement was explanatory of the indorsation, limited its otherwise absolute effect, and explained that it was meant only as indorsation to the effect of constituting a pledge. But nothing of that kind appears on the documents themselves; and I am not satisfied that the delivery-order was indorsed with any such view. It may have been indorsed only to satisfy the requirements of the warehouse-keeper. On the whole, I am inclined to think that the indorsation did not operate as a pledge, but as a conveyance of a proprietary right, but in security, just as in the case of *Hamilton v. The Western Bank*,¹ which on this point is closely applicable.

If this view can be entertained, it will remove at once the importance and the difficulty of the present case, for it will eliminate the third section of the Factors Act, and leave the question to the common law, which will undoubtedly pronounce the right of Inglis incomplete and inferior to that of the arrester.

2. The question whether, supposing there was a pledge of the document of title and a consequent pledge of the goods, in the sense of the statute, such a pledge would be preferable to an arrestment, appears to be more important. It is not obvious that it would be preferable. I know of no authority on the point; but in the absence of authority, I incline to the opinion that it would not. The mere fact that the right given is called a pledge is not conclusive. It is necessary to examine what the true nature of the right was, and what was the power which it conferred on the pledgee. Now possession and custody are the essential characteristics of pledge as a security, and it is these characteristics which make it so effectual as a security. It is, in truth, possession which makes a pledge a real security,—that is to say, possession either by the pledgee or by his agent; and without the power which such possession gives, I doubt whether there could be a security by pledge. Now, in this case what is called pledge has neither of these characteristics. It would not confer possession or custody. It would not of itself convert the warehouseman into a holder for Inglis. But it would put it in the power of the pledgee to obtain possession immediately

¹ 19 D. 152.

No. 139. —that is, by intimation to the warehouse-keeper, who, after such intimation, would hold for him as his agent, and whose possession would be his possession. Without intimation the so-called pledge was just in the position of any other incomplete right, and equally liable to be defeated by arrestment.

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Turning to the interpretation clause, I find that the word "pledge" includes "any contract pledging or giving a lien or security on goods." The most general meaning is that it is a contract giving security on goods. Now, if the right acquired by Inglis be read in terms of the interpretation clause, it seems to amount to this, that the delivery of the delivery-order was equivalent to a contract giving a security over the whisky. But I apprehend that by the law of Scotland a contract giving a security is not a complete and indefeasible right unless it be completed by intimation. That was the nature of the agreement actually executed, so that the indorsement of the delivery-order implied no more in regard to the goods than the agreement which was actually granted. It added nothing to the right which that contract gave, and may, as I have suggested, have been required merely to facilitate arrangements with the warehouse-keeper. If this be the true view of the third section, it does not innovate on or alter the law of Scotland at all; and I think that such a view, if it be at all admissible, is to be preferred to an interpretation which would alter by mere implication an important and settled rule of law.

It may further be observed that the argument for Inglis involves the assumption that such documents of title have been put on the same footing as bills of lading. But that assimilation is not, in my opinion, effected by this Act. Such documents of title were strongly distinguished from bills of lading in the case of *M'Ewan v. Smith*.¹ The distinction between them was partially removed by section 5 of the Act of 1877 and section 10 of the Act of 1889. But otherwise I consider that those distinctions still remained.

I am not aware whether this precise question has arisen in England, but I have no reason to think that in England the security would be held complete without intimation or possession or acknowledgment.

For those reasons I have come to think that the arresters ought to be preferred, and that the interlocutor of the Lord Ordinary should be affirmed.

LORD STORMONTH-DARLING.—The competition between these two claimants must, I think, be determined by the law of Scotland as the law of the *situs*.

The question which of them is to be preferred to the fund *in medio* depends on whether, at the date of the arrestment used by Robertson & Baxter in the hands of the warehousemen, the goods were held by the warehousemen for Goldsmith or for Inglis. If for Goldsmith, the arrestment created a *nexus* on the goods entitling the arresters, as creditors of Goldsmith, to claim the goods (or their proceeds) in payment of their debt so soon as constituted. If for Inglis, the arrestment attached nothing, and Inglis would now be entitled to prevail.

At the date of the arrestment (18th February 1895) the goods stood in

the books of the warehousemen in Goldsmith's name. Nevertheless the case for Inglis is that, from 18th December 1894, when he advanced £3000 on the security of these and other goods, and the delivery-order was blank indorsed to him, the warehousemen held for him. If so, they did not know it, because no intimation of the transaction had been made to them.

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Now, it is beyond dispute that by the common law of Scotland (and I believe of England also) intimation to a warehouse-keeper is necessary to complete and make effectual all rights which depend on the constructive delivery of goods in his custody. The *jus in re* cannot be acquired without that.

But it is said that section 3 of the Factors Act of 1889 abrogates this rule, both for factors and principals, in all questions of pledge, by making a pledge of documents of title to goods equivalent to a pledge of the goods.

I think it very doubtful whether this section of the Act contemplates principals at all. I lay no stress on the italicised heading "Dispositions by Mercantile Agents," which has no more statutory force than a rubric. But the group of sections in which section 3 is found deals with agents alone; and the three sections of the Act (sections 8, 9, and 10), which undoubtedly refer to principals, are all in perfect harmony with the main idea of a Factors Act, because they all contemplate cases of quasi-factorship, i.e., cases where one man has permitted another to be in possession of goods or documents of title, and thereby to create rights over them in favour of a *bona fide* third party. If, therefore, section 3 does affect pledges made directly by a principal, it is the only section of the Act which deals with transactions having no element of agency about them.

I do not, however, make that the ground of my opinion. I say that, whether the section relates to pledges by agents merely, or to pledges by all and sundry, the sole effect of it is to make a contract for the pledge of documents of title equivalent to a contract for the pledge of goods. The whole scope and tenor of the series of statutes consolidated by the Act of 1889 is to give validity to contracts made by persons entrusted with the possession of goods or documents of title, as in a question with the person entrusting them. The Act does not profess to deal with the mode of converting contract rights into real rights. To say that a pledge of documents of title to goods shall be as good against the owner of the goods as a pledge of the goods themselves does not dispense with the common law requisites for rendering the pledge effectual against the world. It does not mean, as regards the case in hand, that a pledge of the particular document of title called a warehouse-keeper's certificate shall be completed without intimation to the warehouse-keeper. So to hold would be, I think, to put a construction on the words of the statute going far beyond its leading purpose, with the result of conferring on pledges of documents a wholly anomalous privilege, and possibly of exposing custodiers of goods to inequitable claims at the instance of persons whose rights were unknown to them.

I have hitherto assumed that the transaction in question might fairly be held to be a pledge of the warehouse-keeper's certificate. But I greatly doubt whether that was its true nature. From the terms of the agreement

No. 139. printed in the appendix, it seems rather to have been a contract for the deposit of the goods themselves, carried out by indorsement of the certificate. If so, it is clear that the claimant Inglis never completed his security by obtaining possession of the goods, either actual or constructive.

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I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD LOW.—The fact that Robertson & Baxter originally sold the goods to Goldsmith does not affect the present question. The goods were delivered to Goldsmith and became his property. Robertson & Baxter therefore appear to me to be in the same position as if they had been creditors of Goldsmith arresting goods belonging to him, with which they had had no previous connection, and with which the debt for which arrestment was used had no connection. Further, I think it plain that the sale sections of the Factors Acts have no application to the case.

The main question appears to me to be, What is the meaning and effect of section 3 of the Factors Act of 1889? To answer that question it is necessary to examine to some extent the previous Factors Acts in order to see what was their scope and effect.

In the first place, it is not unimportant to observe that the Factors Acts of 1825 and 1842 deal only with *contracts or agreements* for the sale or pledge of goods. Thus the second section of the Act of 1825 (6 Geo. IV. c. 94) provides that a person entrusted with, or in possession of, certain documents of title to goods shall be deemed to be the true owner of the goods "so far as to give validity to any *contract or agreement*" for the sale or the deposit or pledge of the goods.

In like manner the Act of 1842 (5 and 6 Vict. c. 39) proceeded upon the preamble that it was expedient that in all cases where the owner of goods would be bound "by a *contract or agreement* of sale" made by a mercantile agent, he should in like manner be bound "by any *contract or agreement* of pledge or lien for any advances *bona fide* made on the security thereof." Accordingly it was enacted (section 1) that any agent entrusted with the possession of goods, or documents of title to goods, "shall be deemed and taken to be the owner of such goods, so far as to give validity to any *contract or agreement* by way of pledge, lien, or security *bona fide* made with such agent."

I shall now pass on to the consideration of section 4 of the Act of 1842, because it contains a clause almost identical with section 3 of the Act of 1889, and it is important to see what is the scope of the section (in the Act of 1842) containing that clause, and to what extent and in what way the other clauses of the section are carried forward into the Act of 1889. I do not deal with the second and third sections of the Act of 1842, because they do not appear to have any bearing upon the present question. Section 2 deals with the substitution of other goods or documents of title for those originally deposited; and section 3 provides that the Act shall be deemed to give validity only to "such *contracts and agreements*" as are made *bona fide* and without notice that the agent is acting without authority or *mala fide*.

Coming, therefore, to section 4, I think that it may be described as being mainly, if not wholly, of the nature of an interpretation clause.

The section begins with the enumeration of a number of documents, No. 139. "which shall be deemed and taken to be a document of title within the meaning of this Act." These are the documents which are specified in exactly the same words in the first section of the Act of 1889, as being included in the expression document of title, with the exception of "India warrant," which is among the documents enumerated in the earlier Act, but is omitted from the later Act. It is important to remember that section 1 of the Act of 1889 is that which is devoted to the interpretation of terms.

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The second clause of section 4 provides that an agent possessed of a document of title, obtained by reason of his having been intrusted with the possession of the goods, or of any other document of title thereto, "shall be deemed and taken to have been intrusted with the possession of the goods represented by such document of title as aforesaid."

That is of the nature of a definition of what is meant by being "intrusted with the possession of goods." The enactment is not in terms repeated in the Act of 1889, but the substance of it is contained in subsections (1) and (3) of section 2.

Section 4 then provides,—"*And all contracts pledging or giving a lien upon such document of title as aforesaid shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relates.*"

I shall have something to say upon that clause presently, but in the meantime I pass it by, with the remark that it forms section 3 of the Act of 1889, with this difference, that the language of the latter section is "*a pledge of documents of title,*" and not "*contracts*" pledging documents of title.

The next clause in section 4 is that "such agent shall be deemed to be possessed of such goods or documents whether the same shall be in his actual custody or shall be held by any other person subject to his control, or for him or on his behalf."

That clause is repeated, with only an unimportant change of phraseology, in section 1 (that is, the interpretation section), subsection (2), of the Act of 1889.

It is unnecessary to go over in detail the remaining clauses of section 4. They all provide for what shall be "deemed and taken to be" the effect of certain circumstances, and are all of the nature of interpretation clauses.

I now revert to the clause in regard to contracts pledging a document of title. It is said that the effect of that clause has been that since the date of the Act a pledge of documents of title by a factor has been as good as a pledge of the goods themselves. I am unable to assent to that view; and during the half-century which has elapsed since the passing of the Act it has never, so far as I am aware, been suggested.

If I am right in the general view which I have taken of section 4 of the Act of 1842, I think that it is plain that the clause was not a general enactment, but applied only for the purposes of the Act. The clause, I think, was intended to interpret section 1. That section provided that an agent intrusted with goods or the documents of title should be deemed to be the owner of the goods "so far as to give validity to any *contract or agreement by way of pledge.*" The clause in section 4 seems to me to do no more than declare that the contract by way of pledge referred to in section 1 should

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include a contract pledging the documents of title, and that if the contract took that form, it should be held to be a contract pledging the goods.

No doubt a difficulty is created by the fact that the clause does not say that a *contract* pledging documents of title shall be deemed to be a *contract* pledging the goods, but that it shall be a *pledge* of the goods. If I am right, however, in regarding the clause as practically an interpretation clause, it is more easy to put upon it the construction which I suggest than if it had been one of the proper enacting clauses. If the clause was to be read literally as meaning that a contract by an agent pledging documents of title should operate a pledge of the goods, a very anomalous state of matters would have existed. In the first place, a *contract* for pledging documents of title would be a great deal better than a *contract* pledging the goods themselves, because there can be no pledge (as distinguished from a contract of pledge) without possession. Neither in England nor in Scotland is a *pledge* of goods possible without delivery. In the second place, if the clause was read literally, an agent could do what the owner of the goods could not do. I think that it is plain that the contracts referred to in the clause are contracts made by an agent. If, therefore, a contract by an agent pledging the documents of title created a pledge of the goods, that was a thing which the owner of the goods could not do, because he could give no pledge of the goods unless he delivered them to the pledgee. I can see no good purpose which could have been intended by introducing such a curious anomaly into the law, and it would have gone far beyond, and indeed defeated, the express purpose of the Act, which was to make contracts of pledge granted by the agent as good as if they had been granted by the owner, but no better.

I repeat that up to the time which I am now considering (*i.e.*, 1842) the Factors Acts in terms dealt only with contract rights, and not with real rights at all. I do not think that the Act of 1842 made any change in the law in regard to such a document of title as a warehouse-keeper's certificate, except that in certain cases possession of the document was declared to be conclusive of the title to transfer. It still remained the law of England (as I understand it), as well as of Scotland, that the transfer, by indorsement or otherwise, of such a document of title did not transfer the property or possession of the goods until it was intimated to the warehouse-keeper, and apparently in England, until the warehouse-keeper had attorned to the purchaser and consented to hold the goods on his account.

If therefore this case had arisen under the Act of 1842, I should have been of opinion that, intimation of the transfer not having been made to the warehouse-keeper, there was no completed or real right of pledge which could compete with the arrestment.

The next Factors Act, namely, that of 1877 (40 and 41 Vict. c. 39), has not, I think, any direct bearing upon this case. It consists only of four operative sections. The first of these—section 2—is, although differently expressed, practically to the same effect as subsection (2) of section 2 of the Act of 1889, and protects a person who has dealt in good faith with an agent whose authority to possess goods or documents of title has been recalled. The remaining sections, namely, 3, 4, and 5, are what are called the sale sections, and they are carried forward with some alterations, which

it is not material to notice, into the Act of 1889, in which Act they are sections 8, 9, and 10. No. 139.

The main reason why the sale clauses were introduced into a Factors Act appears to have been this. In the cases of *Johnson v. Credit Lyonnais Co.*¹ and *Johnson v. Blumenthal*,¹ it was held that a vendor who had been left by his vendee in possession of documents of title to goods, till it suited the convenience of the buyer to accept delivery, could not under the Factors Act confer a good title upon a *bona fide* pledgee. I notice that the learned editors of the last edition of Smith's Leading Cases say that that judgment "created some consternation amongst commercial men," and accordingly the Act of 1877 was passed. The judgment in *Johnson's case*¹ is one among many examples of the strictness with which the English Courts have construed the Factors Acts as being intended to provide for a certain class of cases and nothing more.

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I have one other remark upon the Act of 1877. The 5th section provides that where a document of title has been lawfully transferred to a person as a vendee or owner of the goods, and that person transfers it to another, who takes the same *bona fide* and for valuable consideration, "the last mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*."

That is the only change which is made in terms upon the common law as regards documents of title such as a warehouse-keeper's certificate, and it assimilates such a document to a bill of lading only in one case (namely, as between a transferee or vendee and a second transferee), and only to the effect of defeating the vendor's lien or right of stoppage *in transitu*.

So standing the law in 1877, I come now to the Act of 1889, and I would point out, in the first place, that section 10 re-enacts section 5 of the Act of 1877. Presumably therefore the law was not altered as regarded documents of title,—that is to say, such documents as warehouse-keepers' certificates or delivery-orders were not assimilated to bills of lading to any greater extent than they were by the 5th section of the Act of 1877.

That would not be the case, however, if section 3 of the Act of 1889 was to be read literally and as of universal application. If it was to be so read, then in the case of pledge a warehouse-keeper's certificate or delivery-order would be to all effects equivalent to a bill of lading.

That would amount to a practical repugnancy between the two sections of the Act (the third and the tenth), and a construction which would lead to that result is, if possible, to be avoided. And it can be avoided if section 3 can be construed as being practically a re-enactment of the relative clause in the Act of 1842. In my opinion the section is capable of such a construction.

In the first place, I do not think that the fact that section 3 speaks of "a *pledge* of documents of title," while the relative clause in the Act of 1842 speaks of "*contracts* pledging" documents of title, is so important as at first sight might appear.

I have already pointed out that the Acts of 1825 and 1842 deal only

¹ L. R., 3 C. P. D. 32.

No. 139. with "contracts and agreements" for the sale or pledge of goods. In the Act of 1889 these words are throughout omitted, and the expression used is "any sale, pledge, or other disposition of goods," where in the earlier Act it would have been "any contract or agreement."

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I do not think that it is material to consider whether this change in the phraseology of the Act was more than a mere change of expression. What does seem important is (1) that there is no suggestion (apart from section 3) that any alteration was made in the law in regard to what was necessary for the constitution of a real right in and to goods; and (2) that the change of phraseology in the Act seems to explain how section 3 came to be expressed as it is. It is just the clause in section 4 of the Act of 1842 with the word "contracts" struck out, and I think that it serves the same purpose as the clause in section 4 did.

Section 3 must be read in connection with subsection (5) of section 1, which provides that "the expression pledge shall include any contract pledging or giving a lien or security on goods." Now, if these words are read into any of the sections in the first part of the Act, except section 3, they create no difficulty. Take for example section 2, subsection (1). That section provides that "any sale pledge or other disposition of goods" made by a mercantile agent shall be as valid as if he were expressly authorised by the owner to make it. If the interpretation clause was read into that section the words which I have last quoted would run, "any sale pledge or other disposition of goods, and any contract pledging or giving a lien or security on the goods." That of course is quite intelligible and unambiguous. But it is clear that the definition of the expression "pledge" cannot be read into section 3, upon the first occasion upon which the word is used. I take it, therefore, that the expression, "a pledge of documents of title to goods," must be read according to the ordinary meaning of the language, and as referring to the transfer of the documents of title in pledge. But upon the second occasion upon which the word "pledge" is used—"pledge of goods"—there is no reason why it should not have the full meaning ascribed to it by the first section. It may therefore mean either (1) a pledge of goods, or (2) a contract pledging goods, or (3) a contract giving a lien or security on goods. In a question between the pledger (whether owner or mercantile agent) and the pledgee, it may well be that a pledge of the documents of title is made equivalent to a pledge of the goods. But it is different in a question with a third party, such as a creditor arresting the goods. In such a case to hold a pledge of the documents as a pledge of the goods would be to introduce a serious alteration into the law in regard to what is necessary to constitute a real right in and to the goods. If, however, a pledge of the documents is, in such a case, only deemed to be a contract pledging or giving a security on the goods, the difficulty disappears, because the real right of the arresting creditor would prevail over the contract right of the pledgee. That appears to me to be sufficient for the solution of the present question.

I am inclined to think, however, that section 3 is to a great extent of the nature of an interpretation clause. I have already commented upon section 4 of the Act of 1842, and shewn how the various clauses of that section, in so far as they were continued, were dealt with in the Act of 1889. The

framer of the latter Act seems to have regarded some of the clauses of section 4 of the former Act as purely interpretive, and accordingly they reappear in section 1. Other clauses he regarded as being more of the nature of independent enactments, and accordingly they are brought into the operative clauses. That, I think, accounts for the enactment in section 3 appearing where it does. But reading the Act as a whole, and having regard to the purpose of the Act, and the history of previous legislation on the subject, I think that the effect which section 3 was chiefly intended to have would have been accomplished if the interpretation clause had provided that the expression "pledge of goods" should include "pledge of documents of title to goods." Such an interpretation of the expression "pledge of goods" is necessary to give full effect to some of the enacting clauses, and if that interpretation is not to be found in section 3, it is not in the Act. Take, for example, section 2, subsection (1), which I have more than once cited as dealing with "any sale, pledge, or other disposition of goods." Now, even if that section is amplified by reading in subsection (5) of section 1, it does not include a pledge of documents of title, unless section 3 warrants the word "pledge" being so read.

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Then take section 4, which provides that "where a mercantile agent pledges goods" for an antecedent debt, the pledgee shall acquire no further right to the goods than could have been enforced by the pledger at the time.

Now, it seems to me that the reason of that enactment applies as strongly to a pledge of documents of title as to a pledge of goods, but the enactment does not, in fact, do so, unless section 3 authorises "pledge of goods" to be read as including "pledge of documents of title."

The question, therefore, is, whether the words of section 3 are capable of being construed as meaning that, as used in the Act, the expression "pledge of goods" shall include "pledge of the documents of title to goods"? The words used are "a pledge of documents of title to goods shall be deemed to be a pledge of the goods." The suggestion I understand to be that the meaning of these words is that anyone may now pledge goods by transferring the documents of title. That, however, is not what the section says, and if that is what was intended, it is very badly expressed. A pledge of documents of title and a pledge of goods are entirely different things. If what was intended was to recognise documents of title as symbols of the goods, and to declare that a pledge of the goods might be completed by a transference or by delivery of the documents, it would have been very easy to say so, and if that was what was intended, I can hardly imagine that so simple a proposition would have been stated in such a misleading way.

Where the Act says that a pledge of the documents "shall be deemed" to be a pledge of the goods, I think that it means "for the purpose of the Act." The position of the section, and its history, point in that direction. Further, I think that the words "deemed to be a pledge of goods" must be construed as meaning "are included in the expression pledge of goods." The words, I think, are capable of that meaning, because it seems to me that there would have been no difficulty in so reading them if they had formed part of what bore to be an interpretation clause. Let me give an

No. 139. example : Suppose that a mercantile agent pledged a document of title to goods, without the authority of the owner, and the latter challenged the pledgee's right on the ground that section 1 only applied to a pledge of goods. I think that the pledgee's answer would be that, by virtue of section 3, a pledge of the documents of title was, for the purposes of the Act, to be deemed a pledge of the goods.

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There is another and shorter ground, in my opinion, for holding that section 3 is not applicable to this case.

If that section is of universal application, and means that a pledge—that is, a real and completed pledge—of a warehouse-keeper's certificate is a real and completed pledge of the goods, then I think that it must be strictly applied, and that no case could be held to fall within it which was not strictly and literally included in the words used.

Now here the certificate was indorsed and delivered to Inglis, but that of itself proves nothing. A certificate may be indorsed and delivered for the purpose of carrying out a variety of contracts. It may be designed to carry out a contract for the sale of the goods, or for putting the goods in trust, or for creating a security over the goods, or for pledging the goods, or for pledging the certificate itself.

Here there is no dispute in regard to the contract. It is contained in what is called the agreement of hypothecation or deposit. By that agreement Goldsmith deposited with Inglis, not the document of title, but the goods, and it is admitted that the certificate was indorsed and delivered in pursuance of that agreement. Where, then, was the pledge of the document of title ? In my opinion it did not exist.

It is said that the certificate was held by Inglis in security, and was therefore pledged. I do not think that it was held by Inglis in security. It was indorsed to him in order that he might be able to make real the contract of pledge of the goods by obtaining possession of them. Until that was done by intimation to the warehouse-keeper there was a contract of pledge of the goods, but there could not be any real pledge ; and that, so far as I can judge, is in accordance with the law of England as well as the law of Scotland.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD PEARSON.—The first question is, by which law this case is to be decided. It may be necessary to be informed, in the first instance, what are the rights and obligations of the contracting parties in England, so far as these are peculiar to English law. But I entertain no doubt that Scots law must in the end decide upon the competition of alleged real rights in moveables locally situated in Scotland ; and that we are entitled to carry our examination of the matter back to the point at which it is alleged that the real right accrued in order to ascertain whether the requirements of Scots law have been substantially observed. Thus, if intimation be necessary to complete the real right in Scotland, the question whether it has been made must be determined by the law of Scotland ; and I am further of opinion that the question whether intimation is necessary must also be determined by that law. All this seems to me to follow from the principles recognised

in the cases of *Donaldson v. Ord*,¹ and *The Scottish Provident Institution*,² No. 139. and, indeed, to have been expressly there decided.

The former case turned on a competition of rights under an English creditor deed and a Scotch arrestment. There was, indeed, a preliminary and separable ground for repelling the defences in that case, going to the competency of the defence. But the Court also decided upon the competition itself; and the decree (at page 1071 of the report) finds *separatim* that the defenders' claim of priority "would resolve into a competition of diligence as to the attachment of a fund situated in Scotland, and that such competition must be determined by the rules of the law of Scotland."

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The same principle was recognised and followed in the recent case of *The Scottish Provident Institution*,² where the exposition of the law to this effect by the Lord Ordinary was adopted by the First Division. The competition there was between a trustee in bankruptcy and an English depository of a life policy. There was an admission as to the law of England, to the effect that the deposit of the policy operated as an equitable mortgage, and that if followed by notice to the company it conferred a preferable right. But the English law was invoked only as to the first of these points; and the fact that parties admitted that intimation was required and was sufficient by English law, renders it all the more significant that the question as to intimation was there examined and adjudged on according to the rules of Scots law, as is plain from the Lord Ordinary's note at page 114. The true application of that case to the present seems to have been entirely missed by the reclainer, who even goes so far as to say that it overruled the case of *Donaldson v. Ord*,¹ although the Lord Ordinary referred to that case in support of his opinion.

Here we have an arrestment of goods situated in Scotland, laid on by a creditor of the true owner. According to our law, that gives the arresting creditor, if he be duly diligent, a *nexus* over the goods with which no prior right can compete unless it be a *jus in re*. It is therefore necessary to examine the nature of the prior right here alleged, and the grounds on which a preference is claimed.

The right is constituted by two documents. The one is described as an agreement of deposit or hypothecation, which, according to its tenor, professes to record an instant and actual deposit of specified goods as a security for repayment of an advance of £3000 with interest; and it further gives a power of sale. The other is a delivery-order issued by the keeper of a bonded warehouse, which declares that the goods are "held to the order of Walter C. Goldsmith or assigns by indorsement hereon"; and it is blank indorsed by Goldsmith. This indorsement was, I suppose, made for all the purposes of the contract—namely (1) for the purpose of enabling Ing'lis to make his pledge real, if it were not so to begin with, and (2) to enable him effectually to sell under the power.

The combined effect of these documents upon the rights of the contracting parties themselves is primarily a question of English law. But when that is ascertained, I apprehend that the law of Scotland must determine the effect of the contract as leaving or not leaving the goods themselves

¹ 17 D. 1053.

² 16 R. 112.

No. 139. open to the diligence of the transferor's creditors doing diligence according to the practice of Scotland.

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I am not aware whether or to what extent the English law differs from ours as to the primary effect of such a contract. The reclaimer's averments on that matter are so uncertain and present so many inconsistent alternatives that I regard them as of doubtful relevancy.

Certainly, according to Scots law, as hitherto laid down, these documents do not constitute a pledge at all, either of documents of title or of the goods themselves. They are not a pledge of documents of title to goods, because the transfer of the delivery-order is in terms an absolute transfer. They are not a pledge of the goods, because a pledge cannot be constituted by constructive delivery. The true import and effect of such documents is well settled. In the case of *Hamilton v. The Western Bank*,¹ documents which in all material respects seem to me indistinguishable from the documents in this case were held not to constitute a pledge, but a transference of property, *ex facie* absolute, though truly in security. As is well known, the case itself (with the exception of the opinions) is badly reported; but it has been expounded once and again by high authority to the effect I have stated, in the cases of *The National Bank v. Forbes*,² and *Mackinnon v. Nanson & Co.*,³ and so far as I know, it has never been judicially challenged.

If the matter be tested by Scots law, therefore, there is here no pledge of the documents of title to goods; and if so, whatever may be the meaning and effect of the third section of the Factors Act, 1889, it has no application here.

If, on the other hand, the explanation of the effect of these documents as between the contracting parties is to be furnished by the law of England, it would be necessary to ascertain definitely what that law says upon the matter; and this has not been done. That law may differ from our law on the subject. It may be that, according to English law, a pledge (in the fullest sense) is constituted by the possession of a custodier as agent of the creditor. But if such custodier begins by being the debtor's agent, I am unable to see how he can be made to hold for the creditor otherwise than by some proceeding analogous to our "intimation." Constructive possession can hardly be complete without notice, any more than actual possession is complete without delivery. Without these, there may conceivably be a personal contract of impledgement, but I do not see how there can be the real right of pledge.

Therefore, in my opinion, it would not be enough for Inglis to make out that these documents do, according to English law, import a pledge of documents of title to goods within the meaning of the Factors Act. In view of the interpretation clause, that proposition is quite consistent with the "pledge" being not the real right, but a personal contract; and if the latter, it cannot compete with an arresting creditor. In order to reach that result, some law must be appealed to which enjoins that the contract between Goldsmith and Inglis is to be deemed effectual to constitute a *jus in re* in goods situate in Scotland, and that not merely between the con-

¹ 19 D. 152. ² Dec. 3, 1858, 21 D. 79—see page 86; 31 Scot. Jur. 50.

³ 6 Macph. 974.

tracting parties, but to all effects and against outside creditors. Apart from the Factors Act, this cannot be done; and I am unable to adopt the reclaimer's argument upon the third section of that Act. That section is now part of the law of Scotland; but I can find no sufficient reason either in the section itself, or in its context, or in the statute of which it forms part, for attributing to it so wide a meaning. I have an impression that it really has a comparatively modest intention, and that its true purpose is to serve as an interpretation clause to section 2, and to make it clear that the pledge of goods there dealt with included pledge of the documents of title. But at all events I cannot regard section 3 as importing that when and so long as a delivery-order is out, the goods which it represents are practically withdrawn from effective diligence, even in a case where the warehouse-keeper knows nothing of the right of the person for whom he holds, and has no means of finding out who or where he is.

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It may be suggested that in this matter of intimation there is a distinction between a delivery-order issued by the warehouse-keeper himself "to A or assigns by indorsement hereon" (as in this case), and a delivery-order issued by one of the parties themselves, and indorsed and delivered to the other without the knowledge of the warehouse-keeper, as in *Hamilton v. The Western Bank*.¹ It might seem as if the intimation, which is plainly necessary in the latter case in order to turn the custodier into the holder for the transferee, is not needed in the former case, where the custodier has himself issued a document in favour of A and his indorsee which he is bound to honour. But in the first place no such distinction is recognised in the Factors Act; for both types of documents are equally within the definition of "documents of title." Further, according to my understanding of the law, notice to the custodier is as necessary in the one case as in the other. And be it observed, that it is necessary (at least according to our law) not merely in order to put the custodier *in mala fide* to deliver to anyone else, but also for the separate and important purpose of divesting him of possession for the one party, and investing him with possession for the other. Even where the order is in favour of indorsee, the document has not the full negotiability of a bill of lading, and does not operate otherwise than as a personal contract or engagement, until by notice the custodier has become the indorsee's agent to hold—*Farina v. Home*.²

It is true that the tenth section of the Factors Act effects a change in the legal status of all documents of title to goods in certain circumstances, and assimilates them to bills of lading to a certain limited effect; but that seems to me not to touch the question now in hand.

I may add here by the way, as the question has been mooted, that this case does not appear to me to depend in any degree upon the provisions of sections 8 and 9. It is here a mere incident that the arresting creditor's debt happens to be the unpaid balance of the price of the very goods in question. The contract of sale to Goldsmith had long been completely executed, and I think the case must be taken as if the arrestment had been laid on by a wholly extraneous creditor. If so, I do not see that sections 8 and 9 have any application to the circumstances of this case.

¹ 19 D. 152.

² 16 M. & W. 119.

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It may be thought that the definition clause of the Factors Act, 1889, gives weight to the argument that in this whole class of cases the distinction between a pledge properly so called, and a personal contract or engagement to pledge, is no longer material. That clause enacts that "for the purposes of this Act . . . (5) the expression 'pledge' shall include any contract pledging or giving a lien or security on goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability." I draw quite a different inference from these words. They appear to me to import that the Act is dealing alike with personal engagements to pledge, and with pledges properly so called, and therefore that the Act has no concern with the priorities flowing from the acquisition of real rights, but only with the contractual incidents.

If the third section is to have in this case the wide and absolute meaning contended for, and if it was applied to Scotland by way of assimilating the laws, the result will rather be in the opposite direction. If I am right in what I have said as to the Scots law which is applicable if these transactions had been entirely Scottish, a new anomaly has been introduced by section 3 in that case as compared with a case where the attachment is laid on in the one country and the documents of title are transferred in the other. For unless the rule of *Hamilton v. The Western Bank*¹ is to be regarded as done away with, the purely Scottish case will have to be decided quite differently from the Anglo-Scottish one. And I cannot assent to the view that section 3 not only overrules *Hamilton v. The Western Bank*,¹ but also introduces the new rule that every pledge of a document of title to goods situate in Scotland is now to be held to operate as a completed pledge of the goods themselves to all effects, and that whether intimation is made to the custodian or not.

In my opinion the interlocutor of the Lord Ordinary is right.

At advising,—

LORD JUSTICE-CLERK.—The case to be dealt with may be shortly stated thus:—A deposited goods in a bonded warehouse in Glasgow, the keeper of which issued a delivery-order bearing that they were held "to the orders of A or assignees by endorsement hereon." B advanced money to A under an agreement by which A deposited the goods with B in security of the advance, and gave B power to sell them without A's consent. A, by an undated indorsation, indorsed and delivered to B the delivery-order of the warehouse-keeper. The agreement was entered into and the relative delivery of the indorsed warrant took place in England, both A and B being resident there. No intimation was made to the warehouse-keeper. Subsequently, and while matters were in this position, C (merchants in Glasgow), being creditors of A, arrested the goods in the hands of the warehouseman on the dependence of an action raised by them against A for a debt due by A to C, and in which decree was obtained. Pending further procedure, and in order to release the goods, which were of higher value than C's claim, a sum was deposited in bank to meet C's claim if found good. C now claims this sum

¹ 19 D. 152.

under the decree, maintaining that the arrestment was effectual. B resists C's claim, maintaining that by the agreement and delivery of the indorsed delivery-order to him the goods were pledged or otherwise transferred in security to him, so as to give him a preferable right to any claim founded on the arrestment used by C. No. 139.
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Such being the case presented, there is no question of fact in dispute between the parties, but two questions of law have been raised in the pleadings—(1) whether the case falls to be decided by the law of England or by the law of Scotland; and (2) assuming that it is to be decided by the law of Scotland, must it be decided in favour of B, the holder of the indorsed delivery-order, either at common law or in respect of what is contained in the Factors Acts, 1889 and 1890.

As regards the first question, it is the unanimous opinion of the consulted Judges that the case must be decided according to the law of Scotland. That is also my opinion. The cases quoted in the argument seem to bear this out distinctly. The question does not turn upon the contract between Goldsmith, who is A, and Inglis, who is B, but upon Inglis' (B) right having been made real, so that he can maintain it effectively against any other person claiming a right to the goods in Scotland in respect of diligence duly done to attach them. It is in this country that the *nexus* must be laid on, if a right of priority is to be made sure. And although the documents passing between him and Goldsmith (A) and the rights he possesses by his holding the delivery-order indorsed, must be decided as regards the contractual effect between him and Goldsmith (A) by the law of England, where the contract was made, it is not this contractual question which is to be decided here. It is whether the effect of what was done by the contracting parties placed Inglis' (B) rights to the goods in Scotland on such a basis as to exclude the effective operation of diligence done in Scotland according to the rules and practice of Scotland, so that it is a question between an arresting creditor arresting in Scotland and the party who is said to have received rights to the goods by the contract in England. The question by what law such a case relating to goods warehoused in Scotland is to be dealt with is in my view expressly decided by the case of *Donaldson v. Ord*.¹ There is no later case in which anything to the contrary is to be found, and I entirely agree with what has been pointed out by Lord Pearson in his opinion, that the subsequent case of *The Scottish Provident Institution*² does not derogate from, but confirms, the operation of the principle so distinctly stated in *Donaldson's*¹ case, viz., that in a case such as this the arrester's claim of priority "would resolve into a competition of diligence as to the attachment of a fund situated in Scotland, and that such a competition must be determined by the rules of the law of Scotland."

The case therefore must be decided, if in favour of Inglis, either on the ground that by the common law of Scotland Inglis (B) had a *jus in re* to the goods, so as to prevent Robertson & Baxter's (C) diligence being operative, or if that be not according to the common law, then on the ground that by statutory enactment the law has been altered. On the first point there

¹ 17 D. 1053.² 16 R. 112.

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does not seem to be any difficulty. Whatever were the rights which Inglis (B) had by his contract with Goldsmith (A) and his possession of the indorsed delivery-order, it is certain that intimation was essential to make his right such that the diligence of creditors of Goldsmith (A) should be inoperative. Inglis (B) therefore has recourse to the Factors Act of 1889, which is applied to Scotland by the subsequent Act of 1890. Under that Act he maintains that as it is declared by section 3 that a pledge of the documents of title is to be deemed to be a pledge of the goods, he is entitled to prevail. Three questions present themselves here—(1) Is the transaction a pledge of the documents of title? (2) If it is, does the 3d section of the Factors Act apply, seeing that the transaction was not by a factor but by the owner himself? (3) Assuming that these questions are answered in the affirmative, is the transaction without intimation good to exclude Robertson & Baxter's (C) diligence from operative effect?

First, then, was this transaction a pledge of the documents of title? It can only have been so if the indorsing of the delivery-order to Inglis constituted a pledge. But the evidence of the footing on which that indorsation was made is contained in the agreement upon which it followed. That contract bears to deposit the goods with Inglis, and it makes no reference to the delivery-order. It was to carry out that agreement that the delivery-order was indorsed to him. There was in that no pledge of the document of title. The indorsation enabled him to take over what was given him by contract by obtaining possession, actual or constructive. If that be so, then there is no room for the application of the 3d section of the Factors Act, however wide may be its scope. The purpose of the indorsation was, as I think, not to pledge the document of title, but to enable the indorsee to make the contract for the goods effectual—to make the right given by it real by possession. The delivery-order as indorsed had here no limited effect. It had the full effect of such an indorsed order, so that the warehouse-keeper could have had no answer to a demand for the goods, and Goldsmith (A) was sufficiently divested of proprietorship by the indorsation, provided that it was followed by intimation. The indorsation was not a transaction of the quality of pledge, but a conveyance of a right, although in security.

2. On the assumption that this view is wrong, and that what was done was of the nature of pledge of the document of title, the next question is—Do the Factors Acts operate in the case, not of a factor or agent, but where the transaction is one in which the true owner himself contracts? Another way of stating this question is—Do the Factors Acts deal with all transactions whether entered into by a principal or by a factor for a principal, or do they deal with a less extensive class of transactions—the class where persons, not the real owners of goods, but who in consequence of what the real owners do or allow to be done, have apparent power of transaction under that power, and contract with third parties? The whole scope of the Acts seems to me to be directed towards the giving of validity as against the true owner to the acts of contract done by one put forward, or allowed by him to act, as having the powers of owner, as if they had been done by the owner himself. And the words of the Act appear to me, without any straining in construction, to read only as meaning that a contract of pledge of documents of title made by an agent intrusted with these shall be as

effectual a contract against the owner for pledging the goods as would be a contract of pledge of the goods themselves. That this was so under the Act of 1842 is clear, for, as has been pointed out, the clause in that Act which declares that contracts pledging or giving a lien on documents of title shall be deemed and taken to be respectively pledges or liens upon the goods to which the same relate, is a clause which throughout deals with contracts by persons intrusted with documents of title, by declaring what force they shall have. And accordingly a wider effect was denied to it in the case of *M' Ewan v. Smith*,¹ where a delivery-order to the order of a buyer was held not to be effectual to transfer the property, it being practically held that the Act did not affect transactions in which the owner himself was the contracting party, but related only to cases where a purchaser has dealt with one who had an apparent authority from another, on the faith of that authority.

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But it is said that although this may be so as regards the Act of 1842, the 3d section of the consolidating statute has a more extended effect, and applies to all transactions whether of agent or principal. It is true that the words of the 3d section are different from those of the corresponding section in the Act of 1842. But I agree with the majority of the consulted Judges in holding that the scope of the Factors Act of 1889 is to deal with one class of cases, that of persons not the real owners of goods, but having through the act of the true owner apparent full power of disposing of them, dealing with third parties, who in good faith transact with them as having such power. Accordingly the Act operates by giving effectuality against the true owner to contractual personal rights acquired by third parties from the interposed party, making the contract effectual against the granter and the person whom the granter holding the document of title represented. But I do not see ground for holding that the recent Act goes any further than the Act of 1842 did. The later Act when examined seems to do what was done by the Act of 1842, and nothing more.

The interpretation clause of the Act of 1889 declares that pledge when used in the statute shall include any contract pledging or giving a lien or security on goods, and if pledge in the latter part of section 3 be so read, it has a perfectly intelligible meaning and effect, and is consistent with the enactments of which the Act containing it bears to be a consolidation. And in that view the transaction in this case would confer upon Inglis a personal right only as distinguished from a real right, good against third parties such as creditors. On the other hand, if the clause be read in accordance with the contention of Inglis, then that reading practically gives to the indorsation and handing over of a delivery-order the full effect which by law attaches to the transfer of a bill of lading, an effect which it certainly had not under the previous Factors Acts, and which it is apparent from another clause of the statute it could not have been intended that it should have, for clause 10 would be altogether superfluous if the view maintained by Inglis were sound. That clause declares that where a document of title has been transferred to a person as a buyer or owner of goods, and he transfers to a third party in good faith and for valuable consideration, the latter

¹ 6 Bell's App. 340.

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transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as if it were the transfer of a bill of lading. This clause, which first appeared in the Act of 1877, and is repeated in the Act of 1889, in no way altered the law as between the original vendor and vendee, but only affected the former's rights where the vendee has sold to a *bona fide* third party. But the important point here is, that it only partially removed the distinctive difference of effect between the transfer of bills of lading and other documents of title. But according to the view maintained by Inglis, a transfer of a delivery-order would operate to the full effect of a bill of lading, and section 10 would be re-enacting to a partial effect what had been already enacted in a more extended degree by section 3.

3. Assuming that the two questions dealt with were to be answered to an effect opposite to the views already expressed, would the diligence used by Robertson & Baxter be thereby excluded from effective operation? I do not think so. Without possession, constructive or actual, a pledge would not be a real security to the pledgee. What was done here, by whatever name called, would not confer possession, and so turn the warehouse-keeper into a holder for Inglis instead of a holder for Goldsmith. There being no intimation, the right was an incomplete right, or not an operative right to exclude an arrestment by a creditor of Goldsmith's in the hands of a holder who held for him, who had no intimation to cease to hold for him, and to hold for anyone else. To make his case good Inglis must shew that the legal effect of what was done was, under the Factors Acts, without any further procedure, to constitute a right in the goods in Scotland, not as against Goldsmith (A) merely, but absolutely against all persons having claims on which they could legally proceed to attach the goods there, so that the warehouse-keeper became divested of possession as for Goldsmith (A), or was invested with possession as for Inglis (B). It would seem that if this is to be the effect of the indorsation-over of the delivery-order, then such a document has become by the Factors Acts negotiable to an effect higher than it has ever had before without any direct words in the statute from which such an intention may be gathered. If this was intended, it would reasonably be expected that clear words of enactment would have been used. Particularly in view of the anomalous character of the change in the law which it is said to effect, I see no reason for holding, whatever may be the meaning of the clauses of the Factors Acts which are founded on, that they do indirectly, any more than directly, dispense with the step of intimation to the warehouse-keeper, necessary according to the previously existing law to make complete and real a right to goods obtained by contract, so as to exclude the operation of arrestment done by creditors of the party granting the right in the hands of the holder of the goods.

Along, therefore, with all the consulted Judges, I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD YOUNG.—The competition in this multiplepounding depends on the question whether or not, by the transaction of 18th December 1894, set forth in article 1 of the condescendence for the claimant Inglis, the whisky in dispute was pledged to him by the owner. If it was, his claim must

be preferred to that of his only competitors, which rests on an arrestment used in February 1895 for a debt due to them by the pledgor. If it was not, his claim must be rejected, and that of his opponents sustained.

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The transaction took place in England between two domiciled Englishmen, Goldsmith, a merchant in London, and owner of the whisky, being the one, and the claimant Inglis the other. The question before us is, Did the transaction give Inglis a right of pledge in the whisky? And here the preliminary question arises, whether, in determining the rights which arise out of the transaction, we are to inquire into and apply the law of England as being the *lex loci contractus*, or that of Scotland as being the *lex rei situs*, the whisky having been arrested in Glasgow. This is the first, and, I think, the most important question raised by the record.

The second and only other question arises in the event of the first being answered to the effect that the *lex loci contractus* is immaterial, and that the rights which arise out of the transaction are to be determined according to the *lex rei situs*, and is, What, in that view, are these rights?

These questions we thought of sufficient general interest and importance to justify us in ordering written argument, and requesting the opinion of our learned brethren upon them.

The respondents (Robertson & Baxter) in their minute of debate say that the averment of their opponent Inglis with reference to the law of England "is irrelevant on account of its vagueness." So far as I recollect, there was no hint even of such a complaint when the case was before us. If there had been, and we had thought that there was any vagueness to complain of, we should have allowed, and indeed ordered, it to be corrected. To desire the opinion of the whole Court on such a matter would be somewhat ridiculous. I think the complaint is groundless.

The claimant Inglis' sole ground of claim is the right in the whisky which he took by this transaction between him and the owner. He has no other. If that right was a pledge and subsisted at the time of the arrestment by his competitors for a debt of the pledgor he must, I should think, *prima facie* at least, prevail, inasmuch as, by the law of Scotland, the creditors of the pledgor of goods can attach only the reversionary right of their debtor—(See Bell's Com. vol. ii. pp. 20-21). If at the date of the arrestment the whisky was not pledged to Inglis,—that is to say, completely and effectually pledged to him, for nothing less will serve,—the owner's right was entire. The validity of the arrestment to attach it, whether entire or reversionary, is not disputed. The reclamer's appeal to the law of England has no reference to the validity of the respondents' arrestment, but only to the extent, at the date of it, of their debtor's interest or estate in the whisky arrested.

I. By what law, then, is the dispute regarding Inglis' right arising out of the transaction in question to be determined? I think clearly by the law of England, the country where it was made, between two English merchants, who presumably—I should say certainly—had regard only to that law in expressing their intentions and doing what they knew or were advised was necessary to their accomplishment. The rule of our law on the subject is stated and explained by Erskine in his Institutes (b. 3, tit. 2, secs. 39 and 40). I quote only a short passage which immediately follows

No. 139. one to the effect that conveyances of land or property "which hath its fixed seat" in Scotland must be made and be interpreted according to the law of Scotland, "but in the case of a moveable subject lying in Scotland the deed of transmission, if perfected according to the *lex domicilii*, is effectual to carry the property; for moveables have no permanent situation, but may, at the pleasure of the proprietor, be brought from any other place to his own domicile, and therefore are considered as lying in that territory where the deed is signed, according to the rule *mobilia sequuntur personam*." Professor More deals with the same subject at the very beginning of his Notes on Stair's Institutes. I quote only two short passages. The first is in Note A (p. 1 of the Notes),—"Contracts are interpreted, and receive effect, in the Courts of Scotland according to the law of the place where they had their origin, and which the parties are presumed to have had in view. The evidence by which the contract is proved must be that which would be received in the place where it has been entered into." The second is at the foot of p. 2,—“As a corollary from the preceding doctrine it follows that all the consequences attached to the contract by the law of the state where it has been made ought to be admitted by any foreign Court in which the contract is sought to be enforced. Thus the interest exigible by the *lex loci* for any default in payment ought to be allowed in every country where the principles of international law are correctly understood. And accordingly this has been the rule adopted in Scotland. This, indeed, is a mere rule of construction, giving to the contract the meaning and operation which it is presumed the parties intended it should bear. And, on the same principle, it has been ruled that acts or proceedings which have taken place in a foreign country must be judged of, not according to the construction which such acts would have received had they taken place in Scotland, but according to that put on them by the law of the place where they occurred.”

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The next authority which I cite is the case of the *North-Western Bank v. Poynter*.¹ In that case, as in this, the question was between two claimants in a Scotch multiplepounding brought by the holder of an arrested fund—the price of goods sold in Scotland. The goods had been previously pledged, and admittedly well pledged, by deposit of bill of lading, to the North-Western Bank of Liverpool by the owners Page & Company, who were Liverpool merchants. By a subsequent contract made in Liverpool between the bank (the pledgees) and Page & Company (the pledgors) the former handed back to the latter the bill of lading to enable them to sell the goods as agents for the bank, they undertaking to do so and to account to the bank for the price accordingly. They sold the goods to a Scotch buyer (Cross & Sons), in whose hands the price was arrested by creditors of theirs. The bank claimed the price as pledgees of the goods sold. The arresting creditors did not dispute the bank's claim if the pledge to them, admittedly well made, subsisted at the date of the arrestment, but maintained that it was annulled by their subsequent transaction with the pledgors on which the bill of lading was restored to them. The effect of this transaction on the rights of the parties to it was thus the question between the competing

¹ 22 R. (H. L.) 1.

claimants in the Scotch multiplepinding. If it annulled the bank's pledge, Page & Company were thereafter absolute owners of the goods, and their creditors were entitled to attach them accordingly, or their price if sold, while if it did not, there was no answer to the bank's claim as pledgees. The transaction was in England between English parties, and the noble and learned Lords who decided the case were of opinion that the rights of parties under it must be determined according to the law of England. I refer to the judgments of the Lord Chancellor and Lord Watson quoted in the minute of debate for Mr Inglis. It would serve no purpose, on the question I am now dealing with, to notice the judgment of this Court, which proceeded on the opinion of a majority of the Judges on the transaction judged of according to Scotch law.

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Now, this is certainly the latest authority on this subject, and is precisely in point and conclusive, unless on the question whether the *lex loci contractus* or *lex rei situs* shall predominate in the decision of a dispute upon a foreign transaction it is material whether the dispute regards the creation or the annulling of a pledge of goods.

I also refer to the judgment and opinion of Lord Rutherford in the case of *Wallace v. Davies*.¹ That was a case of unintimated assignation, and there may be grounds for distinguishing between such a case and that which we are now dealing with. Lord Rutherford was of opinion that the intimation to the debtor of an assignation of a debt or of goods to the custodier is, so far as the cedent's creditors are concerned, a mere form or ceremony. I concur in this opinion, and that for the reasons stated by his Lordship. Erskine, iii. 5, 3, explains the origin of this ceremony, and Professor Bell, 2 Com. pp. 18, 19, terms it "the ceremony of intimation." This truly idle ceremony may with respect to Scotch deeds be thought too inveterate to be dispensed with without legislation—though I hope otherwise—but to deny effect to foreign transactions in which it has not been observed by foreigners may well be thought another matter, and I agree with Lord Rutherford in thinking that it is. It is perhaps superfluous to say that a debtor or custodier of goods would not, according to a rule of law resting on substantial and reasonable considerations, be permitted to suffer any prejudice whatever by reason of an unintimated assignation. He has a right to be informed of an assignation, pledge, or anything relating to the debt he owes or the goods he holds, by which his interests may be affected or his conduct influenced. Creditors of the cedent have no such right, can take no benefit from intimation to the only person who has right to receive it, and suffer no prejudice from that person not receiving it. To require the observance of this ceremony by foreigners in foreign mercantile transactions is, I think, as unreasonable as it would be to require from them writing in a bargain about goods when the law and custom of their country where it is made does not require it, or that the writing shall be in a form and executed in a manner unknown in that country.

The respondents' argument on this question is very distinctly stated in their minute of debate, thus,—“It may be true that where a contract is made in England with reference to moveables in Scotland, the rights of the

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parties to the contract would fall to be determined by the law of England as the *lex loci contractus*, but where the party having right under the contract seeks to vindicate his right in and to the thing itself against third parties, then the question depends, not upon his contract, which affects only the contracting parties, but upon whether or not he has obtained a real right in the thing itself which he can vindicate against all the world. It is conceived that this question can only be determined by the *lex situs*. The personal rights of the various competing parties may depend upon contracts made or transactions taking place in different countries, and according to different laws, but when these parties seek to vindicate their rights in the subject, and to determine their preferences, they must, it is submitted, appeal to the law of the country in which the subject is situated to determine which of them is, or in what order of priority they are, in fact, vested with real rights in the subjects; and the law of that country when so appealed to can only give answer according to the rules and principles which it recognises and administers within its borders." I think this argument is unsound. It is indeed true that this contract (like all other contracts) immediately and directly affects only the parties to it. But how this bears on the question I do not see. Nor do I see how it can be of any significance in the contention that the right, which Inglis says, and desires, by reference to the law of England, to prove, that he takes under this contract, gives him a claim upon the fund *in medio* in this multiplepointing superior to that of his only competitor. The vast majority of claims in Scotch multiplepointings depend upon contracts or transactions; some depend on wills and legal succession. Is it a reasonable proposition that the *lex loci contractus*, the law of wills and of legal succession, which would otherwise govern the rights of the claimants, disappears because, and only because, they have an arresting creditor, or any number of arresting creditors, to compete with? The debt of the only arresting creditors here happens to be a Scotch judgment debt. Suppose it had been, as it might, a foreign debt, dependent on a foreign contract or transaction, is it even stateable that the *lex loci contractus* might not have been appealed to by them to support their claim, or by their opponents to defeat it?

In considering the question I am now dealing with, it is not, I think, safe or legitimate for us to conjecture what the law of England is,—that is to say, how we think that an English Court or English counsel would probably determine, or instruct us regarding, the rights arising out of the transaction in dispute. Lord Kincairney declines even to consider the question whether the law of England ought to be ascertained by us, being of opinion "that Inglis has made no relevant averments about the law of England," and that he is "therefore shut up to consider this case as depending on the law of Scotland." His Lordship must, I should think, regret this necessity, for after expressing a distinct opinion that if there was by the English transaction "a pledge of the delivery-order or warrant for the whisky by Goldsmith, it must be deemed to be a pledge of the whisky in terms of the Factors Act," he goes on to consider the question, "did the transaction amount to a pledge of the delivery-order," and says "I have considerable difficulty in understanding the agreement." But certainly the first step and first duty of the Court is to understand the agreement, and it

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is at least probable that the law and custom of the country where it was made may explain it or help to do so. Lord Low and Lord Kyllachy concur in the opinion that there was by the transaction no pledge of the document of title, or indication of intention to pledge. I cannot regard this as satisfactory, and indeed think it clear that we ought to be informed as to the import and meaning of the transaction according to the law and custom of the country where it was made. Nor can I assent to the view that the originally English Factors Act, 1889, having been subsequently extended to Scotland, we are presumably competent to judge of its provisions, and so to determine the effect of any of its clauses upon an English transaction. I think the proper and only safe course is to ascertain the law of England, and that not in the abstract but in the concrete,—that is to say, on the question what, according to that law, by statute or otherwise, are the rights arising to the parties out of the very transaction in question. Let us suppose that we shall ascertain, so as to be judicially satisfied, that by the transaction, according to the law of England, the document of title to the whisky was pledged, not by an executory contract, contracted to be pledged, but by an executed contract, actually pledged to Inglis, being deposited with him,—that is, delivered into his hands in security of the debt due to him by the owner of the whisky, and that the whisky itself was thereby pledged, the question would no doubt remain whether this was sufficient to support his claim in this multiplepinding. I doubt, though of course I am not sure, whether we should have ordered minutes of debate and consulted our brethren on that question, but I am sure, or at least nearly so, that if we had, the minutes of debate and also the opinions of our learned brethren would have been materially different from those now before us.

Suppose, on the contrary, that we shall be informed and judicially satisfied, as we possibly may be if we inquire, that Inglis' averment as to the law of England is unfounded, and that according to that law the transaction, on which alone he rests his claim, gives him no right of pledge either in the document of title or in the whisky—is it reasonably doubtful that this would put an end to his claim?

II. On the second question raised by the record, viz., what is the right arising to Inglis under the transaction in question according to the law of Scotland as the law of the *situs* of the whisky, I must take the facts to be as averred by Inglis and admitted by his opponents (Cond. 1 and Ans. 1). These facts, which indeed constitute the transaction, are in substance that Goldsmith, the owner, deposited the whisky with Inglis in security of a loan of £3000, in so far as a deposit could be lawfully effected by the written agreement of 18th December 1894, and the indorsement and delivery of the warehouse-keeper's delivery-order and warrant No. 18 of process. The loan is admitted, and also the contemporaneous fact that the "agreement of deposit" and the indorsed document of title were handed to the lender "when the loan was made." In short, it is the fact, admitted and agreed on, that on getting the money from the lender the borrower delivered to him in return the agreement and indorsed document of title to the whisky.

On these facts, and having regard to the terms of the agreement of deposit, and of the indorsed document of title which were handed to Inglis in

No. 139. return for his money, I am of opinion that the whisky was deposited with
Mar. 18, 1897. him on a contract of pledge. Pledge is a contract right, but the contract
Robertson & is not complete, or rather, I should say, is no contract of pledge without
Baxter v. deposit of the thing pledged in the hands of the pledgee. A ship's cargo
Inglis. or casks of whisky in a warehouse cannot without much labour, which in
most cases would be superfluous, be handed over and deposited simply and
actually as a watch or jewel may, and so, in the interest of trade, ways have
been devised, and that without any remarkable ingenuity, of obtaining
what may reasonably be called delivery or deposit of ship cargoes and
warehoused goods without the actual physical or mechanical removal of
them. The idea, looking only to the sense and reason of the thing, and
disregarding mere ceremony, is so simple as this, that something shall be
done sufficient to put the custodier (whether ship captain or warehouse-
keeper) in the position of holding for the vendee or pledgee as he had
theretofore done for the vendor or pledgor. Now, looking to the terms of
the delivery-order and warrant of the custodiers here, which shews, and
indeed really is, the contract with the pledgor (Goldsmith) on which they
held the goods, it seems to me that after the indorsement and delivery of it
to Inglis, the custodiers held for him exactly as they did for Goldsmith
before and on the very same terms. Nor had they any choice in the matter.
They were bound by their contract to deliver the goods to Inglis as the
indorsee and holder of their warrant, or to his order "by indorse-
ment hereon," and could not without breach of contract deliver to
any other. If there is any real difference or distinction in the relation
between the custodiers and Inglis after the indorsement and delivery
of the warrant, and that which previously existed between the cus-
todiers and Goldsmith, I have not been able to perceive it. I
think Goldsmith could not have demanded delivery from the Clyde
Bonding Company (the custodiers) without production of their delivery-order
and warrant. For they being by its terms bound to hold to "the order of
W. C. Goldsmith or assigns by indorsement hereon" were certainly not in
safety, and for that reason I think not bound, to deliver to anyone without
its production or other satisfactory assurance that it could not thereafter be
presented to them by a *bona fide* onerous indorsee. I cannot doubt that it
was thus expressed with the intention and purpose of giving anyone to
whom in the ordinary course of business it was indorsed and delivered
assurance that the Clyde Bonding Company had undertaken and were bound
to hold for him under that contract exactly as if it had been made with
him. This seems a reasonable meaning to attach to it, and no other occurs
to me. If it had been expressed thus,—“By the contract which we (the
Clyde Bonding Company) hereby make with W. C. Goldsmith, we, at his
request, undertake to hold the whisky, on the condition specified hereon,
for any person who is the holder hereof indorsed by the said W. C. Gold-
smith,” I could not doubt that this would, without the necessity of any
ceremony, have imported a contract between the Clyde Bonding Company
and Inglis or any other to whom the document expressing it was duly
indorsed and delivered. I think the contract as it stands amounts to this,
and if so, then at the date of the arrestment by Robertson & Baxter, in
the hands of the Clyde Bonding Company, Inglis was the lawful holder

and transferee of the contract on which they held the whisky, and as such entitled to demand implement by delivery. It is, I think, clear that neither the Clyde Bonding Company nor Goldsmith could have declined to recognise his right or lawfully done anything to frustrate it. No. 139.

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On these grounds I am of opinion that Inglis' claim is good at the common law, irrespective of the Factors Act.

On that Act also I think it is good. The important section is the third, and it is remarkable, and regrettable, that there should be such variety of judicial opinion, as this case has elicited, regarding its meaning and practical effect. Without any avoidable criticism of the opinions of others, I will state my own briefly :—(First) I agree with those of my brethren who think that the provision of the section is not limited to factors or mercantile agents. I am unable to accept the view that the Legislature intended to empower any owner of goods to pledge them by pledging the document of title, provided he was careful to avoid doing it himself, and authorised an agent to do it for him. (Second) I concur in the opinion of, I think, the majority of my brethren, that the delivery-order and warrant of the Clyde Bonding Company is a document of title within the meaning of the Act. (Third) I agree with Lord Kincairney and any others who think—I quote from his Lordship's opinion,—“that if there was a pledge of the delivery-order or warrant for the whisky by Goldsmith, it must be deemed to be a pledge of the whisky in the sense of the Factors Act.” (Fourth) I am of opinion that this document was pledged by Goldsmith to Inglis on 18th December 1894. For the exact facts, as I take them to be established by admission, and not really in dispute, I refer to what I have already said. On these facts I hold that the document of title in question was deposited with Inglis to be held by him in security of his loan to Goldsmith. It is of course true that the intention and purpose with which anything is delivered by the owner to another must, if disputed, be shewn somehow, and that satisfactorily. I did not really understand that the intention and purpose with which this document of title was delivered to Inglis was disputed, the only dispute being, as I thought, of a quite other character, viz., whether the admitted intention and purpose of pledge by a borrower to a lender could with respect to warehoused goods be effected without the ceremony of intimation. But assuming that there is such dispute, and that the intention and purpose of the certainly admitted deposit of this document of title with Inglis must be proved to our satisfaction, I venture to ask whether there is room for reasonable doubt as to the matter of fact. Inglis says it was as a pledge to him in security of the loan he admittedly then and there made to the depositor. This is consistent with the agreement of deposit (though that specifies only the whisky), and with the admission given by his opponents in their answer already referred to, and no other account of it or reason for it is suggested. Lord M'Laren says that a pledge of the document of title would be a pledge of only the paper on which it is written, which was probably not intended. I cannot assent to this, for a right to hold and retain from the owner a deed or document written on paper may be more valuable as a security for debt than the paper. I do, however, agree that, irrespective of the clause in the Act which I am con-

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sidering, a pledge of a document of title would not pledge goods. But how this bears on the question before us I fail to see. That question is only this, Was there a pledge of the document of title? If there was not, there was of course no pledge of it either as paper or as document. If there was, then there was by the statute a pledge of the goods. To this I can see no answer.

I may call attention to section 11 of the Act 1889 (one of the supplemental clauses) regarding the "transfer of a document." I think the "transfer" of the document to Inglis was so complete as to need no support from this clause, though it may be referred to as removing any doubt which ingenuity may suggest.

I have said that I should abstain from any avoidable criticisms of the opinions of my learned brethren in which I do not concur. I must, however, state my views regarding the case of *M'Ewan v. Smith*,¹ which is referred to by some of the consulted Judges as supporting the proposition that a pledge or assignation of warehoused goods cannot be made so as to be effectual in competition with an arresting creditor of the pledgor or cedent without intimation to the warehouse-keeper, and by others as supporting the proposition that section 4 of the Factors Act, 1842, and consequently section 3 of the Factors Act, 1889, has no application to principals. I need hardly say that had I taken either of these views of the decision of the House of Lords I should not have formed, certainly not expressed, the opinion which I have now stated, and it is not without diffidence and a careful consideration of the decision as reported that I presume to differ from, I think, all my brethren as to its import. The substantial question in the case was whether on the facts an unpaid vendor retained or had lost his lien on the goods, which at the date of sale were in a bonded warehouse, and were still there when the vendee became bankrupt. There was no warehouse-keeper's certificate or warrant, but only an entry in the warehouse books under the title "James Alexander for J. & A. Smith." J. & A. Smith were the vendors whose lien was in dispute, and Alexander their importing agent. Their vendees were Bowie & Company, who became bankrupt without payment of the price. At the time of the sale Bowie & Company received from J. & A. Smith a letter addressed by them to Alexander desiring him to deliver the goods to their (Bowie & Company's) order. They never received any other document from them. Bowie & Company then sold the goods to M'Ewan & Company, handing to them in return for the price the letter from J. & A. Smith to Alexander, indorsed thus—"Deliver to the order of William M'Ewan, Sons, & Co.—James Bowie & Co." The first sellers were not informed of this subsale until after Bowie & Company's bankruptcy.

These are, I think, the whole material facts, and certainly those on which the judgment of the House of Lords proceeded. The noble and learned Lords were unanimously of opinion, and decided—first, that J. & A. Smith's letter to Alexander, and the handing of it to Bowie & Company, was no hindrance whatever to their lien for the unpaid price; second, that it did not become such hindrance by being indorsed and handed by Bowie & Com-

¹ 6 Bell's App. 340.

pany to the subvendees M'Ewan & Company ; and third, that J. & A. Smith had done nothing in respect of which they ought, on equitable considerations, to be estopped from maintaining and exercising their lien.

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It is only in the view that J. & A. Smith's letter to their agent Alexander was a document of title within the meaning of the Acts of 1842, 1889, and 1893—the meaning is the same in all of them—that the case of *M'Ewan v. Smith*¹ can be intelligently referred to for any purpose here. But is this view stateable? Let me, by supposition, change the facts by substituting for that letter a delivery-order and warrant by the warehouse-keeper to the order of J. & A. Smith, in the same terms as that held by Ingliis, duly indorsed and delivered to Bowie & Co. and by them to M'Ewan & Co., is it reasonably certain, or even conceivable, that the judgment and the reasons for it would have been the same? The House of Lords had no occasion to deal with the question whether section 4 of the Factors Act, 1842, applied to principals holding documents of title, and no allusion whatever, direct or indirect, is made to it by any of the noble Lords. Then with respect to the non-intimation to the warehouse-keeper of the letter to Alexander, I collect from the opinions of all the noble Lords that no intimation would have affected the judgment. The Lord Chancellor says with respect to Alexander, that "being the agent for the vendors, and the goods being in the warehouse of Messrs Little & Co., he could only have acted under the authority of the original delivery-note of the vendors, and all he could have done under it would have been to give directions to the warehouseman to deliver the goods." Lord Campbell says substantially the same, adding emphatically that Alexander was not at liberty to give such directions or authority to the warehouse-keeper to deliver the goods or transfer them to the name of the purchaser except upon payment of the price.

I have been struck with the aversion manifested, and indeed strongly expressed, by my brethren, to regard bills of lading as of the same character and on the same level as the other "documents of title to goods" specified in the Factors Acts of 1842 and 1889, and the Sale of Goods Act of 1893. I must own, though with becoming diffidence, that I cannot see any distinction or reason for any. A bill of lading is a contract of carriage involving custody usually of goods in bulk, and it was found to be convenient, and therefore expedient, in the interests of commerce, that the possession of the bill of lading should be taken as proof of the possession or control of the goods. There was for a long time serious difference of legal opinion and conflicting and indeed diametrically opposite decisions on the subject, but at last, and after juries had returned verdicts finding that such was the usage of merchants, it was determined by the House of Lords that bills of lading should be regarded as negotiable to the effect of transmitting property whether absolutely as by sale, or specially as by pledge, by their indorsation and delivery.

Again, a "warehouse-keeper's certificate and warrant or order for the delivery of goods" is a contract of custody with an obligation on the custodian very similar, I should say, to that imposed by a bill of lading, and,

¹ 6 Bell's Appeals, 340.

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or an agent on his behalf to some other person than the original buyer. In such case the person buying or advancing money on the pledge of the goods or documents of title, without knowledge of the previous sale, is not affected by the previous sale, but is regarded as having acquired his right from one expressly authorised to confer it. Section 9 deals with the case of a person who has bought or agreed to buy goods, and who, with consent of the seller, obtains possession of the goods or the documents of title; and it is provided that any sale, pledge, or other disposition of the goods or documents of title by such person, or any agent on his behalf, shall prevail against any lien or other right competent to the original seller. The one section deals with the converse of the case presented in the other. Section 8 provides for the case of a seller acting to the prejudice of the buyer; section 9 provides for the case of a buyer acting to the prejudice of the seller. But neither of the cases so provided for is the case here. Goldsmith has done nothing to defeat the right of Inglis, and Inglis has done nothing to prejudice Goldsmith. The question before us is, whether Inglis' title to the whisky, as complete (or incomplete) now as when it was granted, is preferable or not to a right in Robertson & Baxter, not based upon any transference or other title conferred by or flowing from Goldsmith, but based upon a decree and diligence which they have obtained and used without the consent of Goldsmith at all. The cases are so essentially different that I cannot understand the reference to sections 8 and 9 of the Factors Act as bearing upon the case or supporting the claim of Mr Inglis.

The only other clause in the Factors Act which is relied on by Inglis is the third, and it is, in my opinion, the only clause which gives even the semblance of support to his case. It provides that "a pledge of the document of title to goods shall be deemed to be a pledge of the goods." It is maintained that that clause means that in every case the pledge of documents of title, whether by owner or mercantile agent entrusted by the owner, shall be the same in all respects and to all effects as actual corporeal delivery of the goods themselves. If that is the meaning and effect of the clause, then *cadit questio*. If the goods were actually delivered to Inglis in December 1894, and remained in his possession or the possession of someone on his behalf, they could not be attached by the arrestment of Robertson & Baxter in February 1895, and if not so arrested, Baxter & Robertson have no claim. Is that the meaning of the clause? I think not.

I think the clause cannot be dissociated from its context, and in speaking of the context I disregard altogether the cross heading "disposition by mercantile agents" and the marginal rubrics. By context I mean the clause which precedes and the clauses which follow the one under consideration. Clause 2 and clauses 4, 5, and 6 have reference to transactions entered into and things done by a mercantile agent, and their effect on his principal. Why, then, should section 3 be read as expressing an abstract rule of law, affecting all transactions or contracts of pledge, apart from every connection therewith of a mercantile agent? To do so is to introduce into the Act a provision foreign to its main purpose. I think the clause may reasonably be read, in view of the context, as a provision merely that a pledge by a mercantile agent of documents of title shall in any question with his prin-

cial be deemed to be a pledge of the goods to which the documents refer. Is it anything more than a proviso qualifying sections 2 and 4? No. 139.

But assuming that the clause refers to transactions between principals as well as between a principal and one who is only an agent (for what an agent may do cannot be said to be beyond the power of the principal) the clause in question does not necessarily bear the interpretation put upon it by Mr Inglis. Mar. 18, 1897.
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The word "pledge" may either mean the thing pledged or the contract under which it is given or to be given by the owner to the pledgee. In clause 2 I think it means the contract, not the thing. This is quite in consonance with the interpretation clause, section 1, subsection 5, which says that the word "pledge" shall include "any contract pledging," and it seems to me to give a full meaning to the clause to read it as providing that a contract to pledge documents of title entered into by an agent or by a principal shall be as effectual as a contract to pledge the goods to which the documents refer. But a contract to pledge would only confer a *jus ad rem*, not a *jus in re*.

I abstain from further observations on this 3d clause of the Factors Act, because I cannot usefully add anything to what has been said thereon by Lord Kyllachy and Lord Low, in whose opinions generally I concur.

I think the interlocutor reclaimed against should be affirmed.

LORD MONCREIFF.—I agree with the consulted Judges and the majority of your Lordships.

1. The claimant Inglis maintains that the question raised falls to be decided according to the law of England. If the law of England applied it would require to be ascertained in the usual way. I am of opinion, however, that the law of Scotland, which is the *lex situs* as well as the *lex fori*, applies, the question being one, not as to the constitution of the contract between Goldsmith and Inglis, but as to a competition of alleged real rights in moveables locally situated in Scotland. The balance of authority is in favour of this view. It is established by a series of decisions in our own Courts (*Strachan v. M'Dougle*,¹ *Ord v. Donaldson*,² *Connal & Co. v. Loder* ³), and is in accordance with a large body of authority in the writings of jurists.

If, then, the case falls to be decided according to the law of Scotland, there is, I think, no doubt that by that law (apart from the Factors Acts) the arresting creditors, the claimants Robertson & Baxter, must be preferred. Pledge being a real right requires for its completion delivery of the goods pledged or equivalents for delivery; and where the goods are in possession of a third party, the mere transfer to the pledgee of a delivery-order or warrant is not of itself sufficient, without intimation to the custodian, to complete the pledgee's right. At common law a delivery-order is not equivalent to a bill of lading—*M'Ewan v. Smith*,⁴ and it makes no difference that the order or warrant transferred bears, as here, that the goods are held to the order of the pledgor or his assignees by indorsement—*Connal & Co. v. Loder*.⁵ The law of England seems to be the same—*Farina v. Home*,⁶ Benjamin on Sale, 4th edn. 829.

¹ 13 S. 954.

² 17 D. 1053.

³ 6 Macph. 1095, per Lord Justice-Clerk, at p. 1110.

⁴ 6 Bell's App. 340.

⁵ 16 M. and W. 119, per Baron Parke, at p. 123.

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2. A more difficult question is raised under the Factors Acts and the Sale of Goods Act, 1893. The reclaimer relies in particular upon the 3d, 8th, 9th, and 10th sections of the Factors Act, 1889, made applicable to Scotland by the Factors (Scotland) Act, 1890, and sections 25 and 47 of the Sale of Goods Act, 1893, which, with certain amplifications, embody almost verbatim the 8th, 9th, and 10th sections of the Factors Act, 1889.

(1) I shall deal first with the 8th, 9th, and 10th sections of the Factors Act, 1889. The answer to the reclaimer's argument on these clauses seems to me to be that in this case there is no room for their application; but they may be referred to as throwing light upon the rest of the argument on the Factors Acts. They deal solely with title to transfer, and implied authority to pledge or sell, possessed by a person entrusted as agent or *quasi-agent* with goods or documents of title. Here there is no question of ostensible ownership or ostensible authority to transfer—there is no agent or *quasi-agent*. There are only the two immediate parties to the contract, Goldsmith and Inglis. No one is claiming through Inglis; he has not transferred the delivery-order to a sub-purchaser; he is claiming on it himself. Again, Goldsmith is not in the position of the person entrusted; there is no dispute that when he agreed to pledge the goods to Inglis he had full right of property in the goods, and full right to dispose of them as he pleased. It is an accident that the arresting creditors Robertson & Baxter happened to have sold the whisky in question to Goldsmith. They have not, and do not profess to have, any right in or against the goods as sellers; and as far as regards the present question they are simply creditors of Goldsmith, using their rights as such to attach his property in satisfaction of his debt to them.

This being the state of the facts, it will be seen that sections 8 and 9 do not in terms apply. The 8th section deals with the case of the seller being left by the purchaser in possession of the goods or documents of title, and thereafter selling or pledging them to another person. The 9th section applies to the case of a purchaser who with consent of the seller obtains possession of the goods or documents of title and transfers them to a sub-purchaser. The effect of these sections—and be it noted that it required express enactment to produce it—is to place a seller or first purchaser in the same position as a mercantile agent for the true owner, and to give to transferences of the goods or documents of title by them to a third party, taking in good faith, the same effect as the previous Factors Acts attributed to a transference by a mercantile agent. Here we have neither of these cases.

Neither does the 10th section touch the question. Inglis has not transferred the delivery-order to a sub-purchaser; and even if Robertson & Baxter could be regarded as the “unpaid sellers,” they are not seeking to avail themselves of any right of lien or stoppage *in transitu* or any other right as sellers. They have been completely divested, and are claiming merely as creditors.

But further, even if the question had arisen with a purchaser from Inglis, or if Robertson & Baxter were held to be the sellers, and Goldsmith the person interested, I am of opinion that the effect of the clauses to which I have referred would have been, not to complete a real right in the sub-

purchaser, but to deprive the seller or sellers of any right of lien or other similar right in the goods which he or they had as such. No. 139.

It is not necessary to examine in detail the 25th and 47th sections of the Sale of Goods Act, 1893, because those clauses simply embody the 8th, 9th, and 10th sections of the Factors Act of 1889. But it may be noted that in the code of which they now form part it is more than once declared that the rules of the common law are not affected, "save in so far as they are inconsistent with the express provisions of this Act"; and by section 61 (4) it is provided—"The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security." Mar. 18, 1897.
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If the law of pledge has been altered by any of the clauses referred to, this has been done not directly but by inference. There is every presumption against such a radical change having been effected in this way, and I cannot point to a stronger illustration than one which is furnished by the Factors Acts themselves. It was found that under the earlier Factors Acts a sale or pledge by a mercantile agent entrusted with goods or documents of title was effectual, while a sale or pledge by a vendee similarly entrusted was not. The Courts of law did not feel themselves entitled to infer from the powers conferred by the statutes on a mercantile agent that a vendee entrusted with the goods or documents of title had equal powers to bind the vendor, and it required the Factors Acts of 1877 and 1889 to effect this change. When it was effected, it will be observed that it was made with an amount of caution and detail which would have been quite unnecessary if it had been intended that the indorsation of a delivery-order should be equivalent to delivery of the goods themselves, and this brings me to the consideration of the remaining statutory provision upon which the reclaimer founds.

(2) Reliance is placed by the reclaimer upon the 3d section of the Factors Act, 1889, which enacts,—“A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.” This, it is said, is an unqualified declaration of general application that a pledge of documents of title shall be equivalent to a pledge of the goods completed by delivery.

Strictly speaking, the agreement of deposit or hypothecation by Goldsmith to Inglist is not a pledge of a document of title; it is a very good example of what the statute calls “a pledge of the goods” themselves, but which really is only, to use the words of the statutory definition of “pledge” (section 1 (5)), “a contract pledging or giving a lien or security over goods.” The words are, “in consideration of your advancing to me the sum of £3000, I hereby deposit with you, having full power and authority to do so, the wines and spirits specified in the schedule hereto as a security for the payment of the said £3000,” &c. The delivery-order was indorsed and transferred in order to make this agreement effectual to Inglist. I do not find in any of the statutes a provision that an agreement to pledge goods shall be equivalent to delivery of the goods. It would be strange if, while in this sense a pledge of the goods is not equivalent to delivery of them, a pledge of the documents of title should have that effect. And therefore,

No. 139. even taking this transaction as a pledge of the delivery-order, I am satisfied that the true effect of the section relied on is simply to define the scope of a mercantile agent's power to contract so as to bind his principal. This is the view which, at least in Scotland, has for upwards of fifty years been taken of that provision as it stood in the 4th section of the Factors Act of 1842.

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The enactment must be interpreted and judged by its setting and by its origin. The heading of the group of clauses in which section 3 occurs is, "dispositions by mercantile agents." This may not, taken by itself, be of importance; but what is of importance is that section 3 occurs in the middle of what are termed the agency clauses. And this is what might have been expected, seeing that the clause is taken from the 4th section of the Factors Act, 1842. That Act is confined to the law relating to advances made to agents entrusted with goods. The 4th section deserves examination. It is an interpretation clause; it begins with defining the term "document of title," and speaks of the various documents therein enumerated as affording proof of the possession or control of goods, or authorising by indorsement or delivery the possessor of such document to transfer the goods. It next states the circumstances in which an agent shall be held to have been entrusted with the possession of goods represented by such document of title; and then come the words from which the 3d section of the Factors Act of 1889 is taken—"all contracts pledging or giving a lien upon such document of title as aforesaid shall be taken and deemed to be respectively pledges of and liens upon the goods to which the same relates." Any difficulty which might have been created by the omission of the words "all contracts" from the 3d section of the Act of 1889 is removed by the definition of the word "pledge" in that statute, to which I have already referred.

The meaning of these provisions as I read them simply is, that if the owner of goods entrusts his agent with the documents of title, any person advancing money to the agent on the faith of them shall be entitled to assume that the agent is in possession of or has control of the goods with the knowledge and consent of the owner, and if the agent pledges the documents of title in security of an advance, it shall be held, as in a question between the pledgee and the owner of the goods, that the agent is empowered to enter, and has entered, into a contract pledging the goods. But I do not read them as meaning that the goods shall thereby be held to have been delivered to the pledgee; they relate to power to contract, and not to the completion of real rights. In this connection I would point out that the case *Farina v. Home*,¹ to which I have already referred, was decided subsequently to the passing of the Factors Act, 1842. In that case it was decided that until the wharfinger attorned to the holder of the warrant there was no constructive delivery to him. And in speaking of such documents of title Mr Benjamin says (4th ed. p. 829),—"In the decided cases between vendor and vendee the Judges construe these documents as mere tokens of authority to receive possession, as mere offers by the warehouseman to hold the goods for the indorsee of the warrant, inchoate and incomplete till the vendee has obtained the warehouseman's consent to attorn to him." This is in

¹ 16 M. and W. 119.

accordance with the Scottish decisions of *M'Ewan v. Smith*,¹ decided in 1849, and the later case of *Connal v. Loder*.² No. 139.

I have hitherto spoken of the 3d section as if it related only to dispositions by mercantile agents, but even if it is held to apply to dispositions by sellers and buyers of goods (which perhaps it does), I do not think that the question is altered, because the effect of sections 8, 9, and 10 is simply to place sellers and buyers in the cases mentioned in the same position as mercantile agents for the true owner. Mar. 18, 1897.
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It may be, although I do not think so, that it was intended by the enactments on which the reclaimer relies, to place delivery-orders and warehouse warrants in the same position to all intents and purposes as bills of lading, and in particular to enact that, in order to the completion of the real right of pledge, it should not be necessary to intimate to the warehouse-keeper the transfer of such documents of title. But in my opinion this has not been effected by any of the statutory provisions in question.

On the whole case, I think that the Lord Ordinary has rightly sustained the claim of Robertson & Baxter, and that his interlocutor should be affirmed.

THE COURT pronounced the following interlocutor:—"The Lords having resumed consideration of the cause, with the opinions of the consulted Judges, in conformity with the opinion of the majority of the whole Judges of the Court, refuse the reclaiming note against the interlocutor of Lord Kyllachy, dated 20th March 1896: Adhere to the interlocutor reclaimed against, and decern: Find the claimants and respondents Messrs Robertson & Baxter entitled to additional expenses, and remit," &c.

MORTON, SMART, & MACDONALD, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.
—Agents.

GAVIN BROWN CLARK, Petitioner (Respondent).—*Ure—Cooper*. No. 140.
ROBERT SUTHERLAND, Respondent (Reclaimer).—*Jameson—Crole*.
ALEXANDER DUGALD MACKINNON, Respondent.

Election Law—Election Expenses—Failure to make a true return and declaration—Authorised Excuse—Bona Fides—Corrupt Practices Act, 1883 (46 and 47 Vict. cap. 51), sec. 34.—In a petition by a Member of Parliament, who had acted as his own election agent, for an authorised excuse for failure, *inter alia*, to enclose certain vouchers with the return of his expenses, and to insert in the declaration the amount of his expenses in the election, *held*, after a proof, that the failure was due to inadvertence, and not to want of good faith, and excuse allowed. Mar. 18, 1897.
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Election Law—Process—Petition for authorised excuse—Amendment—Proposal to add statement of additional error requiring excuse—Notice—Corrupt Practices Act, 1883 (46 and 47 Vict. cap. 51), sec. 34.—It is incompetent to amend a petition by a candidate at a parliamentary election, for an authorised excuse for errors in his return of election expenses, by adding a statement of an additional error requiring an excuse, without notice being given to the constituency.

Election Law—Election Expenses—Failure to make a true return—Petition for authorised excuse—Proof—Corrupt Practices Act, 1883 (46 and 47 Vict. cap. 51), sec. 34.—Section 34 of the Corrupt Practices Act, 1883,

¹ Bell's App. 340.

² 6 Macph. 1095.

No. 140. enacts that, when a candidate's return of election expenses contains some error, if the candidate applies to the Court and shews that such error has arisen, *inter alia*, by reason of inadvertence, or of any reasonable excuse of a like nature, "and not by reason of any want of good faith" on his part, the Court may allow an authorised excuse for the same. *Held* (rev. judgment of Lord Kyllachy) that it is competent for a person opposing a petition by a candidate for an authorised excuse for certain errors in his return of election expenses to lead evidence of other errors in the return, with the view of shewing that those specified were not due to mere inadvertence.

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Process—Expenses—Reclaiming Note on merits and expenses—Time for objecting to Lord Ordinary's award.—When a party reclaiming objects to an interlocutor not only as wrong on the merits but also as wrong in finding the claimer liable in expenses, even if right on the merits, he must state his objection as to expenses in opening on the reclaiming note.

1st DIVISION. (SEQUEL of *Clark v. Sutherland*, Dec. 2, 1896, *supra*, p. 183.)
Ld. Kyllachy.

On 2d December the Court remitted the case to Lord Kyllachy to proceed as might be just. After the interlocutor the respondent Mackinnon took no part in the proceedings. On 10th December the Lord Ordinary allowed a proof before answer.

On 5th January 1897, before the proof was taken, the petitioner craved leave to make an addition to the prayer (arts. 6 and 7).

The respondent objected, but the Lord Ordinary allowed the amendment, reserving all questions of relevancy.

The prayer, as then amended, was as follows:—"To make an order for allowing an authorised excuse for the petitioner's failure (1) to transmit the return of his election expenses within the time fixed by the Statute 46 and 47 Vict. cap. 51, section 33; (2) to enclose as part of said return the receipt for £2, 2s. paid by the petitioner to the Lybster Temperance Hall Committee; (3) to enclose as part of said return the receipt for £5, 15s. paid by the petitioner to James Nicol, Wick; (4) to insert the date of the election in the return which he made; (5) to state accurately the christian name of the said James Nicol in the said return; (6) to insert the date of the election in the declaration as to the petitioner's expenses; and (7) to insert in the said declaration the amount paid by him for the purpose of the said election or for his failure to do any of the above wherein your Lordships shall consider that the petitioner has not complied with the statute; and further, to make an order allowing all or any of the above failures or omissions, if found to have been committed, to be an exception or exceptions from the provisions of the said Act, which would otherwise make the same an illegal practice."

In the course of the proof counsel for the respondent Sutherland proposed to put the following question to the petitioner in cross-examination:—" (Q.) In the summary of election expenses, No. 16 of process, all the personal expenses you have put down are £2, 2s. 6d. ?" This question was objected to by counsel for the petitioner, "in respect that the object of the question is to discover further errors and omissions in the account, which are not in this petition sought to be excused." Counsel for the respondent contended that he was entitled to put such questions to the witness for the purpose of shewing that in his return he wilfully, or with gross carelessness, understated the amount of his personal expenses. The Lord Ordinary sustained the objection.

At a later stage in the proof counsel for the respondent Sutherland further proposed to tender a witness "to prove from the books of the

Royal Hotel, Thurso, that charges for hiring in connection with the election were incurred by Dr Clark, and not included in his election account." Counsel for the petitioner objected, on the ground that the proposed inquiry was not within the petition. The Lord Ordinary sustained the objection. No. 140.
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On 14th January 1897 the Lord Ordinary (Kyllachy) pronounced an interlocutor in the following terms:—"Finds (1) that the petitioner does not insist in that part of the prayer of the petition which prays for an authorised excuse for the failure first mentioned in the prayer, except in so far as such failure may be held to be constituted by the omissions or errors second, third, fourth, fifth, sixth, and seventh mentioned in said prayer: Finds (2) that the said errors or omissions second, third, fourth, fifth, sixth, and seventh mentioned in said prayer arose by reason of inadvertence, and not by reason of any want of good faith on the part of the petitioner: Finds (3) that in these circumstances the petitioner is entitled to an order for an authorised excuse in terms of the 34th section of the statute: Therefore excuses the said errors or omissions, in terms of said section, and also excuses the petitioner's failure to transmit the return and declaration respecting his election expenses, as required by the statute, in so far as the said errors or omissions imported, or may be held to import, such failure so to transmit: To the above extent and effect grants the prayer of the petition: *Quoad ultra* dismisses the same: Finds no expenses due to or by either party, and decerns." *

* "OPINION.—Having considered the proof, I see no reason for refusing the petitioner the order which he seeks for an authorised excuse for the errors and omissions set forth in the prayer of the petition. The excuse suggested, and which I propose to affirm, is that these errors and omissions arose by reason of inadvertence, and not by reason of any want of good faith on the part of the petitioner.

"I do not think that it is necessary to attempt to define abstractly the meaning of the term 'inadvertence' as used in the statute. I am not sure that the term can be better paraphrased than by saying (in the words of one of the English Judges) that inadvertence is just negligence or carelessness where the circumstances shew an absence of bad faith. There may, of course, be degrees of carelessness, and perhaps in this case the degree was considerable. But it was not, I think, the intention of the Legislature that the Court should grant or refuse an order for an excuse according to what might happen to be their estimate of the degree of inadvertence. Bad faith is of course another matter, and it may be that a deliberate and open defiance of the statute would have that character. It has been said that a late eminent legislator used to declare that he would undertake to drive a coach and six through any Act of Parliament that might be passed, and if it appeared that the petitioner had acted in that spirit or with that motive, I do not say that he could have been excused. But I have hardly, I think, to deal with a case of that description.

"There are just two points which I should perhaps notice. The respondents seem to suggest that the petitioner had committed other and similar irregularities for which an excuse was not sought. I refused to allow evidence as to these, because I thought, and still think, that I have only here to deal with the specific errors and omissions for which an excuse is sought. It did not appear that the irregularities in question were connected with those covered by the petition, or that (for that reason or otherwise) their investigation was likely to throw light upon the subject-matter of the petition.

"The other point is this: The petitioner asks to have an excuse under

No. 140. The respondent reclaimed, *inter alia*, on the ground that the Lord Ordinary had erred in sustaining the objections to the question put to the petitioner in cross-examination, and to the evidence which he had proposed to lead.

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LORD PRESIDENT.—I think the rulings of the Lord Ordinary cannot be sustained.

The first question put was to Dr Clark, the petitioner, himself. He was asked,—“In the summary of election expenses all the personal expenses you have put down are £2, 2s. 6d.?” That was a very innocent question, but it was indicative, and was avowed to be indicative, of what was to follow, and that was that questions were to be put tending to shew that more personal expenses had been incurred than the sum which was put down. The objection was this,—“Objected to by counsel for petitioner, in respect that the object of the question is to discover further errors and omissions in the account, which are not in this petition sought to be excused. Counsel for the respondent Sutherland contended that he was entitled to put such questions to witness for the purpose of shewing that in his return he wilfully, or with gross carelessness, understated the amount of his personal expenses,” and the Lord Ordinary sustained the objection. I think that was a bad objection. The petitioner in an application of this kind cannot, by limiting his application to certain omissions, limit the inquiry as to his conduct to these particulars, because the Act of Parliament says that what he has to make out in regard to the omissions sought to be excused is that they were occasioned by inadvertence—which is the allegation here—and not by any want of good faith. Suppose it should appear that the petitioner, over and above the omissions which he seeks to be

the 34th section of the statute,* that being the section which deals specially with errors or omissions in connection with the return of election expenses. He also, however, asks for an order under the 23d section of the statute,† which section deals generally, *inter alia*, with all acts or omissions of a candidate at any election, which, by reason of being in contravention of the provisions of the Act, ‘would be, but for that section, an illegal practice, payment, employment, or hiring.’

“I do not know the precise object for which the double order so sought is desired. It perhaps has to do with a certain difference in the language of the two sections—the 23d section providing that the Court shall make an order allowing an ‘exception from the provisions of the Act,’ and the 34th section providing for an order for allowing an ‘authorised excuse.’ It seems to me, however, that what the statute contemplated, in the particular case with which we have here to deal, was that the order should be an order under the 34th section, and that that order should be sufficient. Indeed I doubt whether, upon a strict construction of the words of the 23d section, an order under that section would be competent. For the exception there authorised is confined to the case where, but for that section, the omission would be an illegal practice. And that cannot, I apprehend, be predicated of errors or omissions with respect to the return of election expenses, seeing that by section 33, subsection 6, such errors or omissions constitute illegal practices only if and when they are without an ‘authorised excuse,’—that is to say, an excuse under section 34. For these reasons I have dismissed that part of the prayer of the petition which asks for an exception under section 23.”

* *Supra*, p. 185, note.

† *Supra*, p. 186, note.

excused from, has wholesale omitted other items which were proper to the heads of his account, would that not bear on the question whether a particular omission was to be excused, whether particular omissions were inadvertent or not, and also on the question whether the omissions were in good faith? In like manner, even one additional omission might, from its character or circumstances, be strong evidence of want of good faith; and in questions of conduct it is impossible to shut out evidence of the *animus* which actuates proceedings of which, by accident, only part are directly under consideration. It seems to me, therefore, that the Lord Ordinary has mistaken the scope of the proof, which it is part of the petitioner's case to offer to the Court,—proof, namely, of inadvertence and of the presence of good faith. To my thinking, the question objected to is highly relevant to the inquiry, and the same observation applies to the second question which was objected to, the objection being again sustained.

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The same reasoning leads me to a like conclusion in regard to the evidence tendered of expense having been incurred for hiring and not included in the return.

With reference to what Mr Ure said as to the distinction to be drawn between the cross-examination of the party to the cause on a particular topic and substantive evidence being led on the same subject, there is no doubt that such a distinction is recognised. But it does not occur when the subject-matter of the inquiry is relevant to the issue, and, as I have already said, evidence of this character seems to me to be completely relevant on the question of inadvertence and good faith. The cases to which Mr Ure refers are cases where the party to the cause may be cross-examined on matters not bearing on the issue with a view to testing his character and credibility. But here the vital point is that the evidence was relevant to the cause. I am therefore of opinion that these objections ought not to be sustained, and that the case should go back to the Lord Ordinary.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

THE COURT found that the objections set forth in the proof ought not to have been sustained: Therefore recalled the interlocutor reclaimed against; repelled the objections; and remitted to the Lord Ordinary to proceed as should be just.

Additional proof was led. At the close of the discussion on the evidence, the petitioner moved for leave to make the following amendment:—“(First) By inserting the following statement:—‘At the time when the petitioner transmitted the said return he had completely forgotten that he had incurred a hiring account to Henderson's Royal Hotel, Thurso, during his candidature. The account had not been sent in to the petitioner, and he had not paid it. The account, which amounted to £2, 9s., was sent in about November 1895 to Surgeon-General M'Lean, a supporter of the petitioner at Thurso, with whom the petitioner was residing at the time when the said account was incurred. Surgeon-General M'Lean sent it to Mrs Clark, who paid it with her own cheque, not knowing that it was an expense connected with the petitioner's election. The petitioner was at that time in India, and did not know till his return home, in or about March 1896, that his wife had paid the said account for him. He was

No. 140. not informed that the account which had been paid was one in connection with his election, and did not know that it was so until after the 5th January 1897, when the said account was referred to by the respondent Sutherland at the previous diet of proof in this petition. The petitioner omitted to mention the said account in his return through pure inadvertence, and he had no intention whatever of not returning any expense he had incurred.' (*Second*) . . . (*Third*) To insert in the prayer of the petition, between the words 'said election' and the words 'or for his failure,' the following words:—'(8) To include as an unpaid claim in the return of his election expenses the sum of £2, 9s., incurred to Henderson's Royal Hotel, Thurso'; and (*Fourth*) to omit the first head of the prayer of the petition."

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The result of the whole evidence led was that the averments of the petitioner were substantially proved. With reference to his personal expenses, the petitioner deposed that these amounted to £2, 2s. 6d., and that he "was very rarely in hotels in the county, as the leading people were always desirous of my living with them."

With regard to the omission of the amount of the election expenses from the declaration, the petitioner deposed,—“My attention has been called to the fact that in the declaration there have been omitted the date of the election and the amount of the election expenses. I do not remember at present when my attention was first called to that. In the Sheriff-clerk's letter of 4th September 1895 he says in the last paragraph, 'I may point out that several blanks, both in the return and in the declaration, were not filled up, and in this way they are both incomplete.' So far as I remember, I received no further information than that with regard to the blanks in the return or declaration. . . . The Sheriff-clerk printed an abstract of the election expenses in the usual way. I saw it in the newspapers. I accordingly believed that the return and declaration were quite in order. The Sheriff-clerk in his letter said that he had printed the ordinary statutory summary of my return of election expenses, and I thought he was perfectly satisfied then with the return. I thought that if the return had not been within the period I would have required to make another, but when the Sheriff-clerk published the abstract I thought the Sheriff and himself had accepted it. I was not aware at the time that I had left two blanks in the declaration unfilled up. (Q.) Was it by inadvertence that you so left them? (A.) Entirely. . . . I did not know at the time when sending it off that I had left those blanks. It was the last page, and on looking over it I struck out the phrase 'by my election agent,' but I did not notice there were two blanks to be filled up. There was no bad faith in the matter. I did not intend to do anything that was wrong. I intended to fill it up in the usual way. It was merely a formal thing to be done. I was giving more attention to the return, in order that everything might be accurate as to the money expended, and the return does contain the sum. It was signed at the same time as the declaration. Cross.—. . . I had acted as my own election agent on only one occasion before this, and that was in 1892. I made myself well acquainted with the provisions of the Corrupt Practices Act and its general scope and intention. The declaration in question was sworn to by me in the evening. . . . It was a solemn and sincere declaration that it was all true. (Q.) What did you solemnly and sincerely declare was all true? (A.) That that was a correct statement of the amount of money that I had paid for election expenses.

(Q.) You said you had paid 'the sum of _____ pounds, and no more'? (A.) It was all one paper, and in the first portion of it I had signed as to the amount. . . . I left in the words 'if the candidate is also his own election agent.' (Q.) Immediately after the words 'by my election agent,' which you scored out, came the words 'the sum of _____ pounds, and no more.' Why didn't you fill that up, which occurs three words after those that you have deleted? (A.) I don't know; it was by pure inadvertence. It was not by inadvertence that I scored out the words 'to my election agent.' (Q.) How do you account for your inadvertence in regard to the much more important matter three words further on, in omitting to put in the amount of pounds which represented your election expenses, and which you declare to be true? (A.) I don't know; I cannot explain it. (Q.) How do you come to make a solemn and sincere declaration in regard to a blank sum like that? (A.) Because what I considered the principal and important portion of the paper was the statement of expenses, which shewed the amount of every item. . . . (Q.) In what sense do you say that the declaration and the summary of election expenses were one document; were they fastened together? (A.) Yes; the sheets were all fastened together. (Q.) In the return there is an intermediate form, which appears to be now absent? (A.) Yes, they are separated. I don't know what became of the intermediate form. When I signed and transmitted the declaration and summary of election expenses they were fastened together, but I cannot remember how they were fastened."

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With reference to the Henderson's hiring account, it appeared that this account had been sent in after the petitioner had gone to India to Dr McLean of Thurso, a supporter of the petitioner, who had sent it on to Mrs Clark, saying that she had better pay as her husband was away. Mrs Clark accordingly paid it on 28th November 1895.

It appeared that after the election Dr Clark had gone first to Brussels, then to London in the middle of November, and that he did not return to Wick until the following year. The maximum amount which he might have spent as a candidate was £800 to £900. The amount of expenses incurred by the candidate, as stated in his return, was £77, 10s. 6½d.

A letter was produced from the Sheriff-clerk to Dr Clark, dated 4th September 1895,—". . . What of the Lybster voucher which I have not yet received, and about which I took notice in my former letter? The return is not complete without it. Nicol's voucher was handed to me on the 2d instant.

"I may point out that several blanks, both in the return and in the declaration, were not filled up, and in this way they are both incomplete."

Dr Clark's letter in reply bore :—"London, 23d September 1895.—Dear Sir,—I have just received your letter, having been away on a bicycling tour in Normandy.

"As for the voucher for the payment of the Lybster Hall, I remember putting it in the envelope. I have looked over the accounts, and I find I have vouchers for every payment, except it and the one from Nicol, for hiring. It may however have slipped out when being put up, and if it was not in the envelope when you received the papers it must have tumbled out. I will write to the secretary at Lybster to send you another voucher.

"I thought I filled up the return properly, and I waited till the

No. 140. last day in order to get Nicol's voucher, but he never sent me one or acknowledged my cheque. He has, however, sent you the voucher, and I hope the secretary of the Lybster Hall Co. will send you a duplicate."

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On 9th March 1897 the Lord Ordinary (Kyllachy) pronounced an interlocutor in the same terms as the interlocutor of 14th January, in addition refusing the petitioner's motion for leave to amend.*

The respondent reclaimed, and argued;—All accounts should have been sent in within fourteen days. Any sent in later should not have been paid—sec. 19 of the Corrupt Practices Act, 1883—and yet the petitioner had paid Nicol's and Henderson's. The return was made too late. "Transmit" did not mean "post." All the vouchers were not sent in at the same time as the return, and Henderson's was never sent in at all. Further—and probably this was the gravest error—the declaration was blank as to the sum of expenses. It was in fact inept, and no declaration at all. The petitioner, though warned by the Sheriff-clerk, took no steps to correct the mistakes. Indeed, he had left the constituency and then gone abroad without making any arrangements whatever for settling up the matters connected with his election. Such a series of errors—even though any one of them individually might be excused on the ground of inadvertence—shewed such an utter disregard and neglect of the statutory requirements as to bring them within the category of errors due to want of good faith.¹ The petitioner had acted as his own election agent in 1892, and was well acquainted with the provisions of the Corrupt Practices Act. He was not entitled in any view to rely on the fact of his having acted as his own election agent to excuse his gross carelessness as a candidate. The amendment should be refused. It was only proposed at the close of the proof. Besides, the petitioner did not move that notice should be given to the constituency. That was absolutely essential, for the new matter really amounted to an additional error, which would of itself form the subject-matter of an independent application for an excuse.

Argued for the petitioner;—The petitioner was probably wrong as to the timeous transmission of the return, and he did not insist in the prayer for an excuse for that. At the same time he conscientiously believed that he was sending the return within the statutory period. Want of good faith was equivalent to dishonesty. There was not a trace of that. The maximum amount of expenses which the petitioner might have incurred was £800 to £900, and within a margin so large he had no interest or object—and indeed none was suggested—for keeping down the return. The omission to enter in detail the hiring accounts was of little importance, for the sums were such as might

* "OPINION.—I find nothing in this additional evidence to lead me to modify my former conclusion, that the errors and omissions for which an excuse was here sought were not inspired by any sinister motive, but were the result of inadvertence, and not of bad faith. Whether the petitioner requires to be excused for the alleged additional irregularities to which to-day's evidence applies, I of course say nothing. That will come up in another form. All I say at present is, that my present impression would not probably be different although these alleged additional irregularities should be held as proved. What I shall do is to repeat my former interlocutor, inserting merely the words, 'as also the additional evidence led of this date.'"

¹ Hobbes, Feb. 11, 1889, 5 T. L. R. 272.

have been entered in the lump as personal expenditure. With regard to the declaration, the omission in it arose from the petitioner's having acted as his own election agent, in which capacity he had already signed the return, which disclosed the full amount which had been expended by him. The amendment should be allowed without further intimation in the county. The Act did not specify that notice required to be given, and the Court had therefore a discretion. The respondent was the only elector who had come forward when the petition was formerly advertised, and it was not likely that any other person was interested to do so now.

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At advising,—

LORD PRESIDENT.—The petitioner, in order to obtain the excuse prayed for, has to satisfy the Court that the omissions to be excused arose from inadvertence and not from want of good faith. The ease or difficulty of making out such a case must depend, to some extent, on the nature of the omissions in each individual instance, and, it might be, on the number of them. Now, it cannot be said that the things specified in the prayer of this petition are in themselves unlikely to have arisen from inadvertence, or are presumptive of bad faith. The omission to send in the return in sufficient time has been withdrawn from the prayer of the petition, and, accordingly, we have no occasion to consider the merits of that question, except in so far as the evidence relating to it may bear on the question of conduct. The omission of the hiring account has the less importance, because this was, properly speaking, an item of personal expenditure, the amount of which might have been added to the sum of personal expenses and never have appeared as a separate item at all. The other omissions are in matters of detail.

The question of inadvertence and good faith being a question of fact and of conduct, I should find it extremely difficult to differ with the Judge who heard the evidence of the petitioner and the other testimony, and who has found that the omissions were caused by inadvertence.

The respondents, however, have shewn that other omissions have occurred on the part of the petitioner for which relief is not sought in this petition. These are relevant to the present question in so far as they may, by their quality or circumstances, throw light on the spirit in which the petitioner performed his duties under the statute, in relation to expenditure and accounts. One of these is certainly, until accounted for, a very grave omission. Every candidate is required to make a solemn declaration stating the total sum which he has spent on the election. In one sense this may be regarded as the most important of all those statutory returns. Yet this candidate attested this return with a blank in the place for the sum, and sent this (which was no return at all) to the statutory officer. The explanation of what at first sight seems gross carelessness, outside the region of inadvertence, is to be found in the fact that the petitioner had acted as his own election agent, and had, at the same time as this skeleton candidate's return was signed, filled up and signed in his own name the election agent's return, shewing the total expenditure and the particulars. When this is known, we see how much more readily the same gentleman might treat as unnecessary what, in his case, he might regard as virtually a repetition of what he had already attested on his personal responsibility.

No. 140. It was also disclosed in evidence that another hiring account had not been stated in the accounts, and had been paid by the petitioner's wife after the time allowed by statute. Our attention was also drawn to the fact that the petitioner had taken no pains to get in accounts, and had, immediately after the election, gone abroad, making no provision for these matters being attended to. It was argued that this, combined with the other omissions, shewed that no honest attention had been paid by this gentleman to the duties imposed upon him in the two capacities which he chose to combine in his own person, and that each of the omissions was thus traced, not to inadvertence, but to a deliberate disregard of the statute.

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I do not think that the facts come up to this, although I accede to the view that a deliberate disregard of the statute could never be treated as inadvertence. The inadvertence must be ~~inadvertence regarding the particular in question~~; there must be a failure in an individual matter, or individual matters, of a general attention. Now, while it is necessary to consider the proceedings of the petitioner in both his qualities (of candidate and of election agent), we are directly concerned with his omissions as candidate. I think, and it is necessary to say this, that the petitioner's duties as agent were performed in a negligent manner. But the fact that he is not a good or efficient agent must not affect our consideration of the manner in which he has done or left undone the statutory duties of candidate. And while, in face of these several violations of the statute, it is impossible to speak of them otherwise than with reprehension, yet we have to remember that, in the exercise of our present jurisdiction, we are necessarily in the region of what is, in greater or less degree, blameable, because it requires an excuse. And as we are sitting as a Court of Appeal, I am not prepared to disturb the judgment of the Lord Ordinary on the evidence taken before him.

I also agree with the Lord Ordinary in declining to allow the proposed amendment of the petition. The petitioner did not desire that this fresh case of omission should be brought within the present petition, unless we could go on and dispose of it without intimation being made in the county. Now, the so-called amendment is simply the introduction of a separate and substantive omission, which, requiring a new prayer for excuse, might of itself form the subject of an application to the Court. It seems to me, therefore, to be clear that under section 34 we would have no option but to appoint some intimation within the county.

Without anticipating anything that may occur in any other proceedings, it may be right to say that, as evidence was led relating to this new omission, it has been within the circumstances which I have found it necessary to consider in disposing of the present application.

LORD ADAM.—I concur.

LORD M'LAREN.—I entirely concur, and wish only to make one observation. Your Lordship has stated that there may be a breach of the statute which is not excusable without a corrupt motive—that a wilful disregard of the statutory requirements is sufficient to void an election.

Now, although the Act of Parliament deals liberally with a certain kind of expenditure, and allows a candidate to put down any personal outlays—

not exceeding £100—as personal expenditure without requiring him to give details, I do not think that it is a compliance with the Act to put down a merely nominal sum of £2, 2s., because, although details are not required, the actual total expenditure must be stated. I am satisfied, however, that in this case there was no intention to evade the statute by putting down a nominal sum. Mr Clark's personal expenditure was really very small, because he took advantage of the hospitality of his friends during the period of his election tour. Accordingly, he had very little to pay except these hires, which for some reason appear to have been overlooked.

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LORD KINNEAR was absent.

The respondent moved for expenses both in the Outer and in the Inner-House, on the ground that he had come forward in the public interest.

The petitioner moved for expenses on the ground that he had been successful, contending that whatever justification the respondent might have pleaded in the Outer-House, he should not have presented a reclaiming note against the Lord Ordinary's judgment in the matter. By doing so he shewed that he was acting not so much in the public interest as from party rancour.

LORD PRESIDENT.—We must deal with the question of expenses on the footing that the Lord Ordinary's interlocutor stands as to the expenses as well as to the merits of the case. I have always understood the correct practice to be as follows. When a reclamer says that the Lord Ordinary is wrong on the merits of a case, and asks that his judgment should be reversed, if this be done, there must be a fresh discussion as to expenses, because the standing disposal of that question has gone by the board, and the new disposal of expenses must be consequential on the new determination of the merits, whatever it may be. But when he says that, even if the Lord Ordinary's decision be right on the merits, it is wrong on the expenses, in that case he should in opening make a motion on that point. Nothing of the kind has been done here, and on that account, and not because we are of opinion that the Lord Ordinary's decision was right, we must hold that the respondent is not entitled to Outer-House expenses. What then of the Inner-House expenses? We have adhered to the interlocutor reclaimed against, and in accordance with the well-known rule in such cases we must find Dr Clark entitled to the expenses of the reclaiming note, simply because the reclaiming note is refused.

LORD ADAM.—I agree. I think that your Lordship's statement of the principle which regulates expenses in such circumstances as we have here is correct. This is not a case in which the expenses follow the merits. Mr Jameson's position is this. He says, *esto* that the Lord Ordinary is right on the merits, he is wrong on the question of expenses. That is a substantive ground for reclaiming against the interlocutor, and should have been opened on.

LORD M'LAREN.—I think it is a fair question for consideration whether, when a respondent in a petition of this kind confines himself to fair cross-examination of the witnesses and criticism of the evidence, he is not entitled

No. 140. to get his expenses on the ground that he appears in the interest of the general body of electors to assist the Court in scrutinising the evidence. If this point had been taken in reclaiming against the Lord Ordinary's finding with regard to expenses, I should have been prepared to give it favourable consideration, but as the point was not opened on we cannot deal with it.

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The expenses of the reclaiming note are in a different position, because I am inclined to think that the integrity and purity of elections are sufficiently vindicated if the questions are submitted to the Judge of first instance. The reclaimer would appear to have persisted rather in the interests of party than in the interests of the constituency as a whole.

THE COURT adhered, and found the petitioner entitled to the expenses of the reclaiming note.

M'NAUGHT & M'QUEEN, S.S.C.—A. & S. F. SUTHERLAND, S.S.C.—Agents.

No. 141. THE RIGHT HONOURABLE ALEXANDER W. F. FRASER LORD SALTOUN AND OTHERS, Petitioners (Appellants).—*Sol.-Gen. Dickson—Clyde.*

Mar. 18, 1897.
Saltoun v.
Magistrates of
Edinburgh.

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH, Respondents.—*Comrie Thomson—Boyd.*

Burgh—Dean of Guild—Alteration of structure—Edinburgh Municipal and Police Amendment Act, 1891 (54 and 55 Vict. cap. cxxxvi.), sec. 49.—Section 49 of the Edinburgh Municipal and Police Amendment Act, 1891, enacts that the Dean of Guild Court may decline to grant warrant for the alteration of any existing house or building until it is satisfied that the plans provide suitably for "strength of materials, stability, mode of access, light, ventilation, and other sanitary requirements."

In a petition for warrant to add to an existing building, *held* that the light and ventilation as to which the Dean of Guild required to be satisfied were the light and ventilation of the additional building for the erection of which warrant was craved, and that the Dean of Guild was not entitled to refuse a warrant on the ground that the proposed addition would interfere with the light and ventilation of the existing buildings.

Burgh—Dean of Guild—Alteration of structure—Edinburgh Municipal and Police Amendment Act, 1891 (54 and 55 Vict. cap. cxxxvi.), sec. 50, as amended by section 34, subsection 7, of the Edinburgh Improvement and Municipal and Police Act, 1893 (56 and 57 Vict. c. cliv.).—Section 50 of the Edinburgh Municipal and Police Amendment Act, 1891, as amended by section 34, subsection 7, of the Edinburgh Improvement and Municipal and Police Amendment Act, 1893, after enacting that every dwelling-house must have an open space of specified extent behind it, provides, *inter alia*, "that in the case of the erection of houses with shops on the ground floor, or of the conversion of a house into a building to be used for business premises only, the Dean of Guild Court may sanction the erection of saloons upon such open space of such height and construction as to them shall seem proper, . . . but where any building is to be used for business premises as much open space shall be required as in the discretion of the Dean of Guild Court shall be sufficient for the purposes of light and ventilation."

In 1893 the proprietor of a tenement used for business purposes, situated in Queen Street, Edinburgh, obtained warrant from the Dean of Guild for the erection of a hall and buildings accessory thereto on an open space behind the street tenement. In 1896 the proprietor applied for authority to erect a room to be used as a cloak-room in connection with the hall above part of the buildings erected under the warrant previously granted by the

Dean of Guild. The Magistrates of Edinburgh opposed the petition, on the ground that the proposed addition to the height of the buildings on the back-ground would prejudicially affect the light and ventilation of the street tenement. The Dean of Guild refused to grant the warrant craved. No. 141.
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On appeal *held* that the provisions of section 50 did not apply, in respect that the application was neither for warrant to erect a new building nor for warrant to convert a dwelling-house into business premises.

(ANTE, vol. xxiii. p. 956.)

Lord Saltoun and others, trustees for the Supreme Council for Scotland of the 33d and last Degree of the Ancient and Accepted Scottish rite of Freemasonry, applied to the Dean of Guild of Edinburgh for a warrant to construct a room over a portion of the flat roof of a building at the back of No. 74 Queen Street, of which they were proprietors.

1st DIVISION.
Dean of Guild
Court, Edin-
burgh.

The petitioners had acquired the tenement No. 74 Queen Street, and certain ground behind it, in 1893, and in accordance with a warrant obtained from the Dean of Guild Court they had erected on the ground at the back of the tenement a hall and other buildings accessory thereto. These other buildings, which were flat-roofed and of considerably less height than the hall, were situated between the hall and the street tenement, and were connected with the latter by a covered corridor. It was on a portion of these flat-roofed buildings that the petitioners proposed to erect the building for which warrant was craved.

The plans having been remitted to the Burgh Engineer, he returned them with the following indorsation upon them:—"This place is already sufficiently built on, having regard to the light and ventilation of existing buildings."

On 11th June 1896 the Dean of Guild, "in respect that all the open space presently existing is required for the proper lighting and ventilation of the premises in question, refuses the prayer of the petition, and decerns."

The petitioners having appealed to the First Division, the Magistrates of Edinburgh appeared by minute, and tendered answers to the petition, and the Court having allowed these to be received remitted to the Dean of Guild to proceed—(ANTE, vol. xxiii. p. 956).

A record was thereafter made up in the Dean of Guild Court.

The petitioners explained that the hall had been originally built for their own purposes, but having been found convenient for private social entertainments, it was hired out for that purpose; and that the purpose of the present application was to obtain warrant for the erection of a ladies' cloak-room to be used in connection with the hall. They denied that the addition would interfere with the light and ventilation of their property, and averred that the street tenement was not used as a dwelling-house.

The respondents founded, *inter alia*, on section 49 of the Edinburgh Municipal and Police Amendment Act, 1891,* and averred that the

* By section 49 of the Edinburgh Municipal and Police Amendment Act, 1891 (54 and 55 Vict. c. cxxxvi.), it is enacted that "the clerk of the Dean of Guild Court shall forthwith, on receiving" a petition for the erection of any house or building, or the alteration of the structure of any existing house or building, "give notice to the Burgh Engineer, who shall, before such petition is heard, report to the Court whether, in his opinion, the plans are in conformity with the provisions and requirements of the Edinburgh Municipal and Police Acts; and the Dean of Guild Court may decline to grant

No. 141. proposed addition would have the effect of materially diminishing the light and ventilation of the street tenement.

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The petitioners pleaded;—(2) The respondents have neither right nor title to appear and oppose the granting of the warrant, and they should be found liable in the expenses of their opposition.

The respondents pleaded, *inter alia*;—(1) The area on which the petitioners propose to construct buildings having been previously covered with buildings, the appeal ought to be dismissed. (2) As the proposed buildings will diminish the space which in the discretion of the Dean of Guild Court is required for the purposes of the light and ventilation of the property belonging to the petitioners, the petition should be dismissed.

On 10th December 1896 the Dean of Guild repelled the second plea for the petitioners, and of new refused the prayer of the petition.*

The petitioners appealed, and argued;—1. The light and ventilation in regard to which the Dean of Guild required to be satisfied under section 49 were the light and ventilation of the building for the erection of which warrant was craved. This clearly appeared from a reference to the various provisions dealing with strength and stability,¹ access,² and light and ventilation.³ 2. The public interest not being involved, the magistrates had no title to oppose the petition. 3. Section 50 did not apply, the warrant craved being neither for the erection of houses with shops, nor for the conversion of dwelling-houses into

warrant for the erection of any house or building, or for the alteration of any existing house or building, until the said Court is satisfied that the plans provide suitably for strength of materials, stability, mode of access, light, ventilation, and other sanitary requirements, and are otherwise in conformity with the provisions of the Edinburgh Municipal and Police Acts."

By section 50 of the Edinburgh Municipal and Police Amendment Act, 1891, as amended by section 34, subsection (7), of the Edinburgh Improvement and Municipal and Police Amendment Act, 1893 (56 and 57 Vict. cap. cliv.), it is enacted as follows (the provision added by the later Act being printed in italics):—"Every new house, and any building altered for the purpose of being used as a house, shall have in the rear thereof, or directly attached thereto, and pertaining to, and used exclusively in connection with such new house or building altered for the purpose of being used as a house, an open space at least equal to three-fourths of the area to be occupied by the intended house, where such house is not of greater height than four storeys; and where such house shall exceed that height, such open space shall be of equal area with that of such house . . . provided also that in the case of the erection of houses with shops on the ground floor, or of the conversion of a house into a building to be used for business premises only, the Dean of Guild Court may ~~sanction~~ the erection of saloons ~~upon~~ such open space of such height and construction as to them shall seem proper, such saloons to continue so long only as such building is so used for business purposes; *but where any building is to be used for business premises as much open space shall be required as in the discretion of the Dean of Guild Court shall be sufficient for the purposes of light and ventilation, but not exceeding the extent required by this section in the case of a house.*"

Section 3 of the Act defines "house" as "dwelling-house."

* "NOTE.—After a consideration of the petitioners' plans, the terms of a report by the Burgh Engineer, and an inspection of the subjects by the Dean of Guild and his Council, the Dean of Guild is of opinion that the operations proposed by these petitioners do not provide suitably for light and ventilation."

¹ Schedule L, Rules 2 and 3.

² Sec. 48.

³ Secs. 47 and 50.

business premises. The hall differed in character from the buildings No. 141. described as saloons in *Scott and Blakeney*,¹ and it was not admitted that its erection had been sanctioned under section 50. That section contained no prohibition against the erection on the ground behind business premises of buildings other than saloons, and conferred no right on the Dean of Guild to prevent buildings being erected on such ground for business purposes only. The addition made to the section by the Amendment Act of 1893 was not applicable, (1) because the buildings were erected before that Act came into operation; and (2) because the proposed addition would not decrease the unbuilt-on space.

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Argued for the respondents;—1. Section 49 conferred upon the Dean of Guild an absolute discretion as to what was suitable provision for light and ventilation, and there was nothing in the section to limit the Dean of Guild in the exercise of that discretion to a consideration of the necessities of the buildings proposed to be erected. In holding that the provision for light and ventilation was insufficient, the Dean of Guild had proceeded on the footing that the whole building was an *unum quid*, and that was the reasonable view. Even if the Dean of Guild's discretion were not absolute, the Court would be slow to interfere with the exercise of that discretion in practical matters.² 2. The hall was a building of a character that fell within the statutory category of "saloon";¹ the sanction for its erection had been obtained under section 50, and the height being within the absolute discretion of the Dean of Guild, could not be increased without his authority.

At advising,—

LORD M'LAREN.—This is an appeal from an interlocutor of the Dean of Guild of Edinburgh, refusing an application for authority to make a small addition to a building in Queen Street, Edinburgh. The facts are not in dispute, and the question which we have considered is whether the refusal of the warrant is justified by the terms of the statute upon which the Dean of Guild Court has professed to act.

The petitioners are trustees for the council of one of the Orders of Freemasons, and they set forth in their petition that they purchased the tenement No. 74 Queen Street for the purpose of building a hall on the area behind the building, and that, after obtaining the necessary warrant from the Dean of Guild Court, a masonic hall was built on the vacant ground. The petitioners, it is stated, had originally intended that the hall should be appropriated to their own uses exclusively, but they had found it convenient to let the hall occasionally for private social entertainments, and with the view of making it more suitable for that purpose they proposed to make an addition to the building in the shape of an apartment placed over the corridor which connects the hall with the house in Queen Street. The corridor, it may be explained, is of less elevation than the hall, so much so, that the corridor and the proposed apartment (intended to be used as a lady's cloak-room) do not together exceed the height of the hall.

The case was first considered by the Dean of Guild Court *ex parte*, and

¹ *Scott's Trustees v. Shaw*, June 17, 1892, 19 R. 895; *Blakeney v. Rattray's Trustees*, July 10, 1886, 13 R. 1151.

² *Pitman v. Barnett's Trustees*, Jan. 26, 1882, 9 R. 444.

No. 141. the warrant was refused, for reasons which I shall afterwards consider. On an appeal to this Court, the Magistrates and Council of Edinburgh appeared in support of the interlocutor, and gave in answers to the petition. By interlocutor dated 3d July 1896 this Court allowed the answers to be received, and remitted the cause to the Dean of Guild Court for further procedure. After a further hearing the Dean of Guild Court adhered to its opinion, and of new refused the prayer of the petition. From this judgment, which is dated 10th December 1896, the petitioners have appealed, and the whole case is now before the Court.

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It is not disputed that the Court has jurisdiction to review the judgments of the magistrates of royal burghs on the merits, and if necessary for determining the true question in issue, we have power to allow a proof, or to obtain a report from skilled persons. But according to the constitution of the Court of the Dean of Guild, the magistrate and his council are entitled to act on their own professional knowledge, with the assistance of the Burgh Engineer, whose duty it is to examine the plans of any proposed building, and to report as to whether the statutory requirements as to drainage, lighting, and ventilation are satisfied by the plans. The jurisdiction of the Dean of Guild to a large extent involves the exercise of personal judgment and skill, and I believe that your Lordships would be very unwilling to interfere with the judgment of the Dean of Guild Court on a purely practical question. The present case, however, raises a question on the construction of the 49th section of the Edinburgh Municipal and Police Amendment Act, 1892. With respect to the 50th section, which was also founded on, I shall only say that it has no application, because this is neither the case of the erection of premises, nor of the conversion of a house into a building adapted for business purposes, but is the case of an alteration of an existing building not involving the appropriation of any unbuilt-on area.

By the 49th section the Burgh Engineer is to report to the Dean of Guild Court whether in his opinion the plans (that is, the building plans for which a warrant is sought) are in conformity with the provisions and requirements of the Edinburgh Municipal and Police Acts, and then it is added, the Dean of Guild Court may decline to grant a warrant for the erection of any house or building, or for the alteration of any existing house or building, until the said Court is satisfied that the plans provide suitably for strength of materials, stability, mode of access, light, ventilation, and other sanitary requirements.

This is a very important, and, I do not doubt, a very necessary power, but it is perfectly clear that if a warrant is refused or delayed in the lawful exercise of this power, it must be because of the failure to make provision in the plans of the proposed building, or proposed alteration of a building, for something which ought to be there. I am unable to see how the refusal of the warrant in the present case can be supported consistently with the statute.

The report of the Burgh Engineer indorsed on the building plan is in these terms—"This place is sufficiently built on, having regard to the light and ventilation of existing buildings." The first interlocutor refusing the petition is just a paraphrase of the Burgh Engineer's report, because the petition is refused "in respect that all the open space presently existing is required for the proper lighting and ventilation of the premises in question."

By "premises in question" I understand either the masonic hall, or the masonic hall and the tenement in Queen Street taken together, because the meaning cannot be that all the open space is required for the lighting and ventilation of the ladies' cloak-room. But then the question referred to the Dean of Guild Court under the 49th section is the sufficiency of the provisions for lighting and ventilation shewn in the plans—in other words, the lighting and ventilation of the new apartment; and this question is not at all considered in the Dean of Guild's interlocutor. I grant that in the matter of ventilation it is necessary to consider the adjacent buildings, and if it had been found in fact that the new apartment could not be ventilated by reason of its proximity to other buildings, the judgment would have been relevant. But I do not suppose that this was intended; in any case, it is not said.

Again, I do not quite understand what is meant by the finding that all the open space existing is required for the proper lighting of the premises in question. As regards lighting, the only question is, whether the new apartment is sufficiently lighted by the windows shewn on the plans, and the interlocutor says nothing to the contrary.

Passing to the interlocutor of 10th December, in which the petition is of new refused, the note to the interlocutor merely states "that the operations proposed by these petitioners do not provide suitably for light and ventilation." If this was meant to indicate anything different from the ground of judgment expressed in the previous interlocutor, I should expect to find the difference explained. I assume that the ground of judgment is the same, the variation being merely verbal. I am of opinion that the appeal should be sustained, and the case remitted, with an instruction to grant the prayer of the petition.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

THE COURT sustained the appeal, and remitted the case to the Dean of Guild, with an instruction to grant the prayer of the petition.

LINDSAY MACKERSY, W.S.—THOMAS HUNTER, W.S.—Agents.

WILLIAM TORRANCE (Gunn's Trustee), Pursuer (Reclaimers).—*W. Campbell—D. Anderson.*

DAVID WARDLAW AND ANOTHER (Traill's Trustees), Defenders (Respondents).—*Clyde—Chree.*

No. 142.

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Bankruptcy—Illegal Preference—Lease—Tenant possessing a farm and steelbow stock under contract of service—Landlord taking possession on death of servant—Act 1696, c. 5—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), sec. 110.—A landlord, in an agreement with G., his ground officer, agreed to give him possession of a farm from Whitsunday 1887 rent free as part of his salary, and also to hand over to him the horses and farm implements and corn crop of 1887 without payment, it being stipulated that a valuation should be made in the same way as if G. were an incoming tenant, and that a similar valuation should be made when the arrangement terminated, and any difference paid by landlord or tenant as the case might be. The agreement was yearly, and might be terminated at any Whitsunday on four months' notice. On G.'s death (on 14th May 1895) the landlord took possession of the farm, and sold the horses, &c.

Within seven months after G.'s death his estates were sequestrated, and

No. 142. thereafter the trustee in the sequestration brought an action calling upon the landlord to account for the value of the horses, implements, and crop. He averred that at the date of his death G. was notour bankrupt.
 Mar. 12, 1897. *Torrance v. Traill's Trustees.* *Held (aff. judgment of Lord Kyllachy)* that the contract was terminated by G.'s death, and that the landlord thereupon became entitled to take possession of the farm and of the horses, implements, and crop, as proprietor thereof, and that his possession was not open to challenge either under the Act 1696, cap. 5, or section 110 of the Bankruptcy Act, 1856.*

1ST DIVISION. ON 8th April 1887 the trustees acting under a trust-disposition granted by James Christie Traill of Rattar, as proprietors of Castlehill Home Farm, entered into an agreement entitled a "Memorandum of arrangements in regard to management of Home Farm," with George Gunn. The agreement was to the effect, *inter alia*, that the part of the farm in arable rotation, being ninety-five acres in extent, should be given rent free to Mr Gunn, "as part of his salary as ground officer."

"4. The whole of the stock, crop, and implements on the farm to be sold by auction shortly before Whitsunday 1887, except three horses and the implements necessary to work the above ninety-five acres. The horses and implements retained, as well as the corn crop of 1887, fallow break, dung, &c., to be valued . . . in the same way as if Mr Gunn were incoming tenant to the farm . . . at Whitsunday 1887.

"This valuation to be signed by Mr Brims [factor on estate] and Mr Gunn, as the agreed-on value of these articles at Whitsunday 1887.

"5. The arrangement contained in this memorandum to subsist for one year from Whitsunday 1887. If either party wishes to terminate arrangement at Whitsunday 1888, or at any subsequent term of Whitsunday, such party to give four months' notice before Whitsunday of their wish to do so, and in this case a valuation to be made at the termination of the arrangement in the same way as at the commencement, and the difference in value to be paid either to Mr Gunn or by Mr Gunn, as the case may be.

"6. Mr Gunn to give to the factor on the estate at each term of Whitsunday a valuation similar to that made at the commencement of arrangement, in order that the factor may satisfy himself of the value of the stock, crop, implements, &c. on the farm."

In terms of this agreement Mr Gunn entered to the ninety-five acres at Whitsunday 1887, and obtained possession of the horses, the implements necessary to work the land, and the growing crops, of which a valuation was duly made. Certain cattle which were upon the farm were also valued and handed over to Mr Gunn without any payment by him upon his entering to the farm. No valuation was made of the fallow or dung.

In October 1894 Traill's trustees gave notice to Mr Gunn, terminat-

* Section 110 of the Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), enacts,—“When the sequestration of the estates of a deceased debtor is dated within seven months after his death, any preference or security for any prior debt acquired by legal diligence on or after the sixtieth day before his death, or subsequent to his death, and any preference or security acquired for a prior debt or any act or deed of the debtor which has not been lawfully completed for a period of more than sixty days before his death . . . shall in these several cases be of no effect in competition with the trustee.”

ing the agreement at Whitsunday (old style, May 26th) 1895. Mr Gunn died on 14th May 1895. Upon his death Traill's trustees entered into possession of the farm and stock and implements thereon.

On 6th July 1895 Mr Gunn's estates were sequestrated. Traill's trustees lodged a claim in the sequestration for £8, 14s. 4d, "being the difference between the value of the stealbow effects and others handed over to the said deceased George Gunn at his entry to the farm of Castlehill, and the amount thereof as realised at a dispenishing sale and valuation at his outgoing."

In May 1896 William Torrance, trustee in the sequestration, raised an action against Traill's trustees concluding for declarator that the farm stock and implements, the growing corn crop, the fallow break, dung, and first year's grass, which were in possession of Mr Gunn at the date of his death, belonged to Mr Gunn, and vested in the pursuer as his trustee, and for decree ordaining the defenders to account for their intromissions therewith.

The pursuer set forth and founded on the memorandum dated 8th April 1887, and averred that George Gunn "received possession of and dealt with said farm, implements, stock, and crops as his own absolute property, and the value of said subjects was treated by the defenders as a debt due to them by him." (Cond. 7) In December 1894 Mr Gunn was rendered notour bankrupt, and continued thereafter to be notour bankrupt down to the date of his death. After his death the defenders appointed a valuation to be made of the stock and implements on the farm, and having taken possession of the same, sold them by auction and unwarrantably retained the proceeds. (Cond. 8) The defenders also took possession of the growing crop, fallow break, dung, and first year's grass on the farm, and sold and disposed of them to the incoming tenant at Whitsunday 1895.

The defenders, in their answers (3d, 4th, 5th, and 6th), made averments to the effect that after parties had signed the memorandum they had agreed that certain cattle on the farm should be valued over to Mr Gunn on the terms expressed in the memorandum with regard to the horses and implements; that the valuation of the fallow break and dung should be dispensed with; that the fallow break, dung, and new grass in the farm at the termination of the agreement should be accepted by the defenders as the equivalent of the corresponding items at Mr Gunn's entry; and that Mr Gunn had possessed the farm, stock, and implements on the terms set forth in the memorandum as thus modified. They also averred that the horses and implements of which the tenant obtained possession at his entry remained on the farm till his death. They did not admit that the tenant was notour bankrupt in December 1894.

The pursuer did not admit these averments, nor did he admit that the value of the subjects handed over to Mr Gunn at entry exceeded the value of the corresponding articles upon the farm at his death.

The pursuer pleaded;—(1) The estate and effects condescended on having been *in bonis* of the deceased George Gunn at his death, the pursuer, as his trustee in bankruptcy, is entitled to decree. (3) The deceased George Gunn having been notour bankrupt at the date of his death, and the defenders having acquired an illegal preference over his other creditors by taking possession of the said estate and effects, the pursuer is entitled to decree, as concluded for. (5) No relevant defence.

The defenders pleaded;—(2) The pursuer's averments are irrelevant. (4) On a sound construction of the memorandum of agreement, the

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articles handed over to Mr Gunn, or in any event, the horses and implements, did not become his property, but were merely hired to him. (5) The defenders having lawfully obtained possession of the stock, implements, &c., are entitled to set off against the sums received by them therefor the amount of the valuations as at Mr Gunn's entry.

On 12th November 1896 the Lord Ordinary (Kyllachy) repelled the pursuer's fifth plea in law, and appointed the case to be put to the roll for further procedure.*

* "OPINION.— . . . I do not think it necessary to recite the terms of this agreement, which for the present purpose is sufficiently set forth on record. It was in effect a steelbow arrangement, the deceased getting handed over to him, without payment, at Whitsunday 1887, the stock, implements, growing crop, young grass, fallow break, and dung upon the farm at that date; and the landlords being, on the other hand, entitled at the termination of the tenancy to obtain possession of the corresponding subjects with which the farm should then be equipped. It was of course contemplated that there might, and must, be changes during the tenancy, and in that view it was provided that there should be a valuation at incoming and another at outgoing, and that any difference should be paid in money by the one party to the other. As appears from the valuation made at incoming, No. 28 of process, this agreement was slightly modified after the memorandum was executed, but for present purposes the differences need not be considered. They come merely to this—that certain cattle not mentioned in the memorandum were handed over by the landlords and valued as part of the stock, and that the young grass, fallow break, and dung were not valued at all, the assumption no doubt being that the value of such subjects would necessarily be much the same, one year with another.

"Such being the agreement, what happened, it appears, was this: The arrangement being terminable on four months' notice, notice was in October 1894 given to terminate it at Whitsunday 1895, but on 14th May 1895, as I have already said, Mr Gunn died. It is said, but not admitted, that he had become notour bankrupt in December of the previous year. I shall consider the effect of that presently. But in any case he died, as I have said, shortly before Whitsunday, and after his death the defenders (the landlords) resumed possession of the farm and its contents. Whether they are to be held as having done so at the date of the death or at Whitsunday is not material. I rather take it that the tenancy terminated at the date of the death. But whether that is so or not, it is beyond doubt that for some time before the sequestration the defenders were in full possession of the farm, and of everything upon it which is now in dispute.

"Now the question is, whether in these circumstances it can be held that the stock, implements, and others in dispute were nevertheless at the date of the sequestration, on 6th July, the property of the deceased or his representatives. In my opinion that is a proposition which is not maintainable. I am not able to doubt that at least from Whitsunday onwards the property was in the defenders. They (the defenders) had by the memorandum of 1887 a contract right on the termination of the tenancy to take possession as their own of everything which the pursuer now claims; and that contract right was completed and made real by possession lawfully taken in due course, as I have described, prior to the sequestration. No act of delivery or other formality was necessary, because none was prescribed. The contract was executed just as it fell to be executed, and, having been so before the sequestration, any claim which the pursuer might have otherwise had is, in my opinion, excluded. The case, in short, is not, in my opinion, distinguishable from the case of *Davidson's Trustee*, 19 R. 808, where a similar question was raised and decided by the Inner-House.

"In the view which I have expressed, it is not necessary to consider

On 15th February 1897 the Lord Ordinary, before further answer, No. 142. allowed the defenders a proof *habili modo* of the averments contained in their answers to the third, fourth, fifth, and sixth articles of the condescendence, and to the pursuer a conjunct probation.

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The pursuer reclaimed, and argued;—It was clear from the terms of the agreement that Mr Gunn had power to sell the stock and crop originally handed over to him, and also the stock and crop afterwards substituted for those originally handed over. It followed that they were his property, and the implements could not be treated as belonging to a different category. All these subjects were therefore *in bonis* of Mr Gunn at the date of his death. The decision in the case of *Butter*¹ was in the teeth of the law as laid down by all the institutional writers, who held that steelbow was a contract of *mutuum*, in which the property passed to the tenant. The preference accordingly which the landlord had secured by entering into possession on Mr Gunn's death was illegal.² The right of the landlord was derived from a voluntary deed,—namely, the contract of 1887,—and the obligation of Mr Gunn to restore the subjects handed over to him, or their equivalent, at the termination of the agreement, was an obligation to

whether in any case the pursuer's claim could be held to extend to the way-going crop, first year's grass, dung, and fallow break. It may be at least matter of doubt whether, looking to the terms of the deceased's tenancy, he or his creditors had any right of property in these subjects. I refer on this point to that part of my opinion in the case of *Sturrock*, 18 R. 576, which was affirmed in the Inner-House, and to the authorities there quoted.

“It is said, however,—and this is a different matter—that the pursuer is entitled to challenge and set aside the whole transaction, as constituting a fraudulent preference under the Act of 1696, cap. 5. And the suggestion seems to be that the deceased, having been (as alleged) notour bankrupt at the date of his death, the transfer of property which, on his death or at Whitsunday, took effect as regards the subjects and articles in dispute, was a voluntary act or deed of the deceased operating in favour of prior creditors. Of course, if I had thought that any relevant case had been stated on this head, I should have allowed a proof, the fact of notour bankruptcy not being admitted. But I confess that I am not able to see how the Act of 1696, cap. 5, can be brought into this case. The tenant was dead, the farm was vacant, and the defenders in taking possession did so, not in virtue of any act or deed of the deceased or his representatives, but in virtue of the original agreement, and of nothing else. No doubt if that agreement (the agreement of 1887) had been an agreement having reference to a prior debt, and if it had been performed, as it was, within the period of bankruptcy, the date of the agreement might have been held to be the date when it was performed; and so by construction the whole transaction might have been held to have been a voluntary alienation in breach of the Act. I need hardly, however, say that no such case arises or can be held to arise here. The transaction of 1887 had nothing to do with a prior debt. Even if entered into within the period of bankruptcy, it would have been protected as a *novum debitum*. Again (the agreement being what it was) had the deceased lived and voluntarily renounced his tenancy at some term within the period of bankruptcy, and by such renunciation had conferred on the defenders rights of property which, but for his action, would have passed to his creditors, the Act of 1696 might have given the creditors redress. But here again no such case has to be considered. The present case, so far as

¹ *Butter v. M'Vicar*, 1764, M. 6208, 5 Br. Supp. 899.

² *Paterson's Trustee v. Paterson's Trustees*, Nov. 13, 1891, 19 R. 91.

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 Trustees.

do something in satisfaction of a prior debt. But an act in implement of a general obligation to deliver goods at a future time,² as distinguished from an obligation to return specific goods, was struck at by the Act 1696, c. 5, if it fell within the period of notour bankruptcy.¹ It was not a sufficient answer to say that the act by which the landlord's right was acquired was not a voluntary act, inasmuch as it was the death of the tenant, for the statute was held to strike at every means by which a preference was acquired. In *Davidson's Trustee*,² although the tenant died insolvent, the effect of notour bankruptcy was not discussed. In the *Scottish Provident Institution*,³ the contract gave the creditor a right to perfect his security at once by intimation, but here the landlord's right was only to be completed at a future date. If Mr Gunn had lived and allowed the landlord to enter into possession, it would have been an illegal act, and it was equally illegal on the part of his representatives to allow it. Further, if any difficulty were supposed to arise from the fact of Mr Gunn's death being the termination of the arrangement, it was obviated by section 110 of the Bankruptcy Act,* in terms of which the landlord's right had not been lawfully completed outwith the period of constructive bankruptcy.

Argued for the defenders;—The memorandum bore to be, and was in reality, an agreement for purposes of management. The stock,

the Act of 1696 is concerned, is, I think, not substantially different from the quite familiar case of a lease—say of a sheep farm—when the tenant, on the one hand, receives the sheep stock at entry on certain terms, and, on the other hand, is bound at the outgoing to leave the sheep stock to the landlord or incoming tenant on similar terms. It has never, so far as I know, been suggested that if such an arrangement happens to be carried out before sequestration, but within the period of bankruptcy, actual or constructive, the rights acquired *hinc inde*, although resulting, it may be, in benefit to the landlord, and in prejudice to the creditors, could be reduced as in contravention of the Act of 1696.

"I am therefore prepared to hold that, in so far as the pursuer's case is laid upon the Act of 1696, cap. 5, his averments are irrelevant. And on the whole case I should be prepared to decide in favour of the defenders, but for two difficulties which arise from the state of the pleadings. In the first place, the pursuer does not admit, though he seemed hardly to controvert, the defenders' statements in answers 3, 4, and 5 relative to the addition of the cattle to the stock given over in 1887, and the non-valuation at that time of the dung, first year's grass, and fallow break. He indeed pleads that the averments in those answers can only be proved by writ or oath, and he does not even seem to admit the authenticity of the valuation No. 28 of process, on which both parties seemed to found at the debate. In the next place, the pursuer does not admit that the valuation of 1887 was in excess of the valuation of 1895, so as to exclude the possibility of a balance being due by the defenders in an accounting. I do not know that these are matters which are seriously in dispute. Indeed the argument proceeded practically on the assumption of the defenders' averments, but until the matters of fact referred to have been cleared up either by a proof or admission, I am afraid that I cannot at present do more in the way of decision than to repel the pursuer's plea to the relevancy of the defence."

¹ Gourlay v. Hodge, June 2, 1875, 2 R. 738.

² Davidson's Trustee v. Urquhart, May 26, 1892, 19 R. 808.

³ Scottish Provident Institution v. Cohen & Co., Nov. 20, 1888, 16 R. 112.

* *Supra*, p. 838, note.

crop, and implements were merely handed over to Mr Gunn for his use, and did not become his property. The arrangement resembled a steelbow contract, and the subjects handed over under such a contract remained the property of the landlord.¹ But assuming the property in the subjects to have passed to Mr Gunn, the Act of 1696 was not applicable unless a security were conferred upon the creditor by the voluntary act of the debtor,² and section 110 of the Bankruptcy Act did not apply unless there was either a voluntary act of the debtor or diligence by the creditor.³ Here there was neither, the right of the landlord arising from the death of the bankrupt, and not being acquired by any diligence on the landlord's part. Further, the right of the landlord was not a preference or security in the sense of the statutes, but was a contract right, and having been duly completed before the sequestration, it could not be challenged.⁴ The pursuer, as Gunn's representative, could not insist on his rights under the agreement, unless he fulfilled his obligations under it.⁵

At advising,—

LORD ADAM.—(After narrating the facts)—It appears to me that when Mr Gunn died on 14th May 1895 the arrangement dated 8th April 1887 came to an end, and the defenders were then entitled to enter into immediate possession of the farm. It is alleged that Mr Gunn was notour bankrupt at the time, but, however that might be, he had not been sequestered, and no trustee was in existence. Nor had any creditor attempted to acquire a preference or right over any of the articles into possession of which the defenders had entered, and no diligence had been used by poinding or otherwise. In these circumstances the defenders had only to deal with matters as under the agreement, without the intervention of any third party. That being so, under the contract it appears to me that the defenders were entitled to take immediate possession of the articles embraced in the agreement as their own, paying only the difference of value, if any, appearing in the valuation taken at the termination as compared with that taken at entry under the agreement. They did enter into immediate possession of the articles, and having thus obtained full and legal possession of the articles it appears to me that they became again their property—if they had ever ceased to be, which the defenders deny. The articles therefore did not, in my opinion, vest in the pursuer on the subsequent sequestration of Mr Gunn. In terms of the contract the pursuer is only entitled to the difference, if any, between the valuation at entry and at the termination of the arrangement.

I do not see that the Act 1696, cap. 5, has anything to do with the case. The arrangement under which all that I have described took place was not a fraudulent transaction, and the death of Mr Gunn, which brought the arrangement to a termination, surely cannot be called a voluntary act on his part.

LORD M'LAREN concurred.

¹ Butter v. M'Vicar, 1764, M. 6208, 5 Br. Supp. 899.

² Lindsay v. Adamson & Ronaldson, July 2, 1880, 7 R. 1036.

³ Scottish Provident Institution v. Cohen & Co., Nov. 20, 1888, 16 R. 112.

⁴ Davidson's Trustee v. Urquhart, May 26, 1892, 19 R. 808.

⁵ Smith v. Harrison & Co.'s Trustees, Dec. 22, 1893, 21 R. 330.

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LORD KINNEAR.—I agree with your Lordship. I do not think it very material to consider whether the agreement of 1887 left the parties in the ordinary position of landlord and tenant as to the subjects in dispute, or whether these relations might not be modified in respect of other considerations. However that may be, I am satisfied, with your Lordship, that the effect of the agreement was, that upon the bankrupt's death the defenders were entitled to enter into possession of the articles in dispute, subject to any question which may still remain open under the interlocutor allowing a proof.

It cannot be suggested that the agreement of 1887 was a fraud upon the creditors, or in any respect prejudicial to them. It appears to me to be unassailable on any such ground, and that the only question is, whether the death of the bankrupt is an event which is struck at by the Act of 1696, or any similar provision of the Bankruptcy Act of 1856. It appears to me to be quite clear that it is not. The effect of the agreement as made was to enable the defenders to enter into possession of the articles in question without any additional security or any additional aid, and therefore there was no voluntary act or preference of any kind within the period of constructive bankruptcy that could bring the case within the scope of the statutes.

The LORD PRESIDENT was absent.

THE COURT adhered.

J. A. PATTULLO, S.S.C.—JOHN C. BRODIE & SONS, W.S.—Agents.

SUMMER SESSION.

No. 143.

May 12, 1897.
Gordon v.
Bruce & Co.

WILLIAM GORDON, Petitioner (Respondent).—*Salvesen*.
JOHN BRUCE & COMPANY, Respondents (Appellants).—*A. J. Young*.

Process—Extra cursum curiæ—Arbitration—Appeal—Competency when no answers lodged—Petition for recall of arrestments—Personal Diligence Act, 1838 (1 and 2 Vict. c. 114), sec. 21.—Section 21 of the Personal Diligence Act, 1838, enacts that "it shall be competent for any Sheriff, from whose books a warrant of arrestment has been issued on the petition of the debtor or defender duly intimated to the creditor or pursuer, to recall or restrict such arrestment, . . . provided that the Sheriff shall allow answers to be given in to the said petition, and shall proceed with the further disposal of the cause in the same manner as in summary causes, and his judgment shall be subject to review in the Court of Session."

In a petition for recall of arrestments the respondent lodged no answers, and the Sheriff "having heard parties" recalled the arrestments on caution. The respondent having appealed, the petitioner objected to the competency of the appeal, on the ground that the respondent, in failing to lodge answers, had so deviated from the course of procedure prescribed by the statute as virtually to constitute the Sheriff an arbiter. The Court held that there had been no deviation from the statutory procedure, and repelled the objection.

Opinion (per Lord McLaren and Lord Kinneare) that a deviation from the ordinary course of judicial procedure does not constitute the proceedings an arbitration unless it follows upon an agreement by the parties and is assented to by the Judge.

In February 1897 John W. Bruce & Company raised an action in the Sheriff Court of Lanarkshire, at Glasgow, against William Gordon, builder there, for £6400, for loss and damage alleged to have been sustained by them through the defender's fault. No. 143.
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On the dependence of this action they used arrestments.

In March 1897 Gordon presented a petition for recall of the arrestments. 1st Division.
Sheriff of
Lanarkshire.

The petition was served upon Bruce & Company, but they did not lodge any answers.

Thereafter the Sheriff-substitute (Erskine Murray) pronounced an interlocutor, by which he, "having heard parties' procurators," on the petitioner finding caution to the amount of £300, recalled the arrestments.

The respondents appealed to the Court of Session, and on the case appearing in the Single Bills the petitioner objected to the competency of the appeal, and argued ;—The provisions of section 21 of the Personal Diligence Act, 1838,* were imperative, and the respondents were bound to lodge answers. Not having done so, they had lost their right to submit the Sheriff's judgment to review. By their deviation from the course of procedure prescribed by the statute they had virtually constituted the Sheriff an arbiter.¹ In any view, there being no record, there was no means of knowing what had been before the Sheriff. The Appellate Court could not review a judgment without having the pleadings of both parties before them.

Argued for the appellants ;—There had been no deviation from the statutory course of procedure. The case fell to be disposed of as a summary cause, and it was a matter of every-day practice for a Sheriff to decide summary causes without requiring answers to be lodged. Even assuming that there had been a deviation *extra cursum curiæ*, it was not suggested that the deviation was a matter of agreement between the parties, and such an agreement was necessary in order to constitute the Sheriff an arbiter.

LORD PRESIDENT.—The section provides that the Sheriff shall allow answers to be given in, and shall proceed with the further disposal of the action in the same manner as with summary cases, and that his judgment shall be subject to review in the Court of Session.

Now, Mr Salvesen has not made out that, if this had been an ordinary summary case, it was incompetent, or *extra cursum curiæ*, for the Sheriff, no answers having been given in, to proceed to hear parties, and to dispose of the cause. That being so, and the statute pointing to summary procedure as the criterion of procedure, I am not satisfied that there has been

* The Personal Diligence Act, 1838 (1 and 2 Vict. c. 114), sec. 21, enacts, " . . . it shall be competent for any Sheriff, from whose books a warrant of arrestment has been issued on the petition of the debtor or defender, duly intimated to the creditor or pursuer, to recall or restrict such arrestment on caution or without caution as to the Sheriff shall appear just ; provided that the Sheriff shall allow answers to be given in to the said petition, and shall proceed with the further disposal of the cause in the same manner as in summary causes, and his judgment shall be subject to review in the Court of Session."

¹ Dykes v. Merry & Cuninghame, March 4, 1869, 7 Macph. 603, 41 Scot. Jur. 355.

No. 143. any irregularity, or that the parties have so acted as to withdraw the cause from the ordinary jurisdiction of the Sheriff.
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LORD ADAM.—I am of the same opinion. It is quite true that if parties deliberately agree to go out of the ordinary *cursus curiæ*, they may deprive themselves of the right of appeal. But, then, in many instances, parties may go out of the ordinary *cursus curiæ* by mistake, and to say that an error in procedure of that nature makes the Sheriff an arbiter is, to my mind, altogether out of the question.

LORD M'LAREN.—If it were necessary to consider the legal question which Mr Salvesen raised, I should be disposed to hold that, in order to displace the right of review, it is not enough to say that there had been a deviation from the course of procedure prescribed by statute. That might be the very thing complained of in the appeal or reclaiming note. If deviation is shewn to have been the act of the parties to the case assented to by the Judge, then only do the proceedings become a proper arbitration.

In this case I do not think that there has been any deviation from the procedure prescribed by statute. The Act provides—[quotes section]. I take that to mean that if the respondent moves the Sheriff for leave to lodge answers, the Sheriff cannot refuse the motion. But then the application is to be dealt with in the same manner as summary causes, and it is a matter of ordinary practice that, in summary cases, a party to whom intimation has been made is entitled to be heard without the necessity of first lodging answers. If the question is merely as to the amount of caution, or again if it is merely as to the choice of a particular individual for the office, e.g., of judicial factor, answers are not necessary. When, on the other hand, the party contends that the application is incompetent, or ill-founded on the merits, it is proper that answers should be ordered.

LORD KINNEAR.—I agree. I am not satisfied that there has been any departure from the regular course of procedure, and indeed Mr Salvesen admitted, very properly, that if a respondent does not take advantage of the order of the Sheriff allowing him to lodge answers, that does not put him out of Court, but leaves the Sheriff to proceed upon the statement of such answers as may be given orally. The procedure in the Sheriff Court therefore was regular, but I agree also with what has been said by Lord M'Laren that a mere deviation from the ordinary course of procedure is not equivalent to a submission of the questions in dispute to a Judge as an arbiter where it proceeds upon a mere error or slip in the conduct of a case, and not upon any agreement to make such a departure.

THE COURT repelled the objection, and sent the case to the Summar Roll.

GILL & PRINGLE, W.S.—L. M'INTOSH, S.S.C.—Agents.

HAROLD FRASER BELL, Pursuer (Appellant).—*Cooper.*
JOHN MUNRO BELL, Defender (Respondent).—*Macaulay Smith.*

No. 144.

May 13, 1897.
Bell v. Bell.

Process—Appeal—Competency—Omission to lodge prints—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 71—A. S., 10th March 1870, sec. 3.—In an appeal in vacation from the Sheriff Court the appellant omitted to lodge prints as required by the Act of Sederunt, March 10, 1870, sec. 3. An objection was taken to the competency of the appeal, and the appellant having admitted that the failure to print was not due to inadvertence, the Court *dismissed* the appeal as incompetent.

THIS was an action brought by Harold F. Bell in the Sheriff Court at Edinburgh against John Munro Bell for an accounting and payment of £38.

1ST DIVISION.
Sheriff of the
Lothians and
Peebles.

On 8th March 1897 the Sheriff-substitute (Hamilton), after a proof, dismissed the action.

The pursuer appealed, on 22d March 1897, to the Court of Session.

He printed the appeal, record, and interlocutors, but did not print the proof.

On the case being called in the Single Bills, the respondent objected to the competency of the appeal, on the ground that the appellant had not printed the proof as required by the A. S., 10th March 1870, section 3.*

Counsel for the appellant explained that the present action touched only part of a larger question which had arisen between the parties; that an action had been raised in the Court of Session to try the whole question, and that accordingly he had intended when the appeal was called to move the Court to remit it *ob contingentiam* to the Lord Ordinary before whom the Court of Session action was pending. He had come to be satisfied, however, that such procedure was not competent, and he now proposed to follow forth the appeal in ordinary course.

The respondent argued;—There had been here a wilful deviation from the prescribed procedure. The appellant had applied his mind to the question of printing, and it could not therefore be said that his omission to print was formal and innocent, or due to inadvertence. On the contrary, it was deliberate and intentional. The present case was therefore quite distinguishable from the case of *Boyd*.¹

* The A. S., 10th March 1870, sec. 3, in virtue of the power given by sec. 106 of the Court of Session Act, 1868, enacted,—“That the course of proceeding prescribed by the 71st section of the said statute” shall be altered to the following extent and effect:—“(2) The appellant shall during vacation, within fourteen days after the process has been received by the Clerk of Court, deposit with the said clerk a print of the note of appeal, record, interlocutors, and proof, if any, unless within eight days after the process has been received by the clerk he shall have obtained from the Lord Ordinary officiating on the bills an interlocutor dispensing with printing in whole or in part, . . . and the appellant shall, upon the box-day or sederunt-day next following the deposit of such print with the clerk, box copies of the same to the Court, . . . and if the appellant shall fail within the said period of fourteen days to deposit with the Clerk of Court as aforesaid a print of the papers required . . . or to box or furnish the same as aforesaid on the box-day or sederunt-day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except upon being reponed as hereinafter provided.”

¹ *Boyd, Gilmour, & Co. v. Glasgow and South-Western Railway Co.*, Nov. 16, 1888, 16 R. 104.

No. 144.

May 13, 1897.
Bell v Bell.

Argued for the appellant;—Section 71 of the Act of Parliament contained no such regulation about printing as was now sought to be enforced against the appellant. The question arose strictly under an Act of Sederunt, and an Act of Sederunt should be very liberally construed. The Court had a discretion in the matter, and there being no suggestion that any prejudice would arise to the respondent from the technical breach of the Act of Sederunt, the appellant should be allowed to insist in the appeal.¹

LORD PRESIDENT.—Even if we were to assign no greater rigidity to the Act of Sederunt than was contended for by Mr Cooper, I still think that his request must be refused.

The Act of Sederunt, at least, lays down what is the rule of practice; and the decision which has been cited is not an exception to the following of the rule, but merely shews that, where the spirit of the rule would not be carried out by a literal compliance with it owing to exceptional circumstances, it will not be misapplied.

But the case cited was a case of inadvertence, and the appellant here is constrained to admit that he did advert to this point; but he had at that time a theory, which on better consideration he is obliged to abandon, that the Court might be successfully moved not to hear the appeal in ordinary course, but to send it to a Lord Ordinary. He accordingly adverted to the duty of printing, and took his chance of not complying with it. He is now proposing to follow out the appeal in ordinary course, and he is asking us to absolve him from the consequences, not of an accidental omission, but of a deliberate and calculated contravention of the rule applicable to appeals.

LORD ADAM.—I concur.

LORD M'LAREN.—I am of the same opinion, and I will only add that, while there may be many cases in which an Act of Sederunt should be enforced in the spirit rather than according to the letter, it has been pointed out to us that this particular regulation is one which comes in place of a provision of an Act of Parliament. It is an enactment under the delegated authority of Parliament to repeal a Parliamentary enactment, and to substitute for it something which experience has shewn to be more suitable in practice. I must hold, then, that such a regulation should be interpreted in the same spirit as if it were in the original Act, because it is to all intents and purposes a statutory regulation.

LORD KINNEAR.—I concur.

THE COURT sustained the objection to the competency of the appeal, and dismissed the appeal.

R. AINSLIE BROWN, S.S.C.—LISTER SHAND & LINDSAY, S.S.C.—Agents.

¹ Boyd, Gilmour, & Co. v. Glasgow and South-Western Railway Co., Nov. 16, 1888, 16 R. 104.

MRS MARY SHIELDS, Pursuer (Reclaimer).—*Watt—P. J. Blair.* No. 145.
 DAVID F. DALZIEL, Defender (Respondent).—*W. Campbell—Clyde.*

May 14, 1897.
 Shields v.
 Dalziel.

Reparation—Landlord and Tenant—Known Danger—Promise of land-lord to repair defect.—The wife of a tenant of a house raised an action against the landlord to recover damages. The pursuer averred that her husband was occupying the house as a monthly tenant; that in February 1896 he complained to the defender's factor that the ceiling was in an apparently insecure condition; that the factor admitted that the ceiling required repair, and undertook to put it right; that the complaint and undertaking were repeated in April 1896; that the pursuer's husband, in reliance on the factor's assurances, continued the tenancy; that the factor did nothing; and that in November 1896 a portion of the ceiling fell on the pursuer and severely injured her.

Held (rev. judgment of Lord Kincairney) that the action was relevant. Webster v. Brown, Jan. 12, 1892, 19 R. 765, distinguished.

ON 15th December 1896 Mrs Mary Russel or Shields, wife of 1st Division. James Shields, raised an action against David F. Dalziel to recover damages for personal injury. Lord Kincairney.

The pursuer averred that her husband was tenant of a shop and room belonging to the defender; that he had been tenant since November 1895, conform to a missive of lease.* "In February 1896 the pursuer complained to the defender's factors . . . that the ceiling of the said room was in an apparently insecure condition, and requested that it should at once be put right. The factor at first stated that there was little wrong with the ceiling, but ultimately undertook and promised to put it right. He further admitted that the ceiling required repair. The pursuer relied on the assurance of the said factor that the ceiling would be attended to at the earliest opportunity. Nothing, however, was done by the said factor; and again, in the month of April, his attention was directed to the apparently insecure condition of the ceiling, and an urgent request was made to him by the pursuer to have the matter attended to. The said factor again promised to have the ceiling put right and in a condition of safety, but again nothing was done. The pursuer, relying on the assurances of the said factor, was thereby induced to continue the tenancy of the said shop and room belonging to the defender."

The pursuer further averred, that on 14th November 1896 a portion of the ceiling gave way and fell upon her, whereby she sustained severe injuries.

The defender pleaded;—(1) The pursuer's averments are irrelevant, and insufficient in law to support the conclusions of the summons.

On 2d February 1897 the Lord Ordinary (Kincairney) found that the averments of the pursuer were irrelevant, and assoilzied the defender.†

The pursuer reclaimed, and argued;—The case of *Webster*,¹ on which the Lord Ordinary based his judgment, was distinguishable, for

* From the missive of lease, it appeared that the pursuer's husband had taken the subjects in the first instance for one month, and continued thereafter in occupation, paying a monthly rent.

† "OPINION.—I am not able to distinguish this case from *Webster v. Brown*, 12th January 1892, 19 R. 765, and I consider myself therefore bound to hold the averments irrelevant. But for that judgment, I should have been disposed to approve of the issue submitted."

¹ *Webster v. Brown*, Jan. 12, 1892, 19 R. 765.

No. 145. there the defect which occasioned the injury was the very same from the first. The condition of the premises—such as it was—remained unaltered. Here there was at most a risk that unless repairs were effected the premises would prove a source of injury. Complaint was duly made, and the defender undertook to remove the risk. It was in reliance on this assurance that the tenant continued to occupy. The present case was analogous to the cases of *M'Martin*¹ and *Fulton*.¹ Knowledge of a defect on the part of a pursuer was not necessarily a bar to the recovery of damages.²

May 14, 1897.
Shields v.
Dalziel.

Argued for the defender;—The present case was not distinguishable from the case of *Webster*.³ The tenant here had accepted the subjects with the ceiling in an apparently insecure condition. The complaint to the landlord made no difference.⁴ The risk being patent and known, the landlord was not liable.⁵

LORD PRESIDENT.—But for the supposed application of *Webster*,³ the Lord Ordinary says he would have allowed an issue, and it seems to me that, apart from that case, the action is clearly relevant.

As I read the record, the statement made is this,—that at the time of the accident the pursuer was occupying the house as a monthly tenant, on an admission by the landlord that the house required repair in this essential matter of the ceiling, and on an undertaking that that repair would be made. If that be so, I think there is a clear ground of action; and although it has been pointed out that the statement involves a considerable lapse of time, and a carrying forward, through much procrastination, of the landlord's promise, I think the fair meaning of the record is that not merely the promise but the legal undertaking to execute the repairs was extant as a term of the tenancy when the accident occurred. And therefore I think the action quite good.

The case of *Webster*³ seems to apply to a very different state of matters, for the theory of the judgment is that the tenant accepted the house in its apparent and visible condition, which was exactly the same when the accident happened as when the tenant entered. The bad stair was the cause of the accident, and it was no worse then than it was, and was seen to be, at the time of the accident. In the present case the condition of the house was not the same, for the ceiling fell; what was visible when the tenancy began was a risk; and against this risk the landlord bound himself to protect the tenant. The facts here seem to me to necessitate trial by a jury.

LORD ADAM and **LORD KINNEAR** concurred.

LORD M'LAREN was absent.

THE COURT recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary.

W. K. STEEDMAN, W.S.—PATRICK & JAMES, S.S.C.—Agents.

¹ *M'Martin v. Hannay*, Jan. 24, 1872, 10 Macph. 411, 44 Scot. Jur. 230; *Fulton v. Anderson*, Nov. 18, 1884, 22 S. L. R. 100.

² *Smith v. Baker & Sons*, L. R. [1891], A. C. 325; *Wallace v. Culter Paper Mills Co., Limited*, June 23, 1892, 19 R. 915.

³ *Webster v. Brown*, Jan. 12, 1892, 19 R. 765.

⁴ *Russell v. Macknight*, Nov. 7, 1896, *supra*, p. 118.

⁵ *Henderson v. Munro*, July 7, 1888, 15 R. 859.

MISS JESSIE ANNAN, Pursuer (Respondent).—*W. Campbell—Deas.*
 JAMES HUTTON (Annan's Curator Bonis), Defender (Reclaimer).—
Balfour—Salvesen.

No. 146.

May 14, 1897.
 Annan v.
 Annan's
 Curator Bonis.

Judicial Factor—Curator Bonis to Minor—Investment of Curatorial Funds—Discharge—Pupils Protection Act, 1849 (12 and 13 Vict. c. 51), sec. 13.—Held that the passing by the Accountant of Court—at his annual audit of a judicial factor's accounts under section 13 of the Pupils Protection Act, 1849—of investments made by a judicial factor, does not relieve the factor from responsibility for improper investments.

THIS was an action at the instance of Miss Jessie Annan, a minor, with the advice and consent of her mother, against James Hutton, chartered accountant, Glasgow, curator bonis of the pursuer, concluding, *inter alia*, for declarator that a loan of £1750, made by the defender upon a bond to the Greenock Harbour Trust, was *ultra vires* of the defender as curator. 1ST DIVISION.
Ld. Kyllachy.

In the bond, which was dated 24th March 1885, the Harbour Trustees assigned "the rates, duties, and other revenues of the trust."

The grounds upon which the investment was challenged by the pursuer were (1) that the loan was outwith the class of investments open to trustees or judicial factors; and (2) that even if it were within the class of authorised investments, it was improvident and bad in itself. It is unnecessary, for the purposes of this report, to refer further to the questions so raised, as it was decided in the case of *Cowan's Trustees v. Ferrie's Curator Bonis*, *supra*, p. 590, prior to the present action being heard in the Inner-House, that such a loan was an improper investment of curatorial funds.¹

In the present action, however, the defender averred that the investment complained of was disclosed in his accounts from the first, and was passed by the Accountant of Court without objection at the annual audit under section 13 of the Pupils Protection Act, 1849,* and he maintained, therefore, that he was freed from responsibility.

The following facts bearing on this contention were admitted by the parties, or were established in a proof allowed by the Lord Ordinary:—

In February 1885 the defender, who was at that time factor *loco tutoris* to the pursuer, lent the sum of £1750 out of the tutorial funds to the Greenock Harbour Trustees upon a bond.

On 11th May 1887 the Greenock Harbour Trust was declared to

¹ *Cowan's Trustees v. Ferrie's Curator Bonis*, Feb. 26, 1897, *supra*, p. 590.

* The Pupils Protection Act, 1849 (12 and 13 Vict. cap. 51), sec. 13, enacts,—“That the Accountant shall see that the factor's accounts of charge and discharge, with the vouchers thereof, are duly lodged, and shall thereafter examine the same without undue delay, and audit the account on the general principles of ordinary good management for the real benefit of the estate and of those interested therein, and he shall consider the investments of the estate and the sufficiency thereof, and he shall be entitled to require from the factor all necessary information and evidence, and he shall fix the amount of the factor's commission for the period embraced by the audit, according to his opinion of what is just in each particular case, and he shall strike the balance, and shall state the result of the audit in the form of a short report, and if he has made any corrections on the account he shall, if required by the factor, explain such corrections, and his reasons for making them.”

No. 146. be insolvent, and at the date of these proceedings the market price of the bond was about £38 per cent. There was evidence that prior to 1887 par value could have been got for the bond.

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The loan was duly entered as an investment of the tutorial funds in the accounts lodged by the defender with the Accountant of Court for the years ending 31st March 1886, 1887, and 1888, and no objection was taken by the Accountant.

The first occasion on which the Accountant made any observation was on receipt of the defender's accounts for the period closing at 31st March 1889, when he wrote on his report—"A sum of £1750 was invested by the factor on Greenock Harbour Trust bond which is not yet due. When the date of payment arrives this bond should be realised. Meantime all questions are reserved.

"Reported this 17th day of April 1889."

On 8th August 1896 the Lord Ordinary (Kyllachy) pronounced an interlocutor finding "that the loan in question was not a loan which in the circumstances was justified, and therefore that the defender is bound to make good the loss which has accrued, or may accrue thereon: Appoints the case to be enrolled for further procedure," &c.

The defender reclaimed, and—besides contending that the investment was one which a factor was entitled to make, and that it was a good investment in the circumstances existing at the time it was made—argued;—Under section 13 of the Pupils Protection Act the Accountant was bound to consider the investments disclosed in the defender's accounts from year to year. He—an officer of Court—controlled the factory, and not having taken any exception to the investment in question, the factor could not be held liable in damages for negligence in the selection of it. If the Accountant had reported the matter to the Lord Ordinary under section 14,* and if the Lord Ordinary had approved the investment, the defender would have been freed from liability. If, on the other hand, the Lord Ordinary had sustained the Accountant's objection, the defender would have sold the bond, and so saved any loss to the estate. The Accountant had, by passing the investment, shifted the responsibility on to his own shoulders, and his audit was an indemnity to the defender.

Argued for the respondent;—The case of *Cowan's Trustees*¹ was conclusive as to the incompetency of the investment. Further, the Pupils Protection Act, as its title indicated, was designed for the protection of pupils, and not of factors. There was nothing in section 13 to suggest that what the Accountant approved was to be binding on the pupil, and sections 14 and 15* negatived the view that the Accountant could of himself alter the common law liability of a factor. Section 17* was a complete answer to the defender's contention.

¹ *Cowan's Trustees v. Ferrie's Curator Bonis*, Feb. 26, 1897, *supra*, p. 590.

* The Pupils Protection Act, 1849 (12 and 13 Vict. c. 51), sec. 14, enacts, that "the Accountant shall have power, upon report to and with the approval of the Lord Ordinary, where the sum involved exceeds twenty pounds, . . . to dispense with the rules of exact diligence in any matter of factorial management."

Section 15 provides for the factor's objections to the Accountant's report, and for such objections being disposed of by the Court.

Section 17 enacts that during the subsistence, or after the termination of the factory, it shall be competent for any person beneficially interested to make appearance, and upon cause shewn to open up the audit of all accounts which have been audited by the Accountant in his absence.

LORD ADAM.—The question in this case is whether a judicial factor for No. 146.
 a ward is liable personally for a certain investment made by him upon a
 bond of the Greenock Harbour Trust. The Lord Ordinary has found that May 14, 1897.
 he is liable, and I think the Lord Ordinary is right. The sum here invested Annan v.
 appears to have been £1750. It was invested in February 1885. We have Annan's
 had the matter of these Greenock Harbour bonds before us in the recent case Curator Bonis.
 of *Cowan's Trustees*.¹ In that case we held that the investment was not of
 the class of investments in which a judicial factor is entitled to invest the
 money of a ward, and in accordance with that decision we held the factor
 in that case liable. The grounds being the same in this case, we must
 simply adhere to our judgment in that case,—we must hold that this invest-
 ment was not of the class in which a judicial factor is entitled to invest his
 ward's money. But an additional argument is made to us in this case,
 which was mentioned but not maintained in the previous case, namely, that
 in this case, in the annual audit by the Accountant of Court of the factor's
 accounts, this particular investment was brought under his notice and was
 passed as a sufficient investment. The documents bearing upon that shew
 that from 1886 onwards this particular investment was brought under the
 Accountant's notice and was originally passed by him without observation.
 But he seems to have observed upon it as early as the year 1889, and then
 it seems to have been passed. It was argued to us that if this investment
 was brought under the notice of the Accountant of Court, and was passed
 by him without objection, it is to be held under the 13th section of the
 Pupils Protection Act, 1849, that that absolves the judicial factor from
 liability for the investment, and that it must be held that it was an invest-
 ment which it was permissible for the judicial factor to make,—that the
 mere fact of its being passed by the Accountant of Court is conclusive of
 its being a permissible investment. The words of the 13th section of that
 Act throw this duty upon the Accountant of Court,—“The Accountant
 shall see that the factor's accounts of charge and discharge, with the
 vouchers thereof, are duly lodged, and shall thereafter examine the same
 without undue delay, and audit the account on the general principles of
 good ordinary management for the real benefit of the estate and of those
 interested therein, and he shall consider the investments of the estate and
 the sufficiency thereof, and he shall be entitled to require from the factor
 all necessary information and evidence,” &c. The duty laid upon the
 Accountant of Court was to consider the investment, the sufficiency thereof,
 and to require all necessary information and evidence and judge of their
 sufficiency. My opinion is that that clause is not introduced for the purpose
 and with the object and result of removing from the shoulders of the
 judicial factor the responsibility which prior to the Act rested upon him,
 but that it is for him to judge of the class and sufficiency of any investment he
 chooses to make, and that if he fails in his duty to the Court in that matter,
 and makes an investment not of the proper class or sufficiency, he will be held
 personally responsible for so doing. I do not think that the object of the
 13th section was to remove a judicial factor's responsibility in any way in that
 respect. It does not say so. I think the object and intention of introducing

¹ *Supra*, p. 590.

No. 146. that provision in the Act was to provide an additional protection and additional security in favour of the pupils. I altogether demur to the proposition to the effect that that clause removes any liability which prior to the Act rested upon the judicial factor. Indeed, it would be a very strong thing to say that the factor and the Accountant, in the absence of the parties truly interested, namely, the wards themselves, could finally decide as to the permissibility and sufficiency of an investment. Therefore I am of opinion that the 13th section is not applicable as contended for by Mr Salvesen. I do not think it is necessary to advert in detail to the other clauses, because I think the 14th and 15th clauses point in the same direction. Being of opinion that, as in *Bringloe's* case,¹ this security is not of the class of investments which the judicial factor was entitled to make, I do not think the question of the sufficiency of the security arises, as it would have done had this been a permissible security. But I have only to say that I quite agree with the Lord Ordinary upon that matter too. I think it is obvious that this is not a sufficient security. It was a security of a speculative character, depending upon whether or not the James Watt Dock would be successful or not. That was truly the position of matters. The facts are clearly set forth by the Lord Ordinary. I agree with him, and do not think it necessary to add more.

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LORD KINNEAR.—I entirely agree with Lord Adam, for the reasons which he has given, that this case is not distinguishable from that of *Bringloe*.¹ The only additional observation which I desire to make is, that it appears to me that the statute itself expressly provides against the contention of Mr Salvesen, that an audit by the Accountant is equivalent to a discharge. It appears to me that the audit is merely an additional precaution for the protection of the pupil. That, I think, is perfectly obvious, because the statute by section 17 provides—[quotes]. So that any party may open up any question on the accounts which has been decided in his absence, and that right is given both to any person beneficially interested and to any succeeding factor. Accordingly, when any factor—or his representatives—applies for his discharge the statute has made express provision that his liability shall not be held to be determined by a mere audit, but, on the contrary, that any question which has not been decided between the parties shall still be open. On the remaining questions, I agree with Lord Adam.

The LORD PRESIDENT.—I concur.

LORD M'LAREN was absent.

THE COURT adhered to the interlocutor reclaimed against, with this variation, that the words "in the circumstances" were deleted.

W. & J. BURNES, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

¹ *Supra*, p. 590.

THE CALEDONIAN RAILWAY COMPANY, Complainers (Respondents).— No. 147.
Clyde.

MRS AGNES COCHRAN AND OTHERS (Cochran's Trustees), AND
 ANOTHER, Respondents (Reclaimers).—*R. V. Campbell—Deas.*

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Process—Bill-Chamber—Suspension—Sheriff—Interim decree ad factum praestandum—Sist of execution.—In a Sheriff Court action the Sheriff granted warrant to the pursuer to restore a wall which had been interfered with by the defender, to its original condition, but refused to deal with the question of expenses until the wall had been restored.

The interlocutor not being appealable the defender presented a note of suspension praying the Court to interdict the pursuer from interfering with the wall or enforcing the decree. The Lord Ordinary on the Bills (Pearson) granted interim interdict and passed the note. The pursuer reclaimed, and contended that the suspension was incompetent, and that any sist of execution would prevent an appealable interlocutor being obtained from the Sheriff, and would therefore be permanent. Both parties moved the Court to decide the case on the merits.

The Court adhered to the Lord Ordinary's judgment, *holding* that the suspension was competent, but that it was not competent for the Court sitting in the Bill-Chamber to do more than to pass the note.

Wilson v. Bartholomew, July 7, 1860, 22 D. 1410, *followed*.

THIS was a note of suspension and interdict for the Caledonian Railway Company against Mrs Agnes Gibb or Cochran and others—the trustees of the deceased Robert Cochran—and Alexander Morton, sheriff-officer.

1st Division.
 Bill-Chamber.
 Lord Pearson.

The following were the circumstances in which the note was presented:—

In August 1895 Cochran's Trustees raised an action in the Sheriff Court at Glasgow against the Caledonian Railway Company, craving the Court "to interdict the defenders from encroaching in any way on the pursuers' property known as the Verreville Pottery, situated in Finnieston Street, Glasgow, or from interfering in any way with the retaining wall forming the northern boundary of the pursuers' property, and to grant interim interdict; to ordain them instantly to restore the said retaining wall to the condition in which it was before the defenders' interference therewith, and failing their restoring the said wall as aforesaid within such period as the Court shall appoint, to grant warrant to the pursuers to get the said restoration effected; and to find the defenders liable in the expenses thereof, and of this application."

The pursuers stated that their property was bounded on the north by the defenders' line of railway; that under an agreement between them and the defenders a retaining wall was erected along the northern boundary of the pursuers' property; that the defenders were in course of making large openings or spaces in the wall, which they had no right to do; that these endangered the pursuers' property; that the defenders refused to desist; and that it was essential that the wall should be restored to its original state without loss of time.

The defenders stated that the wall was built partly on the pursuers' and partly on the defenders' property, admitted that they had formed two recesses in that part of the wall which was situated on their own property, and denied that these recesses in any way injured the wall or the pursuers' property.

The Sheriff-substitute (Spens) pronounced the following inter-

No. 147. locutors:—"Glasgow, 8th November 1895.—Having heard parties' procurators, and made avizandum, interdicts the defenders from interfering to any further extent than what they have already done with the retaining wall in question, except by agreement with pursuers, or unless warrant be granted by a competent Court of law on the application by the defenders, and declares the same perpetual: *Quoad ultra* appoints the case to be enrolled on the Procedure-roll of the 27th inst. with regard to the other cravings of the petition."*

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"Glasgow, 9th December 1895.—Having heard parties' procurators and made avizandum, finds it is stated by the respondents' agent that an order in this Court on the respondents to restore the retaining wall in question to the condition in which it was before it was interfered with by respondents will not be complied with: Finds it therefore unnecessary to order the respondents to restore as craved within a certain period; but, in terms of the alternative craving, grants warrant to pursuers to restore the said wall to the same condition in which it was previous to the interference therewith at the sight of Mr William Crouch, C.E., Glasgow, reserving to pronounce further."

The defenders appealed to the Sheriff, who on 29th October 1896 adhered to his Substitute's interlocutor, and remitted to him for further procedure.

The Sheriff-substitute then pronounced the following interlocutors:—"Glasgow, 11th November 1896.—Having heard parties, refuses defenders' motion that the Court should *hoc statu* deal with the question of expenses."†

"Glasgow, 19th February 1897.—Having heard parties' procurators, grants warrant to and authorises Alexander Morton, one of the sheriff-officers of the Sheriff Court of Lanarkshire, and as representing the said Court, to take possession of the retaining wall in question, to the effect of seeing that the operations authorised by the interlocutors of 9th December 1895 and 29th October 1896 to be done by pursuers at the sight of Mr Crouch, C.E., are duly carried out; and for that purpose grants warrant to the said Alexander Morton to enter the defenders' premises, and to take and use such assistance as he

* "NOTE.—. . . In the prayer of the petition in this action there is a further craving to restore the retaining wall to the state in which it was previous to the interference complained of. I send the case to the Procedure-roll of Wednesday, the 27th inst., with reference to this other craving. If the above judgment be acquiesced in or becomes final, I will then deal with the other point."

† "NOTE.—Defenders' agent requested me to deal at this stage of the case with the question of expenses of process, I understand, on the theory that he could at once appeal to the Court of Session if I did so. I do not express an opinion as to whether an appeal *hoc statu* is or is not competent to the Court of Session. I am, however, clear that this is not the stage for me to deal with the question of expenses of process, because one very material part of the petition remains undisposed of. It is part of the petition that the respondents shall be made liable for the expense to which the petitioners may be put in restoring the wall in question to the *status quo ante*. The defenders have declined to restore, and the petitioners have been authorised by the Court to restore, in consequence of that refusal, at the sight of a civil engineer of eminence. No doubt when that work is carried out the petitioners will ask decree for the expense of that work against defenders, and the appropriate time to deal with the question of expenses of process is when the substantive cravings of the petition have been exhausted."

may think necessary, but supersedes extract hereof for fourteen days No. 147. from this date." *

The Caledonian Railway Company then raised the present note of suspension and interdict. They stated that they were threatened to be charged at the instance of Cochran's trustees under one or more of the decrees of 9th December 1895 and 19th February 1897 (above quoted), and craved the Court "*simpliciter* to suspend the said pretended decrees and charge, and whole grounds and warrants thereof; and further, to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents, Cochran's trustees and Alexander Morton, or either of them, or any person authorised by them, or either of them, from entering the complainers' premises at Finnieston Street, Glasgow, and from taking possession of, trespassing on, or otherwise interfering with any part of the said premises, including the retaining wall between the complainers' property and that belonging to the respondents Cochran's trustees on the south, and from restoring, altering, or executing any works whatsoever upon the said retaining wall, and from enforcing the said pretended decrees, and from acting under or carrying out the same in any manner of way, and to grant interim interdict to the effect above stated; or to do otherwise in the premises as to your Lordships shall seem proper."

In their statement of facts the Railway Company narrated the circumstances in which the wall had been erected, and the recesses in it constructed by them. They also, *inter alia*, stated, that for the purpose of bringing the Sheriff's judgment of 29th October 1896 under review of the Court of Session by appeal, they "moved the Court to dispose of the question of liability for expenses; but the Sheriff-substitute, on 11th November 1896, refused the complainers' motion, on the ground that, in his opinion, the question of expenses did not fall

* "NOTE.—I intimated at the Court that I proposed to consult Sheriff Berry as to the form of interlocutor to be pronounced, and to this course both agents assented. This interlocutor and note embody our joint views. The Court has held, rightly or wrongly, that pursuers are entitled to restore the retaining wall to the *status quo ante* defenders interfered with it. Defenders have refused to make that restoration, and pursuers have been authorised to do it; but with the object of minimising the inconvenience and loss to which the railway company may be put, a civil engineer of eminence, in whom the Court has confidence, has been nominated to superintend the work; and it is not to be doubted that, so far as consistent with the proper carrying out of the work, Mr Crouch will defer to the suggestions made by the railway company's engineer. It appears from the statements made that defenders have refused to allow pursuers' workmen to enter the defenders' premises for the purpose of doing the work which this Court has authorised. That is a thing, of course, which cannot be permitted, and this Court formally authorises possession of the retaining wall in question to be taken by a sheriff-officer of this Court, as representing the Court; and it is well it should be understood that interference with him by anyone in the duty entrusted to him may be taken up and dealt with as a criminal offence. It will be his duty to see that the pursuers' contractor and workmen get access to the premises, and he will report to the Court any interference by anyone which may have the effect of preventing this. . . . No opinion is expressed as to the competency of a note of suspension of this interlocutor, but that defenders may, if so advised, present a note of suspension to the Court of Session, extract of this interlocutor is superseded for a fortnight."

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to be dealt with until after the work of restoration had been completed. Notwithstanding this, the present complainers proposed to appeal the interlocutors of 9th December 1895 and 29th October 1896, but the Sheriff-clerk refused to allow them to note an appeal."

They further averred that they were "desirous of bringing the said interlocutors under review before the existing state of matters is interfered with, as the proposed restoration of the wall would cause great injury to the complainers and the public using their railway, and the present application has accordingly been rendered necessary."

They pleaded, *inter alia* ;—(3) At all events, in the circumstances condescended on, the respondents are not entitled to enforce the said decree or carry out the same, and the complainers are entitled to suspension and suspension and interdict as craved.

On 27th February 1897 the Lord Ordinary on the Bills ordered intimation, and meantime sisted execution, and granted interim interdict.

Answers were lodged by Cochran's Trustees.

They pleaded, *inter alia* ;—(1) In respect of the said Sheriff Court proceedings condescended on, the present application is premature and incompetent. (3) The said decrees having been legally and properly pronounced, and being in accordance with the rights of parties, the note should be refused. (4) The complainers' interference with the said retaining wall being outwith their rights, and in violation of the rights of the respondents, the note should be refused.

On 13th March 1897 the Lord Ordinary (Pearson) pronounced this interlocutor :—" Passes the note without caution, and continues the sist and interim interdict."*

* "OPINION.— . . . The suspension now brought proceeds as upon a threatened charge. This would have been appropriate if the Railway Company had been ordered to restore the wall ; but it is doubtful whether any charge would be competent upon these interlocutors. However, the interlocutors are certainly being put in execution through the warrants which have been granted ; and, assuming the suspension to be otherwise competent, I see no objection to the form of it.

"The respondents challenge it as incompetent, on the ground that it is substantially an attempt to review interlocutors in a case where review is excluded by the statute. The complainers do not dispute that neither of the interlocutors is reviewable at this stage ; but they say that their purpose is not review, but a sist of execution until they are in a position to appeal on the merits. This distinction received effect in the case of *Wilson v. Bartholomew* (1860, 22 D. 1410) ; and, in my opinion, that case rules the present.

"In passing the note and continuing the interim interdict, I desire to make it quite clear what, according to my opinion, is the question, and the only question, for decision under this note, and what are the limits within which I hold such procedure competent. The question I take to be this,—whether it is more expedient or more in accordance with justice that the proposed restoration of the wall should now proceed, or should await the result of an appeal.

"It will be observed that that question can be determined without touching in any way the merits of the Sheriff Court action. It is not quite so obvious that it can be determined without touching the merits of the two interlocutors sought to be suspended. But the point is, whether a stay of execution involves the review of either interlocutor ; and it seems to me that it does not. On the contrary, I assume that the Sheriff was quite right in pronouncing both interlocutors ; that they followed from his previous decision as to interdict ; and that he could not have done otherwise than he

Thereafter, on 24th March 1897, Cochran's Trustees presented a note to the Sheriff-substitute, and moved him to deal with the Sheriff Court expenses of process in order that they might have a judgment on the merits which could be appealed for review in the ordinary course, but the Sheriff-substitute refused the motion, for the reasons stated by him in the note to his interlocutor of 11th November 1896. No. 147.
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Cochran's Trustees then reclaimed against the interlocutor of the Lord Ordinary on the Bills, and argued;—It was not competent to appeal against the Sheriff's judgment, as the question of expenses had not been dealt with by him, and his judgment was therefore not a

did. But inasmuch as an appeal from the final judgment will bring up for review all prior interlocutors, it is certain that the interlocutors now in question may ultimately be submitted for review; and the question now is, not whether they are right, or whether they should be reviewed, but whether their execution should be sisted, in order to enable them to be effectively reviewed when the time comes.

"In certain classes of cases it is obvious that this power must exist in the Bill-Chamber. Interim warrant may be granted in the Sheriff Court to do something absolutely irreparable, such as the cutting down of timber; and, if the Appellate Court should ultimately reverse on the merits, it would find itself powerless to give an effective decree. The same may be said of operations not in themselves irreparable, but so expensive or so risky that justice and common sense alike demand that they should await the result of an appeal. On the other hand, there is a large class of cases where the thing ordered to be done is so trivial, or so easily restored against, that it is not worth while to stop it, and where its execution would not hamper an Appellate Court in dealing with the whole case as it saw fit.

"Between these extremes there lie a large number of cases, each of which must be judged of according to its circumstances; and, in my opinion, this is one of them. When the parties meet on a closed record, it will be seen whether the sist should be continued, and on what conditions. Beyond that, I do not, as at present advised, see that there will be any question to try, though the complainers may state such objections as they can, so long as they do not involve review on the merits. The complainers indeed set forth in this note their position on the merits of the Sheriff Court litigation, and none of their pleas in law expresses the ground on which, and on which alone, I think the note should be passed. If this is not remedied at the next stage, the note may have to be refused. But meantime the reasons of suspension seem to me to be capable of being read as presenting a competent and relevant case for interference on the limited ground I have mentioned.

"It was suggested that this may lead to a dead-lock; and indeed it would do so if any step necessary towards an appealable judgment in the Sheriff Court were rendered impossible by the suspension of the warrants. If, for example, the Sheriff were not in a position to dispose of the case so as to let in an appeal, without ascertaining and decerning for the expense of restoring the wall, the case might be hung up indefinitely. But this is not so. The statute, as expounded in the case of *Malcolm v. M'Intyre* (1877, 5 R. 22), seems to admit of an appeal even before such steps have been taken, provided the expenses of process have been disposed of by a finding. The Sheriff-substitute indeed declined to deal with expenses of process until he had disposed of the liability of the Company for the expenses to which the trustees may be put in restoring the wall. But he has not been asked by either party (so far as the process discloses) to pronounce a finding as to liability for the expenses of restoration. If that were now done and the other statutory conditions of appeal were observed, the somewhat protracted dispute would speedily come to an end."

No. 147. final judgment.¹ The present note of suspension was really an attempt to get the merits of his judgment submitted to review, but that was incompetent. In any case the note should be refused. Otherwise matters would be brought to a dead-lock, because of the refusal of the Sheriff to deal with expenses until after the wall had been restored, and of the impossibility of restoration if execution were sisted. In these circumstances to pass the note would inflict a great hardship on the respondents, who held the Sheriff's judgment, and were therefore presumably right on the merits. The circumstances of the case were entirely different from those in *Wilson v. Bartholomew*.² In any event the Court should hear parties on the merits, or remit to the Sheriff to make a finding as to expenses.

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Argued for the Railway Company ;—They concurred in asking the Court to hear the parties on the merits. If that were not competent, then the Court should pass the note. There was a proper question to be tried, viz., whether execution should be sisted or not. The suspension was not brought to have the judgment of the Sheriff reviewed on the merits, but to stay execution until parties were in a position to appeal on the merits. In the case of an interim order *ad factum praestandum*, an appeal was incompetent, and the only course open to the railway company therefore was to bring a suspension.³

LORD PRESIDENT.—Two courses are before the Court, to adhere to the interlocutor passing the note, or to recall the interlocutor and refuse the note.

It appears to me that the case of *Bartholomew*² is sufficient to support the Lord Ordinary's interlocutor. In the Bill-Chamber it is enough to shew that there is a question to be tried, and that being so, I am for adhering to the interlocutor of the Lord Ordinary.

The Court would gladly aid the parties in having the merits decided, and grant the motion made if that were possible, but we must have a question to decide and be able to pronounce an operative judgment.

In the present case, as I have said, there are but two alternatives, and I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM.—The alternatives are to pass the note or to refuse it. Now, we do not refuse a note unless we think that there is no question to try, and we think that there is a rather serious question to try here. In passing the note, we are, in my opinion, following the authority of the case of *Bartholomew*.²

LORD M'LAREN.—I agree with what has been said by your Lordships, that there is a proper question to be tried, and that is enough to warrant us in passing the note. But the Lord Ordinary has gone somewhat further, for it is not unusual in passing a note to express an opinion as to the grounds

¹ Parochial Board of Greenock v. Miller & Brown, May 25, 1877, 4 R. 737; Russell v. Allan, Oct. 18, 1877, 5 R. 22; Malcolm v. M'Intyre, Oct. 19, 1877, 5 R. 22.

² Wilson v. Bartholomew, Feb. 4, 1860, 22 D. 693, 32 Scot. Jur. 266, and July 7, 1860, 22 D. 1410, 32 Scot. Jur. 645.

³ Wilson v. Bartholomew, *supra*, note 2; Hunter v. Turnbull, March 10, 1824, 2 S. 786.

for doing so. Now, his Lordship has pointed out the inconvenience, the possible hardship, which might result to the Caledonian Railway Company if the order which has been made against them were carried into execution before the company has had an opportunity of bringing that order under review. Nothing has been said that tends to displace in my mind the impression made by what his Lordship says, and while we can do no more than pass the note I should hope that it will not be necessary to rehear the case on the question of the proper procedure, but that the parties will accept Lord Pearson's view that there are grounds for staying execution on the interlocutor of the Sheriff-substitute until the merits of the case can be brought competently before the Court by appeal.

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LORD KINNEAR concurred.

THE COURT refused the reclaiming note.

HOPE, TODD, & KIRK, W.S.—W. & J. BURNES, W.S.—Agents.

BARONESS ROISSARD DE BELLET, Pursuer (Reclaiming).—*Abel*.
JAMES AULDJO JAMIESON AND OTHERS (Scott's Trustees), Defenders
(Respondents).—*W. Campbell—Fleming*.

No. 148.
May 21, 1897.
Roissard v.
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Trustees.

Reparation—Damages for delay in payment of money—Interest.—A widow raised an action against testamentary trustees for payment of £11,000, as damages on the ground that heritable properties belonging to her had been brought to a forced sale through the fault of the defenders in withholding payment of sums due to her.

The pursuer averred that if she had received payment of £400 in March 1893 the forced sale would not have been necessary, and that she then applied to the law-agents of the trustees "for such sums as would enable her to pacify her pressing creditors." That no notice was taken of the application, and that the estates were sold; that in 1894 she received a letter from these law-agents stating that since May 1870 they had held a sum of £1250 belonging to the pursuer. The pursuer further averred that in January 1894 her claim for that sum and interest was compromised for £3000. The pursuer did not aver that she had informed the trustees or their law-agents, or that they knew, that if the money was not paid in 1893 the pursuer's estates would be brought to a forced sale.

Held (*aff.* judgment of Lord Kincairney) (1) that the action was not relevant, as the pursuer had not set forth circumstances inferring liability on the part of the defenders for damages for delay other than interest; and (2) that the pursuer's acceptance of interest excluded the claim for damages.

ON 6th November 1896 Elizabeth Isabella Johnstone Gordon, ^{1ST DIVISION.} Baroness Roissard de Bellet, raised an action of damages for £11,000 ^{Lord Kin-} against the trustees of her first husband, the late Major Hugh Scott ^{cairney.} of Gala, who had died in 1877. In 1878 she had married the Baron Roissard de Bellet, who died in 1891.

The pursuer averred that in 1891 she was possessed of properties in France, in the purchase and improvement of which she had expended above £16,000. (Cond. 5) That immediately before the Baron's death "a number of large mortgages affecting these properties were cleared off by the sale of a large villa and ground near Hyères, but there remained a number of merchants, tradesmen, and others, with unsatisfied claims of small amount, and these smaller creditors pressed the pursuer for immediate payment. The pursuer consulted M. Paget, a notary at Hyères, with a view to seeing what could be

No. 148. done to meet these claims and the arrears of interest due on certain small mortgages secured on the said properties. M. Paget stated that with a sum of £400 he could satisfy pursuer's creditors and avert a sale of her estates. M. Paget, at the request of the English Consul, M. Jouve, undertook to arrange with pursuer's creditors to delay taking legal proceedings for enforcing their claims for six months, and also a delay of one year to redeem pursuer's gallery of oil paintings, bronzes, and works of art pledged by the late Baron Roissard to M. Crevelli for 6000 francs (£240). As the result of the pursuer's consultation with M. Paget in March 1893, the pursuer, the said M. Jouve, Mr Chapman, banker, Hyères, and the Rev. C. Panter, D.D., English clergyman, on pursuer's behalf, made repeated application to her sons, the said Mr John Scott of Gala, and Mr Hugh Scott MacDougall of Makerstoun, and to Messrs Tods, Murray, & Jamieson, W.S., Edinburgh, the law-agents for the trustees and executors of the said deceased Hugh Scott (who had in their possession at this time a considerable sum of money belonging to the pursuer) for such a sum as would enable pursuer to pacify her pressing creditors. The letters addressed to the pursuer's sons were forwarded to the said Messrs Tods, Murray, & Jamieson, but said letters and the requests contained therein were totally disregarded by all these parties, the pursuer receiving no reply of any kind. In consequence of no moneys being forthcoming, the pursuer's heritable properties in France and her valuable gallery of oil paintings and bronzes were brought to sale by her creditors, and were sold for what could be obtained immediately." (Cond. 6) "The foregoing properties, having been brought to a forced sale, realised much less than their real value, and the pursuer has suffered great loss and damage in consequence. In particular, the property of La Tuilerie, which, had it been judiciously and voluntarily realised, would have brought not less than £7000, was sold for £1250." Similar statements were made in regard to other properties. "The occasion when pursuer's said properties were disposed of was not favourable for selling in the south of France, properties being then diminishing in value. Shortly thereafter prices improved, and they are now, and shortly after the date of said sales were, greatly higher than at the time when the pursuer was forced to put them in the market. . . ." (Cond. 7) "After the sale of pursuer's properties, which she bought for about £17,000 and sold for £3200, the pursuer, finding herself without means of support, returned to Scotland, and applied to her sons and to her daughter, and to the defenders, the trustees and executors of the late Major Scott, for aliment," and ultimately raised against them an action of aliment. (Cond. 8) "On the date of the calling of the said action for aliment (10th January 1894), the pursuer's law-agents received a letter from Messrs Tods, Murray, & Jamieson, intimating that during the whole period, since May 1870, the said Hugh Scott, and after his death his trustees and executors, had held the sum of £1250 belonging to the pursuer. They then offered, on behalf of the defenders, to make payment of this sum, together with interest at 6 per cent, which they had received from May 1870 to May 1875, amounting to £374, with the further addition of £247 of interest received on the same sum from July 1875 to July 1879, and to allow bank deposit rates from July 1879 to date of offer of payment, under deduction of income-tax. This offer was declined, and the pursuer's agents demanded an explanation of the retention of the said sum of £1250. After some

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correspondence, they learned that the fund in question had been originally lent to Lord Belhaven at 6 per cent; that it had been uplifted from that investment by Messrs Tods, Murray, & Jamieson, as Major Scott's law-agents, in May 1875, and thereafter invested by them, on Major Scott's behalf, in the Credit Foncier of Mauritius, where it remained from July 1875 to July 1879. It was then uplifted by Messrs Tods, Murray, & Jamieson, and retained by them, as agents for Major Scott's trustees, until the calling of the summons for aliment, when, as already explained, intimation was for the first time given that the defenders were prepared to make payment of this sum, with interest as aforesaid, to the pursuer." (Cond. 9) "In view of the peculiar circumstances in which the fund had been retained, the pursuer instructed her agents to insist upon payment of the interest accumulated thereon at full legal rates, but as pursuer was obliged to leave this country for France, where certain business matters were requiring her immediate attention, a compromise was effected on the question of interest, and the defenders, through the said Messrs Tods, Murray, & Jamieson, paid to her the said sum of £1250 and interest, in all £3000, on or about 24th January 1894. If this sum had been paid to the pursuer at the time when the defenders were informed that her creditors were pressing her, it would have obviated the sale of pursuer's French properties." (Cond. 10) " . . . Had the pursuer had command of the sum of £400 at the time of the threatened foreclosing of the mortgages on her French properties she would have been able to pay off the creditors' claims and to have postponed the sale until such time as the property market improved, or until she was able to make other arrangements for borrowing the money, or in any event, by obtaining time to bring the properties judiciously and voluntarily to sale, she would have secured a much larger price for them than she did. The properties, if judiciously realised as aforesaid, would have brought not less than £14,500, and the pursuer has accordingly lost a sum of not less than £11,000, which is the sum sued for." (Cond. 11) "For the loss the pursuer has sustained the defenders, as trustees and executors fore-said, and as individuals, are responsible to the pursuer. They retained in their own hands, or, at any rate, their agents, for whom they are responsible, held for them, money which they knew or ought to have known, or which their said agents knew or ought to have known, belonged to the pursuer, and though repeated applications were made to them therefor, the purpose of the application explained, and the consequences to the pursuer if the money was refused to her clearly pointed out to them, they took no notice of her letters, and refused or delayed to make payment of such sum to her. In consequence of the unwarrantable, illegal, and malicious conduct on the part of the defenders, great loss and damage has been sustained by the pursuer."

The pursuer pleaded;—(1) The pursuer having suffered loss, injury, and damage through the fault of the defenders, or of those for whom they are responsible, she is entitled to reparation therefor. (2) The sum sued for being reasonable compensation in the circumstances considered on, the pursuer is entitled to decree therefor.

The defenders pleaded;—(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons. (3) The pursuer having been paid interest on the said sum of £1250, and having discharged the defenders of all claims therefor, has no

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No. 148. further legal claim arising from the delay in paying said sum to her, and the defenders should be assoilzied, with expenses.

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On 23d February 1897 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds the averments of the pursuer irrelevant to support the conclusions of the summons, and therefore sustains defenders' first plea in law: Sustains also the defenders' third plea in law, and assoilzies them from the conclusions of the summons." *

* "OPINION.—This is an action of damages by the Baroness de Bellet, at one time the wife of the late Major Hugh Scott of Gala, who died in 1877. The defenders are his trustees. The sum claimed is £11,000, and the ground of claim seems to be, that because of the defender's delay in paying to the pursuer a sum of £1250 belonging to her, which was in their hands, certain properties belonging to her were sold by or through the pressure of her creditors, at a sacrifice, whereby she suffered loss to the amount sued for.

"It does not appear precisely how that sum came into the defenders' hands, nor what the character of their obligation to pay it was, nor the reason why it was not paid earlier. On these points the condescendence and the defences are alike unsatisfactory. But at present I am not concerned with the defences, but only with the condescendence, because the defenders have maintained, and I think successfully, that it is wholly irrelevant. I have formed that opinion (1) because of the obscurity and incompleteness, and what I may call the incoherence of the pursuer's averments, and (2) because liability for the damages claimed does not, under the circumstances averred, follow from the defenders' delay in payment. I think also that the defenders' third plea is well founded, and that the pursuer's claim for damages has been satisfied, and that the present action is excluded by the admitted payment to her, on 24th January 1894, of the £1250, with interest.

"The pursuer's averments relate, firstly, to the damage sustained, and secondly, to her applications to the defenders. On the first point she avers that after Major Scott's death she married the Baron de Bellet, who died on 6th December 1891; that she was then possessed of properties, in the purchase and improvement of which she had expended above £16,000; that immediately before the baron's death 'a number of large mortgages affecting these properties were cleared off'; but that she had still a number of creditors for small amounts; and 'in consequence of no moneys being forthcoming, the pursuer's heritable properties in France and her valuable gallery of oil paintings and bronzes were brought to sale by her creditors, and were sold for what could be obtained immediately.' She states that a property worth £7000 was sold for £1250, another property worth £5000 for £1250, and a third worth £2500 for £1000. As I read condescendences 5 and 10, the pursuer's averment is that these properties were sacrificed because she could not raise £400, and that had she received that sum the sale of her estates could have been averted. But if it be true, as she avers, that large mortgages affecting her properties had been cleared off, and if it be true that the creditors agreed to delay proceedings for six months, as she also avers, how can it be true that she was unable to raise £400 on security of these properties? I suppose that in considering relevancy I am bound to make an effort to assume the truth of the pursuer's averment; but still it is so nearly incredible, and so completely unaccountable, as to throw on the pursuer the obligation of explaining distinctly, specifically, and in detail, how it was that she was unable to raise £400, and so to prevent the sale of her properties. There is no such explanation, and therefore I hold that her averments on that matter are not such as can be sent to proof. Farther, the dates of the sales of the pursuer's properties are not given, and they may have been, for anything that is clearly stated on record, before any application was made to the defenders or their agents."

"With regard to these applications, it appears from condescendence 3

The pursuer reclaimed, and argued ;—The action was relevant. The No. 148.
 pursuer had averred that the defenders knew, or ought to have known, that they held in their hands money belonging to her ; that she had May 21, 1897.
 intimated to them her need of this money ; and that, had she received Roissard v.
 payment of it, she would not have had to sell her properties in France Scott's
 at a sacrifice. The defenders committed a wrong in retaining the Trustees.
 money, and were liable in damages for the loss resulting from their
 actings. No doubt in the ordinary case, where special damage could
 not be qualified, the damage due for delay in payment of money was
 the interest only. But where, as here, special damage had been shewn,
 the damages due were not so limited, but included the whole damage
 flowing from the wrong done.¹

That damage was just such as naturally, in the circumstances,
 resulted from the defenders' actings.²

The defenders were not called upon.

that the pursuer did not know of the existence of this fund in the
 defenders' hands, and from condescendence 5 I gather that the applications
 were made after March 1893. They were not made to the defenders, but it
 is averred that they were made to their law-agents. They could not have
 been applications for money due to the pursuer, as she did not know that
 any money was due. What is of more consequence is, that the pursuer does
 not aver that she informed the defenders' agents that her property was
 about to be sold for want of money, nor that she mentioned the amount
 required. She only avers that application was made for such a sum as
 would pacify pressing creditors. It is true that in condescendence 11 there
 is a general averment that repeated applications were made for money due
 to the pursuer (which is, of course, impossible if she did not know that
 any was due), that 'the purpose of the application' was 'explained, and
 the consequences to the pursuer, if the money was refused to her, clearly
 pointed out to them.' But it is not said what purposes or what consequences
 were disclosed ; and I cannot hold that this general averment adds anything
 to the more specific averment in condescendence 5. I think, therefore, that
 it is not relevantly averred that the defenders were informed that the con-
 sequences of non-compliance with her requests for money would be the
 forced sale of the pursuer's properties.

"In the ordinary case the damage due for delay in payment of money is
 nothing but interest. 'Here interest is the damage due.'—Bell's Pr.,
 sec. 32 ; *Fletcher v. Taylor*, 2d November 1855, 25 L. J., C. P. 65. That
 is the only damage which in the ordinary case a debtor and creditor have in
 view, and which, generally speaking, is the only damage recoverable. That
 general rule seems to hold whether damages are claimed for breach of con-
 tract or *ex delicto*. In this case the want of all averment as to the condi-
 tions under which the defenders held the pursuer's money makes it
 difficult, if not impossible, to say under what head this claim comes.
 There is no contract averred. At the same time it is not alleged that the
 defenders held the money as trustees for the pursuer. They were, in fact,
 not trustees for the pursuer. Counsel for the pursuer stated that he pre-
 ferred to put his case on the delict of the defenders. But here again he
 has not alleged any delict or fault. Fault is mentioned generally in the first
 plea in law ; but not, so far as I have noticed, in the condescendence. But
 whether the pursuer's claim is rested on breach of contract or on delict, it

¹ *Robin v. Steward*, 1854, 14 Scott's C. B. Reports, 595 ; *Larios v. Bonany Gurety*, 1873, L. R., 5 P. C. App. 346.

² *Hayley v. Baxendale*, 1854, W. H. & G.'s Exch. Rep. 341 ; *Gee v. Lancashire and Yorkshire Railway Co.*, 1860, 6 Hurlstone & Norman, 211, *per Baron Bramwell*, 218.

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LORD YOUNG.—In this case the Lord Ordinary has dismissed the action, and I am of opinion that his judgment is right, on the grounds very fully and clearly stated in his note. I think that the defenders might, and possibly ought, to have ascertained after the trust-estate came into their possession that this sum of £1250 in their hands belonged to the pursuer, and that they might, and possibly ought, to have informed her sooner that they had the money; but I am not able from the statements made by her on record to impute to them any actionable *culpa* involving them in a claim of damages. It would require a case very emphatically shewing *culpa* to entitle the owner of money in the possession of another, who has never been asked to hand it over, to damages beyond interest from such a holder. I do not think such a case has been stated here. I have said that the defenders might, and possibly ought, to have ascertained sooner than they did that money belonging to the pursuer was in their possession, but I also think that the pursuer might, and possibly ought, to have ascertained that money belonging to her was in the hands of her first husband's trustees. I concur in the

is nothing but a claim of damages for failure to fulfil in due time an obligation to pay money, and it can only, apart from special circumstances, be for such damages as might fairly and naturally be held to flow, according to the usual course of things, from failure to implement the obligation, and that, when the obligation is to pay money, can only be for interest (besides the principal). Nor will a debtor in such a case be subjected to additional liability for damage arising on account of special circumstances unless these special circumstances are fully disclosed to him.—See *Hayley v. Bazendale*, 6 Exch. 341; *British Columbian Sawmill Company v. Nettleship*, 1868, L. R., 3 C. P. 497; *Mayne on Damages*, p. 11, *et seq.* The pursuer referred to *Robin v. Steward*, 1854, 14 C. B. (Scott's) 595, in which a bank was held liable in damages for dishonouring a bill of a customer who had money in bank. There damage was allowed for injury to credit. But that case has little application. It may shew that in certain circumstances a claim for damages other than interest may arise from failure to pay money. That may be so, if the special circumstances and their bearing on the failure to pay be known to and appear to have been in the contemplation of the parties; and in this case, if it had been averred that the defenders were certified that the pursuer's property was in peril, and would be sold at a great loss if a sum demanded were not paid, it may be that there might have been a case for inquiry, had not payment of the whole debt with interest been made and accepted. But as above explained, I think the pursuer has not made any sufficient averment to that effect. I am therefore of opinion that the general rule applies, and that interest is the only damage due.

"Farther, it seems to me that the payment of the £1250 with interest is conclusive against the pursuer. £1250 with £1750 of interest was paid and accepted on 24th January 1894, and it is not averred that any claim on account of failure to pay at an earlier date was reserved. The payment of the interest was undoubtedly a payment of damages for delay in payment, and it was accepted as damage for that delay; and no reservation of right to claim additional damage being made, it was clearly accepted as the whole damage.

"I apprehend that when the defenders made that payment their obligation, whether it was of the nature of contract or not, was fulfilled; and that the pursuer cannot now claim damages on the ground of failure to fulfil it. On this short ground I think the defenders are in any case entitled to prevail. It is expressed in the defenders' third plea, and I see no good answer to it. I shall therefore find that the pursuer's averments are irrelevant, and shall further sustain the defenders' third plea in law."

conclusion which the Lord Ordinary has arrived at, and on the grounds No. 148. stated by him, that there is here no relevant claim for damages.

LORD TRAYNER.—I agree. I think that the grounds stated by the Lord Ordinary are sufficient to support the findings in his interlocutor. I would only observe that the cases quoted by Mr Abel are cases of breach of contract, and therefore cannot relevantly be considered in deciding the present.

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The LORD JUSTICE-CLERK and LORD MONCREIFF concurred.

THE COURT adhered.

JAMES ANDERSON, Solicitor—TODS, MURRAY, & JAMIESON, W.S.—Agents.

WILLIAM BRUCE LINDSAY AND OTHERS, Petitioners.—*Balfour*
—*Constable*.

No. 149.

THE MAGISTRATES AND TOWN-COUNCIL OF LEITH, Respondents.—
Jameson—Salvesen.

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Burgh—Revision of boundaries of wards—Proof of expediency—Sheriff—Burgh Police Act, 1892 (55 and 56 Vict. c. 55), secs. 11 and 13.—The Burgh Police Act, 1892, enacts by sec. 11 that on the application of the Commissioners or of the Council of any burgh, and after publication in the *Gazette*, and “such other notice and inquiry as he may deem necessary,” the Sheriff may, after hearing parties interested, revise the boundaries of the wards in the burgh, and increase or lessen their number. Section 13 enacts, that any owner or occupier who considers himself aggrieved by the deliverance of the Sheriff, may appeal to the Court of Session, and “the Court . . . may either pronounce a final order or remit to a Lord Ordinary to direct inquiry into the circumstances of the case. . . .”

Held that the power given to the Sheriff by section 11 is administrative, and not judicial, and that he is not entitled to grant an application to alter the boundaries of a burgh in respect of no opposition, but only if *tota re perspecta* he considers it expedient to do so.

In March 1897 the Provost, Magistrates, and Town-Council of 1ST DIVISION. Leith presented a petition to the Sheriff of the Lothians to “revise, alter, and readjust the boundaries of the wards of the said burgh for the purposes of the Burgh Police (Scotland) Act, 1892, and for all parliamentary and municipal purposes . . . and to define in a written deliverance the new boundaries of the wards of the said burgh in manner following, viz. :— . . .” *

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), enacts, sec. 11,—“Upon the application of the Commissioners or of the Council of any burgh, and after publication in the *Edinburgh Gazette*, and in any newspaper published in such burgh . . . and such other notice and inquiry as he may deem necessary, it shall be lawful for the Sheriff, after hearing all parties interested, from time to time to revise . . . the boundaries of such burgh for the purposes of this Act . . . and where in any burgh wards exist at present the Sheriff may increase their number or lessen their number, by combination or rearrangement; and the Sheriff shall define in a written deliverance on such application the new boundaries of such burgh and wards for the purposes of this Act, and such deliverance, unless appealed against in manner hereinafter provided, shall be final, and when recorded along with the application on which it proceeds in the Sheriff Court Books of the county, shall fix and determine the boundaries of such burgh and wards for the purposes of this Act. . . . The Sheriff or

No. 149. The petitioners stated the grounds on which they considered an alteration to be necessary. They then set out the proposed redivision of the wards, and in cond. 9 stated the reason for the new division.

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On 25th March 1897 the Sheriff (Rutherford) pronounced the following interlocutor:—"Having considered the foregoing petition, appoints intimation of the import thereof, and of this deliverance, to be forthwith made by advertisement once in the *Edinburgh Gazette*, *Leith Burghs Pilot*, and *Leith Observer*; and further directs notice to be made by handbills posted in and around the burgh of Leith: Directs the petition and relative plans to lie in the hands of the Sheriff-clerk at Edinburgh, for the inspection of all concerned, for ten days after the date of said advertisement: Requires all parties interested who may desire to oppose the petition, or to be heard in reference thereto, to lodge in the hands of the said Clerk of Court at Edinburgh, within the said ten days, a notice of appearance, with certification."

No answers were lodged, and on 14th April 1897 the Sheriff pronounced the following interlocutor:—"Having resumed consideration of the petition and relative productions, in respect no appearance has been made to oppose the prayer of the petition being granted, defines the new boundaries of the wards of the burgh of Leith for the purposes of the Burgh Police (Scotland) Act, 1892, and for all parliamentary and municipal purposes," in accordance with the scheme suggested by the petitioners.

On the 28th April a petition was presented to the First Division by William Bruce Lindsay and others, owners and occupiers of property within the first ward, craving the Court "to recall the deliverance of the Sheriff complained of, and refuse the petition of the Town-Council, or otherwise to remit to any Lord Ordinary to direct inquiry into the circumstances of the case, and to issue such order thereupon as he may deem requisite to determine the boundaries of the wards of said burgh."

The petitioners stated that the proposed alterations of the boundaries of the first ward were quite unnecessary, and, in any event, unsatisfactory, and not calculated to meet the purpose of the proposers.

"The first ward has long held the position of premier ward in the burgh, and said petitioners object to the said scheme as being not only, for the above reasons, unnecessary and inexpedient, but as

Sheriffs, in revising the boundaries of a burgh, shall take into account the number of dwelling-houses within the area proposed to be included, the density of the population, and all the circumstances of the case, whether it properly belongs to and ought to form part of the burgh, and should in their judgment be included therein. . . ."

Sec. 13, provides that any owner or occupier who considers himself aggrieved by the deliverance of the Sheriff may, within fourteen days, present a petition to the Court of Session setting forth the grounds on which he objects, and the Court may "either pronounce a final order or remit to a Lord Ordinary to direct inquiry into the circumstances of the case, and to issue such order thereupon as he may deem requisite to determine the boundaries of such burgh. . . ."

The Local Government (Scotland) Act, 1894 (57 and 58 Vict. c. 58), sec. 13, subsec. 6, enacts, that sec. 11 of the Burgh Police (Scotland) Act is to be construed as including the revision of boundaries for parliamentary and municipal as well as for police purposes.

tending to deprive the ward of the influence it has hitherto exercised in municipal affairs." No. 149.

The Magistrates and Town-Council lodged answers, in which they maintained the propriety and expediency of the proposed readjustment of the boundaries. May 22, 1897.
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The petitioners argued ;—The Sheriff had proceeded as if acting in his judicial capacity, whereas he had to perform a purely administrative duty. That clearly appeared from the phraseology of his interlocutor. Accordingly he had pronounced the deliverance without inquiry, and without applying his mind to the expediency of the proposed alterations. The judgment should have been pronounced *causa cognita*. It was in effect a decree in absence. The facts set forth in cond. 9 of the Magistrates' petition were not accurate. The proposed treatment of the first ward was unjustifiable, and would have the effect of transferring a large section of the mercantile community into what was essentially an artisan ward.

Argued for the Magistrates and Town-Council ;—The petitioners, two of whom were in the town-council, had ample notice and knowledge of the application to the Sheriff, and they should have opposed it before him. Their failure to do so was not due to inadvertence. The Sheriff was entitled to take into consideration the fact that, out of 14,000 ratepayers or interested persons, not one appeared to oppose the application. That, together with the Sheriff's local knowledge, made a formal inquiry by him unnecessary. The considerations now advanced were purely sentimental, and were not relevant to justify any further inquiry. The Court was quite entitled to refuse the prayer for inquiry, and to pronounce a final order.

LORD PRESIDENT.—By section 11 of the Burgh Police Act of 1892, power is given to the Sheriff to revise the boundaries of the wards of burghs. He is to be moved to do so by the Council or Commissioners of any burgh, and it is quite plain from the terms of sections 11 and 13, and also from the subject-matter of these sections, that the Sheriff is exercising an administrative power in altering boundaries, and he is only bound to do so if satisfied that a change is expedient. The selection of the Sheriff was of course made on the ground that he was the local Judge, necessarily having an extensive acquaintance with the community whose interests were involved, and his duty is to preserve the *status quo*, unless reason is shewn for the alteration.

In the present case, after advertisement had been made of the application to have these wards altered, no answers were put in. The Sheriff, when he came to resume consideration of the application, was no doubt quite entitled to have in view as an element supporting the application that there was no opposition ; but that did not, in my opinion, absolve him from the duty of satisfying himself that the alteration was expedient, although it might make that duty more easy. But his judgment in so many words discloses that he proceeded on the fact that no appearance had been made to oppose the application. His judgment says so. I am unable to regard that as a judgment, *tota re perspecta*, on a full consideration of the merits and demerits of the proposal.

Certain persons now come forward by petition to this Court who say that they are aggrieved by that judgment, that the change made by the order is

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unnecessarily far-reaching, that the redress of the balance of the burgh, with a view to the increased representation assigned to it, might have been effected without touching the ward they were interested in, and that they object to the change as altogether unnecessary.

Now, it seems to me that even assuming that these objections rest partly on a feeling of objection to change, and of attachment to old associations, that is the kind of thing that the Sheriff is bound to consider, and that he was not excluded from weighing it by what has been offered on the other side. The question then is, are we to shut the door to persons who come forward alleging more strongly than I have stated the objections I have mentioned? Our duty is to remit to a Lord Ordinary to direct an inquiry.

The proper order will be [See interlocutor].

LORD ADAM.—I am of the same opinion. Nothing can be clearer than that the duty which the Sheriff has to perform here is administrative, and not in any sense judicial. The duty imposed upon him by statute is to satisfy himself that the proposed alterations were necessary, and that the method proposed was the most expedient.

Now, I agree that looking not only at the interlocutor, but at the whole case, it appears that the Sheriff thought that he was acting in a judicial capacity, and that no person appearing to oppose he was entitled to decide the question as if he were pronouncing a decree in absence in a personal litigation, because he says,—(Quotes Sheriff's interlocutor).

In the face of that expression, I cannot come to any other conclusion than that the Sheriff came to form his opinion without making any inquiry to satisfy his mind not only that the change was necessary, but that the mode of change proposed was the best. I agree with Mr Salvesen that a change of some sort is probably necessary, but still the question is, how is it best to be effected, having regard to the existing interests and feeling on the subject? That is what the Sheriff should have applied his mind to, and as far as I can judge he has not performed this duty.

What, then, is our position? I think we are just in the position in which the Sheriff was originally, and I can quite understand that even if the Sheriff had not applied his mind, as I think he ought to have done, we might, if we were satisfied, after fully hearing parties, that no further inquiry was necessary, pronounce a final order. But my view is that, sitting as it were as the Sheriff in the first instance, I could not dispose of the application without further inquiry, and that inquiry we cannot under the Act conduct ourselves. The only course open to us is to do as your Lordship suggests, to remit to a Lord Ordinary to direct inquiry into the circumstances.

LORD M'LAREN.—In all questions as to the determination or alteration of the powers of Local Authorities, or as to the enlargement of local areas, it is the settled practice that variations shall be made only after evidence as to their desirability shall have been produced, to the satisfaction of the authorities by whom the order is to be made. Sometimes it is by Parliament itself, as when a private bill is promoted for the purpose of consolidating, or enlarging, the area of a burgh. Sometimes, again, the order is by the Secretary for Scotland, on a report by the Sheriff, and sometimes by the

Sheriff acting as a direct delegate of Parliament. Now, looking to the terms of the enactment giving powers to the Sheriff, there is no reason to suppose that it is intended that applications of this kind should be dealt with in a manner inconsistent with the established usage in all similar cases. On the contrary, it is plainly intended that the facts establishing the expediency of the proposed order should be brought to the notice of the Sheriff. The evidence required to satisfy the Sheriff does not necessarily take the form of a proof, but there must be evidence, formal or informal, to establish that the case has arisen for the exercise of the statutory power.

No. 149.
May 22, 1897.
Lindsay v.
Magistrates of
Leith.

Now, agreeing with your Lordships that the Sheriff's action in the matter cannot be sustained, it appears to me that this is a case for a remit to a Lord Ordinary. The statute deals with two cases, where the Court having all the materials for decision may pronounce a final order, and where not having them it must "remit to a Lord Ordinary to direct inquiry into the circumstances of the case." If the Sheriff had held an inquiry, and we had before us notes of evidence taken before him, or reports from skilled persons, there might have been no necessity for further inquiry; but having nothing of this kind before us, the proper course is to remit the case to a Lord Ordinary.

LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Remit to Lord Stormonth-Darling to inquire into the circumstances of the case, and to issue such order as his Lordship may deem requisite to determine the boundaries of the wards of the burgh."

WALLACE & PENNELL, W.S.—IRONS, ROBERTS, & Co., W.S.—Agents.

THOMAS HENDERSON ORPHOOT, Petitioner.—Cook.

No. 150.

Trust—Resignation of Trustee—Nobile Officium.—Circumstances in which the Court authorised a testamentary trustee to resign office on repayment of a legacy he had received.

May 27, 1897.

ON 12th May 1897 Mr Thomas Henderson Orphoot, one of the trustees under the settlement of the late Sir James Naesmyth of Posso, Bart., presented a petition to the Court, craving power and authority to resign the office of trustee.

1ST DIVISION.

The petitioner stated that Sir James Naesmyth had died on 10th October 1896, and that the petitioner, along with two other trustees nominated by the testator, accepted office. The purposes of the trust were—(1) the payment of debts, &c.; (2) the payment of certain money legacies, including those in the following terms:—"To each of my trustees and executors (who may be willing to accept the office of trustee and executor) I leave one hundred guineas, free of legacy duty; (3) the disposal of certain articles as specific legacies"; (4) the payment to the testator's widow of the interest of the whole amount of the capital of the estate, and upon her death, the realisation of the capital and its payment in certain proportions to various charities.

The petitioner further stated that the testator's widow still survived, and that all parties interested in the petition offered no opposition to his being relieved of his office.

"That the total means and estate left by the truster amounted to upwards of £87,000, of which the greater portion was invested by the

No. 150. deceased on investments of a nature which the trustees are not entitled to retain, and that accordingly they have been, and are still, in the course of realising these to the best advantage with a view to the reinvestment of the funds on securities within their powers.”

May 27, 1897.
Orphoot.

“That your petitioner accepted office in ignorance of the magnitude of the trust-estate, and of the time and labour required for the proper management of so large a fund. He now finds that his official duties, which are varied and laborious, prevent him from giving proper attention to the affairs of the trust. Your petitioner is Sheriff-substitute of the Lothians and Peebles at Peebles. He has the whole duties of his office in Peebles to discharge. In addition, upon three days of each week he requires to sit in Edinburgh in the Sheriff Summary and Bankruptcy Courts of Midlothian. On these days he has also to dispose of the whole of the miscellaneous and administrative business falling to the Sheriff-substitutes of Midlothian, in so far as his time permits him to discharge that duty. Further, in each alternate month, in addition to the duties above mentioned, he sits in the Police Court of Edinburgh for three days of each week. These numerous and varied duties engross the whole of your petitioner's time. The result is that he cannot attend meetings of trustees, and that he is unable to bestow upon the multiplicity of questions which arise in connection with the large fund which the trustees require to administer, the time and consideration which these questions require. He is accordingly unable to discharge the duties of the office conferred upon him by the said trust-disposition and deed of settlement. It is not expedient in the interest of the trust that he should be obliged to remain in office. The trustees have only the statutory powers of investment. In these circumstances your petitioner desires to resign, and he makes this application to your Lordships for authority to do so. He has offered to repay the legacy of £105.

“That the trust not being a gratuitous one, the petitioner has no power to resign under the Trusts (Scotland) Act, 1861, and the trust-deed does not provide for his resignation, so that if the petitioner is to be relieved of the office of trustee he can only be so with the authority of your Lordships.”

Counsel for the petitioner cited in support of the petition the cases of *Watson v. Crauccour*, Feb. 17, 1844, 6 D. 687, *per* Lord Cuninghame, 16 Scot. Jur. 324, and *Alison*, Feb. 3, 1886, 23 S. L. R. 362, and was proceeding with his argument—

LORD PRESIDENT.—This application is made, is it not, on the distinct understanding that the legacy of 100 guineas is repaid?

Counsel answered in the affirmative.

THE COURT, without hearing further argument, granted the prayer of the petition.

STRATHERN & BLAIR, W.S., Agents.

No. 151.

May 28, 1897.
Smith v.
Kirkwood.

ANDREW SMITH, Suspender (Reclaimer).—*A. M. Anderson*.
GRACE STIRLING KIRKWOOD, with consent of her Father, **WILLIAM HENRY KIRKWOOD**, Respondents.—*Crabb Watt*.

Process—Suspension—Extrinsic Objection to judgment of inferior Court—Competency—Court of Session Act, 1868 (31 and 32 Vict. c. 100).—It is not competent to set aside by way of suspension the decree of an inferior Court on the ground that it has been obtained by fraud.

Question, whether having regard to the provisions of the Court of Session

Act, 1868, suspension of a final decree of an inferior Court is now available No. 151.
as a process of review.

ON 5th March 1894 Grace Stirling Kirkwood, with consent of her father, William Henry Kirkwood, raised an action of filiation and aliment in the Sheriff Court at Edinburgh against Andrew Smith, Lothian Bridge, Midlothian. Smith acknowledged the paternity of the child, and having consented to decree as concluded for being pronounced against him, he was decerned to pay £2, 2s. of inlying expenses and £7 per annum of aliment till the child, who was born in December 1893, should attain the age of fourteen.

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1ST DIVISION.
Lord Kin-
cairney.

On 26th July 1894 Kirkwood charged Smith to make payment in terms of the decree, and after a warrant to imprison had been presented against him, he was ordained, on 18th September 1894, on pain of imprisonment, to pay £3, 2s. within one week and 3s. weekly thereafter. The charge and petition for warrant to imprison thereon proceeded upon section 4 of the Debtors (Scotland) Act, 1880 (43 and 44 Vict. c. 34), and section 4 of the Civil Imprisonment (Scotland) Act, 1882 (45 and 46 Vict. c. 42).

On 21st October 1896 Smith presented a note of suspension in the Bill-Chamber craving the Court to suspend the charge and warrant to imprison, and whole grounds and warrants thereof.

The note was passed of consent, and a record was made up.

The complainer averred that he had been induced to consent to decree against him in the Sheriff Court by certain false representations made to him by the pursuers. He further averred that he had paid the whole sums referred to in the warrant of imprisonment as they had become due.

The complainer pleaded ;—(1) The decree in said affiliation action having been obtained by means of the fraudulent representations and actings of the respondents, the charge and warrant to imprison following thereon are inept, and ought to be suspended.

Kirkwood and her father, as her curator-in-law, admitted the payments alleged, but denied the complainer's averments of fraud, and pleaded ;—(1) The complainer's statements are not relevant or sufficient to support the prayer of the note, and it ought to be dismissed.

On 29th January 1897 the Lord Ordinary (Kincairney) pronounced this interlocutor :—" Finds that the first plea in law for the complainer cannot be entertained in the action, therefore repels said plea : Finds that it appears from the statement of parties that the sum charged for has been paid, therefore suspends said charge and warrant for imprisonment."

The complainer reclaimed, and argued ;—The note of suspension was competently directed against the decree upon which the charge (now exhausted) was given. No doubt the time for appealing against the Sheriff's judgment had long since elapsed, but suspension of that judgment was still open to the complainer. Inferior Court decrees pronounced *in foro* might be brought up for review either by reduction or by suspension, the latter being the proper remedy where a charge had followed.¹ The Court of Session Act, 1868, had not abolished review of such decrees by suspension.

Argued for the respondents ;—Suspension was no longer a competent mode of bringing under review inferior Court judgments.² In

¹ Mackay's Court of Session Practice, ii. 475 ; Ersk. Inst. iv. 3, 8.

² Court of Session Act, 1868 (31 and 32 Vict. c. 100), secs. 64 and 78.

No. 151. any view, the grounds of suspension here were extrinsic to the Sheriff Court process.

May 28, 1897.
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LORD ADAM.—(After stating the facts his Lordship proceeded)—The only averment I find in the suspension is that the respondents on a petition following on the said charge obtained warrant of imprisonment, and that the sums referred to in the warrant have been paid, and accordingly that the warrant is entirely exhausted.

Now, as I understand, the complainer does not so much object to the Lord Ordinary's interlocutor suspending that warrant, but he goes further, and says, —I want also in this suspension to have the original decree against me in the Sheriff Court set aside, and the ground upon which he wishes it to be set aside is that it was obtained fraudulently. I have always understood that to upset a decree on the ground of fraud is to introduce extrinsic matter, and that that can only be done by way of reduction. Accordingly, the Lord Ordinary seems to me to be quite right when he says that that plea cannot be entertained, and I think we should adhere.

LORD M'LAREN.—I concur with Lord Adam, and have little to add.

The first proposition maintained by Mr Anderson is that suspension of a charge with its warrant is a legal and competent mode of obtaining review of a decree upon its merits.

There was, no doubt, a period in the history of our process law when that proposition might have been affirmed. I think it is laid down in the institutional writers that decrees both of inferior Courts and of the Lords Ordinary might be reviewed by way of suspension.

I should desire to reserve my opinion upon the question how far such procedure would be still competent in view of the radical changes introduced by the Court of Session Act, 1868, in the mode of dealing with judgments of inferior Courts. But supposing the proposition to be well founded, it does not appear to me that any proper application of the kind is before us. We are not asked to review a judgment finding the defender liable for aliment on his own admission (which was the only matter before the Sheriff), but we are asked to set aside the decree upon grounds which were not before the Sheriff, and I fail to see how an application of the kind can be regarded as a mode of reviewing the decision of the Sheriff.

While the Lord Ordinary was no doubt quite entitled to suspend, no one opposing, he was, I think, also right in rejecting the complainer's first plea in law and the argument founded upon it.

LORD KINNEAR.—I am of the same opinion. I quite agree with Lord M'Laren that it is unnecessary for the purpose of this case to consider how far the process of suspension of a final decree of an inferior Court is now available as a process of review. Assuming it to be so, I confess I should be disposed to read the note of suspension now before us as presenting to the Court, not an appeal against a judgment of the Sheriff on its merits, but a note of suspension of a charge for the purpose of staying diligence. However that may be, I think the true and sufficient ground of judgment is that which has been already stated. The charge and warrant of imprisonment complained of is a charge proceeding upon a warrant granted upon a petition

to the Sheriff under the special provisions of the statute. The sum which the complainer has been charged to pay has now been paid, and therefore the warrant is exhausted because it has been satisfied, and that seems to me a perfectly sufficient ground for suspending a charge and warrant for imprisonment. But that being done, the only ground on which we are asked to consider anything further upon the complainer's application is that the decree which was obtained against him was obtained by fraud of the pursuer of the action. That is not a ground of review of the Sheriff's judgment on its merits, but a reason for setting aside the judgment on grounds altogether extrinsic to the process. I agree that this is not a competent process for raising any such question.

The LORD PRESIDENT concurred.

THE COURT adhered.

MUNGO HEADRICK, Solicitor—GEORGE JACK, S.S.C.—Agents.

MRS AGNES HALL AND ANOTHER, Pursuer (Respondent).—*Watt—Abel.* No. 151.

MRS JANE HUBNER AND HUSBAND, Defenders (Appellants).—

Salvesen—Cook.

May 28, 1897.
Smith v.
Kirkwood.

Reparation—Landlord and Tenant—Defective Premises—Emerging Defect—Rotten Stair—Relevancy.—The wife of a tenant of a house was injured by falling through a wooden stair in the house, and in an action of damages at her instance against the landlord she averred that her husband had been tenant of the house for thirty years; that the steps of the stair were after the accident discovered to be in a decayed, rotten, and ruinous condition; that the defender was personally aware of the dangerous state of the stair; that the pursuer's husband had frequently asked the defender to have the stair repaired, and that he had specially done so about a month before the accident, when the stair was inspected by the pursuer's factor.

The Court, *holding* that the averments disclosed a case for inquiry, allowed an issue for the trial of the cause.

Webster v. Brown, May 12, 1892, 19 R. 765, *distinguished*.

MRS AGNES HALL, wife of James Hall, tenant of a house and shop in Roxburgh Street, Kelso, sustained injuries by falling through a stair in the house, and raised this action, concluding for £500 as damages, against Mrs Jane Hubner, the proprietor of the subjects, and her husband.

2D DIVISION.
Sheriff of Rox-
burghshire.

The pursuer averred;—(Cond. 2) "In the month of September 1895, and for thirty years or thereby previous thereto, the said James Hall was one of the female defender's tenants in said property. . . . The wood which formed the steps of said stair was, when the injuries after received were sustained, discovered to be in a decayed, rotten, and ruinous condition." (Cond. 3) On the evening of 28th September 1895 the pursuer was in the course of going down the stair of the house. "When she had reached the middle of the stair, and when on the sixth step thereof counting from the bottom, that step, owing to its decayed, rotten, and ruinous state, suddenly and without any warning broke or gave way, and having no hand-rail or other means of checking her descent, she violently went down 3 feet 6 inches or thereby into a cellar below. The pursuer was much hurt. . . ." (Cond. 4) "The ruinous state of the said stair was occasioned by the female defender's culpable

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May 29, 1897.
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Hubner.

and reckless neglect to have the stair referred to thoroughly repaired or entirely renewed. The staircase was in a defective and dangerous condition, and the defenders were personally well aware of the dangerous, dilapidated, and ruinous state of the stair. The said James Hall, the pursuer's husband, frequently complained to Mr Thomas David Crichton Smith, solicitor, Kelso, the defenders' factor at Kelso, to whom she entrusted the management of said property, and asked him to have the stair repaired or renewed; and specially did he do so in or about the month of August 1895, when Mr Robert Moodie Grieve, principal clerk to the said Mr Thomas David Crichton Smith, visited and inspected the said stair, and was then at least fully aware of the defective, ruinous, and dangerous state of the stair. . . . By her own culpable neglect, and that of her factor or agent, for whom she is responsible, the serious injuries to the pursuer took place."

The pursuer pleaded;—(1) The female defender being the owner of the stair and staircase in question, was and is legally bound to maintain it in a safe condition, and the pursuer's injuries having been caused through her failure to do so, she is liable in reparation.

The defenders pleaded;—(1) The pursuer's statements are irrelevant.

On 8th March 1897 the Sheriff-substitute (Baillie) sustained the first plea in law for the defender, and dismissed the action.*

On appeal the Sheriff (Vary Campbell) recalled this interlocutor, and before answer allowed to both parties a proof of their averments.†

The defender appealed, and argued;—The Sheriff-substitute was right in holding that the case was ruled by *Webster v. Brown*.¹ The ground of judgment in that case was the continued occupation of the house in the face of obvious danger. The pursuer's averments made it clear that this was a case of a similar kind. The Sheriff was therefore wrong in treating this as a case of emerging defect. The other distinction suggested by him did not justify the action. The pursuer being the tenant's wife was either identical with him and the case of *Brown*¹ ruled the present, or she was a stranger to the landlord, and must seek her remedy, not against him, but against the tenant.

Counsel for the pursuer were not called upon.

LORD JUSTICE-CLERK.—If I thought that this case was similar to that of *Webster v. Brown*,¹ I would arrive at the same result. But the circumstances

* "NOTE.— . . . I think it is clear from the pursuer's averments that for some time prior to the accident she was aware of the state of the stair, and that, knowing this, she and her husband chose to remain on in the occupation of the house. I am therefore of opinion that this case falls within the rule laid down in *Webster v. Brown*, 19 R. 765, and *Shields v. Dalziel*, 2d February 1897, 4 Scots Law Times, 257 [afterwards reversed in the Inner-House, *supra*, p. 847], and that I must hold her averments irrelevant."

† "NOTE.—I do not think that I can refuse an inquiry in this case. It does not appear to me that the case is ruled by the decisions referred to in the note of the Sheriff-substitute. The pursuer is not the tenant of the premises, and the defect alleged is an emerging defect, of which it is averred by the pursuer that notice was given to the landlord. I think the true basis of the case consists in distinct proof of *culpa* as against the landlord, and the defender has on record various pleas as to the knowledge or contributory negligence of the pursuer, which may yet become available upon the true state of facts being ascertained."

¹ *Webster v. Brown*, May 12, 1892, 19 R. 765.

are different. In *Webster*¹ what happened was this: A tenant continued to use stone stairs leading to her house, which were so worn as to be obviously dangerous judged both by the eye and by the feeling of the foot, long after entering upon her tenancy, and did not take the course which was open to her of rejecting the tenancy. She knew the danger, because it was obvious to all, and, therefore, she was held to have taken the risk. Here the case is different. The stairs were of wood and had been used with safety for years, and to outward appearance may have been the same as before. But by constant use they had got into a state of decay, and had become not strong enough for the work they had to do. I think this is a case for inquiry. It may turn out that the landlord is not to blame, but I do not think that, in the circumstances stated on record, we can decide that she is not without inquiry.

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LORD YOUNG.—I am of the same opinion. This house has been let to the same tenant for thirty years, the lease, I suppose, being renewed from year to year. I have no doubt that the house was let as being in tenable and habitable condition. A house is not necessarily uninhabitable merely because the surface of stairs therein is much worn by long use. But if the stairs become so rotten with age that they may give way at any moment the house ceases to be a tenable house, habitable with safety. It has got into an uninhabitable and discreditable condition. The present is, I think, a clear case for inquiry.

LORD MONCREIFF.—I am also of opinion that there should be inquiry.

LORD TRAYNER was absent.

THE COURT appointed issues to be lodged.

W. & J. L. OFFICER, W.S.—W. & J. BURNES, W.S.—Agents.

SCOTT, SIMPSON, AND WALLIS, Pursuers (Respondents).—*Aitken*.
FORREST & TURNBULL, Defenders (Reclaimers).—*Cooper*.

No. 153.

June 1, 1897.

Process—Proof—Diligence to recover writings.—In an action of damages the ground of action averred by the pursuer was that the defender had refused to implement an award appointing him to retire certain bills of lading. The defender, besides disputing the validity of the award, denied liability on the ground that the goods covered by the bills were not conform to contract. The Lord Ordinary allowed the pursuer “a proof of his averments on record, and to the defenders a conjunct probation.” Held that the defender was not entitled to a diligence for the recovery of documents bearing upon the condition of the goods—evidence on that question being excluded by the terms of the order for proof.

Scott, Simpson, & Wallis v. Forrest & Turnbull.

THIS was an action at the instance of Scott, Simpson, & Wallis, 1st Division. merchants, London, against Forrest & Turnbull, merchants, Leith, Lord Kin- concluding for payment of £42, 1s. 4d. cairney.

The pursuers averred that on 6th August 1896 they sold to the defenders 400 bags of sugar known by the name of Russian crystals; that the contract between them contained a clause that “this contract

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is subject to the rules of the Refined Sugar Association, and that these rules provided, *inter alia*, that 'all disputes from time to time arising out of any such contract, including any question of law arising in the proceedings . . . shall be referred to arbitration in accordance with these rules'; that the obtaining an award . . . shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of any such contract'; . . . that 'documents must be taken up on presentation without prejudice to the question in dispute to be referred to the Council, failing which sellers may resell the sugar for account of whom it may concern.'

The pursuers further averred that on 18th August 1896 they forwarded an invoice of 288 bags, the price in which amounted to £337, 16s. 11d. That the defenders refused to take up the bills of lading or pay the amount in the invoice, on the ground that the bills of lading bore a marking "several bags wet, damp, and weak, several with holes." That the pursuers thereupon submitted the dispute which had arisen to the Council of the Refined Sugar Association as arbitrators, and the Council, by award dated 28th August 1896, decided that they had jurisdiction to decide the dispute within the terms of the rules of the Association, and that the buyers should retire the bills of lading. This award was at once communicated to the defenders, along with a new invoice, amounting to £337, 16s. 11d., but the defenders still refused to take up the bills of lading, whereupon the pursuers resold the 288 bags, and realised therefor £295, 15s. 7d., which being deducted from the sum of £337, 16s. 11d., left the amount sued for.

The defenders stated that they "declined to take up the bills of lading and to pay in exchange the amount of the invoice, on the ground that *ex facie* of said bills it appeared that the tender of sugar made was not a tender under the contract, or one which the defenders were bound to accept. Of the 288 bags tendered, no less than 98, including their contents, were soaking wet, and many others were holed. Admitted that the pursuers wrote certain letters to the Council of the Refined Sugar Association, and that said Council issued a pretended award, to which reference is made. Explained that the present action is not one for the enforcement of said award, but is an action of damages for alleged breach of contract, and that, assuming the general rules founded on by the pursuers to be applicable, they have not complied with same."

The pursuers pleaded;—(1) The defenders having committed a breach of the contract libelled, the pursuers are entitled to decree for the loss, damage, and expense thereby incurred to them.

The defenders pleaded, *inter alia*;—(5) The provisions as to arbitration being inept, the pursuers are not entitled to found on the pretended award.

On 4th February 1897 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Before further answer, allows the pursuers a proof of their averments on record, and to the defenders a conjunct probation."

The 9th June having been subsequently appointed the diet of proof, the defenders, on 11th March 1897, lodged a specification of documents, and moved for a diligence for their recovery. The Lord Ordinary struck out two articles of the specification relating to correspondence passing between the pursuers and persons other than the

defenders, and granted the diligence. Among the articles in the amended specification were several which referred to writings shewing the condition and quality of the sugar at the time of shipment and discharge.

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The defenders reclaimed, and argued;—The Lord Ordinary should have granted diligence in terms of the original specification. In any view the defenders were entitled to a diligence in terms of the amended specification. None of the grounds of defence had been repelled as irrelevant, and the interlocutor allowing proof was *quoad* the defenders quite general, and the Court was not entitled to limit its scope by restricting the diligence.¹ “Conjunct probation” in practice meant such a proof as would enable a defender to establish the defences stated by him, and did not merely give him an opportunity of refuting the precise statements of the pursuer. This was just an action for breach of contract, and the answer to it was that the goods tendered were not conform to contract. It was not an action to enforce the alleged award.

Argued for the pursuers;—The diligence should be refused *in toto*. The specification was largely concerned with writings tending to shew the condition and quality of the sugar at different dates, but that matter was not remitted to probation. The order for proof was not in general terms, but was restricted to the averments of the pursuers. These contained no reference to the condition of the sugar.

At advising,—

LORD PRESIDENT.—The interlocutor of 4th February 1897 was not reclaimed against within six days, and is therefore final. To it, accordingly, we must look for the scope of the proof which is to be taken in this cause, and by its limits must be determined what writings are relevant to the inquiry, and may therefore be recovered by diligence.

Now, that interlocutor does not allow a proof of the whole averments on record. The well-established formula for such an allowance is to allow the parties a proof of their respective averments, and to the pursuer a conjunct probation. What has been done in this case is to allow the pursuers a proof of their averments on record, and to the defenders a conjunct probation. The reason, or at least an adequate reason, for this limitation of the order for proof is to be found in the nature of the controversy, and the state of the record. It seems to me that no relevant answer is made by the defenders to the pursuers’ averments that the Council of the Refined Sugar Association was, under the contract, the proper judge of whether the buyers were bound to retire the bills of lading, and did decide that question, and that the question whether the sugar tendered was conform to contract is not in the case. The action is one of damages; but the ground of liability is the defenders’ having failed to retire the bills of lading when ordered to do so by the Council, and the merits of the Council’s decision cannot be questioned. Accordingly, the condition of the argument is that the buyers were bound to pay for the sugar, whatever its condition may have been in point of fact.

The specification before us is manifestly framed on a totally different view of the limits of the proof to that which I have stated, and is quite

¹ Duke of Hamilton’s Trustees v. Woodside Coal Co., Jan. 9, 1897, *supra*, p. 294.

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inappropriate to what I hold to be its true scope as determined by the interlocutor of 4th February. Some articles of the specification are legitimate enough, and, if the defenders present a re-modelled specification, I do not doubt that they will obtain a diligence. But it is not in accordance with our practice in the Inner-House to patch up specifications which proceed on wrong principles, and in the meantime I think our proper course is to recall the Lord Ordinary's interlocutor, to refuse the motion for a diligence to recover the writings mentioned in the specification No. 42 of process, and to remit to the Lord Ordinary to proceed.

LORD ADAM and LORD KINNENEAR concurred.

The LORD PRESIDENT intimated that LORD M'LAREN, who was absent at the advising, also concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and refused the diligence.

WEBSTER, WILL, & RITCHIE, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH,
S.S.C.—Agents.

No. 154. HILARION DUNCAN AND OTHERS (James Duncan's Trustees), Pursuers (Reclaimers).—*Clyde*.

June 1, 1897.
Duncan's
Trustees v.
Steven.

A. & P. STEVEN, Defenders (Respondents).—*Johnston—Cook*.

Reparation—Relief—Relief against claim neither admitted nor established—Relevancy.—An action concluding for relief against an action for damages which had been brought against the pursuer *dismissed* as irrelevant, in respect that the pursuer neither averred that he was liable for the damages, nor averred that he had been found liable.

1ST DIVISION.
Ld. Kyllachy.

THE trustees of the deceased James Duncan were proprietors of certain premises in Miller Street, Glasgow, and Messrs Sandeman & Son, wine-merchants, were their tenants of the cellars in the sunk flat of the property.

On 18th December 1896 Duncan's trustees raised an action against A. & P. Steven, hydraulic engineers, Glasgow, concluding that the defenders should be ordained to "free and relieve the pursuers of an action raised against them in the Court of Session at the instance of David Sandeman & Son . . . the summons in which was signeted on 20th November 1896, concluding for £4000 sterling, with interest . . . and of the whole expenses and consequents of the same: And for that purpose to make payment to the pursuers of (1) the sum of £4000, with interest as aforesaid, or of such other sum, with such interest, as the pursuers herein may be decerned as defenders in said action to pay to the pursuers therein; (2) the sum of £500 sterling, or of such other sum, more or less, as the present pursuers may be found liable in to the said Messrs Sandeman & Son in said action in name of expenses; and (3) of the further sum of £500, or such other sum, more or less, as the pursuers herein may incur in connection with the defence of said action: . . . Or otherwise, the defenders ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuers of the sum of £6000 sterling."

The pursuers averred,—In November 1895 a hoist in their premises broke down, and they entered into a contract with the defenders to put in a new one. It was the duty of the defenders in

executing this operation to disconnect the pipe, which had supplied the old hoist with water, which passed under the cellar tenanted by Messrs Sandeman & Son, from the main water-pipe in the street. It was also their duty to instruct the Water Company to cut away the valve connection with the street main.

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On 1st April 1896 the defenders intimated to the pursuers that the new hoist was in place.

"On or about 11/13th April thereafter a serious flooding occurred in the cellar let to Messrs Sandeman, whereby the same and its contents were submerged to a depth of more than 3 feet above the floor of said cellar, and much injury done to the stock of wines and spirits both in bottle and in wood stored therein. . . ." (Cond. 5) "Messrs Sandeman at once intimated to the present pursuers a claim of damages, and they have since raised in the Court of Session against the present pursuers an action of damages concluding for £4000 in respect of the loss sustained by them consequent on the flooding above referred to," being the action referred to in the conclusions of the summons before quoted.

The pursuers further averred that the flooding was due to the defenders' failure to disconnect the main pipe in the street, and to instruct the Water Company to remove the valve. "They are accordingly responsible for the flooding which occurred, and liable to relieve the pursuers of Messrs Sandeman's claim of damages. . . ." (Cond. 7) "Immediately on ascertaining the cause of the flooding, the pursuers intimated their claim to be relieved of the consequences of said flooding to the defenders. But the defenders repudiate all responsibility in the matter. The pursuers have suffered, and will suffer loss and damage, through the negligent and untradesmanlike conduct of the defenders, and by their failure to complete their contract in a careful and efficient manner, to an extent not less than £6000."

The pursuers pleaded;—(1) The said flooding having occurred through the fault and negligence of the defenders, and through their failure to implement their contract with the pursuers in an efficient and tradesmanlike manner, the defenders are bound to relieve the pursuers of the consequences thereof. (2) The action at the instance of Messrs Sandeman having been brought against the present pursuers in consequence of the said flooding caused by the defenders' said negligence and failure as aforesaid, the pursuers are entitled to relief as concluded for. (3) Alternatively, the pursuers having suffered loss and damage to the extent sued for through the fault of the defenders, and through their failure to complete their contract with the pursuers in a careful and tradesmanlike manner, the defenders are liable in reparation therefor, and the pursuers are entitled to decree in terms of the alternative conclusions of the summons.

The defenders denied liability, and pleaded, *inter alia*;—(1) The action is incompetent, *et separatim*, premature. (2) The pursuers' statements are irrelevant, and insufficient in law to support the conclusions of the summons.*

On 10th March 1897 the Lord Ordinary (Kyllachy) sustained "the

* In the action at the instance of Messrs Sandeman & Son against Duncan's Trustees, the Lord Ordinary (Kyllachy), on 10th March 1897, allowed parties a proof of their averments bearing on the question of damages, but on 1st June 1897 the First Division recalled this interlocutor, and allowed parties a proof of their averments generally.

No. 154. defences in so far as directed against the conclusions for relief, and dismisses these conclusions, and decerns; but with respect to the alternative conclusion for damage, before further answer allows parties a proof of their averments.*
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 The pursuers reclaimed.†
 At advising,—

LORD PRESIDENT.—The Lord Ordinary has stated what, I think, is a sufficient reason for dismissing the conclusions for relief; but, in my opinion, the action is open to a more radical objection.

The only damage alleged or suggested as having been sustained by the present pursuers arises out of the claim against them by the Messrs Sandeman. The flooding is not said to have done their cellar any harm, and it is only because it hurt the Sandemans' wine that any loss can arise to the pursuers at all. But then they can suffer through this injury to the Sandemans only if they are legally liable for it. In this action they do not say either that they are liable, or that they have been found liable for the Sandemans' loss. On the contrary, they say only that they are sued by the Sandemans in an action to which they refer, and when that action is referred to it appears that in it they deny all liability to the Sandemans. It is to be presumed that the present pursuers, if, as they say, they are not liable to the Sandemans, will be assoilzied from that action with expenses. It follows that, on the pursuers' own shewing, they have suffered, and will suffer, no loss whatever.

On this short and, as I think, conclusive ground, I consider that the con-

* "OPINION.—In this case I agree with the argument of the defenders that the action as an action of relief is irrelevant. I should for myself be prepared to accept the test of the competency of such actions expressed by Lord Neaves in the case of *Colt v. Caledonian Railway Company*, 21 D. 1108, 3 Macq. 833. But in any view it seems to me to be settled that the claim of relief and the claim from which relief is sought must at least be commensurate, and I think that is not the case with the claims here. They are not, in my opinion, commensurate in the sense explained in the case of *Colt*, and also in the more recent case of *Ovington*, 2 Macph. 1066.

"I apprehend, however, that this point is really of no practical importance, because the pursuers have a good conclusion for damages; and I am of opinion that they have sufficiently averred a *prima facie* case of breach of contract, and have also made averments of damage, which I cannot upon their statement pronounce to be necessarily irrelevant. I desire to reserve as much as possible all questions of measure of damages, which questions, in cases of this kind, are sometimes delicate, but I am not prepared to accept the defenders' argument that if damages fall to be paid under the principal action to the Messrs Sandeman, the fact of such damages being incurred may not form a relevant and material element in assessing the damages due for the defenders' alleged breach of contract.

"I shall therefore sustain the defenders' pleas so far as directed against the conclusions for relief, and dismiss those conclusions, but with respect to the conclusions for damages I shall allow the parties a proof, &c."

† The following authorities were referred to by the parties:—*Colt v. Caledonian Railway Co.*, July 2, 1859, 21 D. 1108, 31 Scot. Jur. 621, Aug. 3, 1860, 3 Macq. 833; *Ovington v. M'Vicar*, May 12, 1864, 2 Macph. 1066, 36 Scot. Jur. 553; *Pollock v. Wilkie*, July 17, 1856, 18 D. 1311, 28 Scot. Jur. 659; *Gardiner v. Main*, Nov. 29, 1894, 22 R. 100.

clusion for damages ought, in the Lord Ordinary's interlocutor, to have shared the fate of the conclusions for relief. **No. 154.**

What has been said in no way prejudices any claim, whether of relief or of damages, which the present pursuers may ultimately find that they have, after the determination of Messrs Sandeman's claim. It is quite possible that, if the pursuers are found liable to the Sandemans, they may have a claim of relief against the defenders; but this must depend upon the grounds and nature of that liability. I make this remark because, while the Lord Ordinary, whose judgment is under review, had in the Sandemans' action practically decided that the present pursuers (the landlords) were liable for the flooding on a specified legal ground, this Division has recalled that interlocutor and has sent the whole case to proof. This circumstance, although it is no more, illustrates the extreme difficulty of supporting the present interlocutor, which, treating the two actions as independent, sends the present action to proof, irrespective altogether of the result, or the dependence, of the other.

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I shall only add one observation of a practical kind. I am well aware that in practice it is sometimes an anxious question what a man should do who being sued for damages—and of course my remarks apply to questions of damages—does not think that he is liable (but is not sure), but at all events feels confident that if he is legally liable the ultimate liability rests with another. My judgment to-day does not in the least suggest that, in such cases, notice should not be given of the claim or such further invitation as is not unusual for concerted opposition to the claim. But in order to save such a right of recourse, it is not necessary to come into Court with a claim of relief or damages until liability is either admitted or established, and if anyone comes into Court with a premature action, his having an intelligible motive for doing so cannot exempt his action from the fate which attends irrelevancy.

I am for recalling the Lord Ordinary's interlocutor and dismissing the action.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT intimated that LORD M'LAREN, who was absent at the advising, also concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and dismissed the action.

WEBSTER, WILL, & RITCHIE, S.S.C.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

WALTER BAIN NIVEN, Pursuer (Respondent).—*Salvesen—Aitken.*
THE TRUSTEES OF THE AYR HARBOUR, Defenders (Reclaimers).—
Sol.-Gen. Dickson—Hunter.

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Reparation—Ship—Harbour—Ship injured by storm while lying in berth assigned by Harbour-master.—After loading a cargo at a crane berth in Ayr Harbour on a December evening, the master of a steamship, influenced by a falling barometer and an increasing gale from the south with rain, resolved to remain in harbour all night. As the loading berth was required for another vessel, the harbour-master ordered him to remove, and supplied him with a berth in the dock basin, which was safe, except in a storm from the

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west or north-west. According to the experience of the port there was a probability that under the existing conditions of the weather the wind would veer to the west. During the night it did so veer and blew a gale of extraordinary severity, which resulted in damage to the steamship, and to most of the other vessels in the harbour.

In an action of damages by the owner of the steamship against the Harbour Trustees, on the ground that the harbour-master had wrongfully directed the removal of the vessel to a berth which was known to be unsafe, *held (rev. judgment of Lord Stormonth-Darling)* that the damage was due to the extraordinary violence of the storm, and not to any fault on the part of the harbour-master in fixing the berth, and that the defenders were not liable.

2D DIVISION.
Ld Stormonth-
Darling.

THE STEAMSHIP "DENIA," of Troon, an iron screw-steamer of 248 tons gross and 97 tons net register, while in berth in Ayr Harbour, sustained injuries during a storm which occurred on the night of the 21st and the morning of the 22d December 1894, and her owner, Walter Bain Niven, Glasgow, raised this action of damages for £1100 against the Trustees of Ayr Harbour. The pursuer averred that the "Denia" completed her loading about 9.20 P.M. on 21st December. That the hatches were then secured and made ready for sea, but that as the wind was blowing strong from the south, and was gradually increasing in strength, the master decided to remain in harbour. (Cond. 4) "By eleven o'clock on the same night the wind had increased to a gale with heavy squalls, but notwithstanding the severity of the weather and the obvious danger of shifting the steamer from what was a safe berth to one very much exposed, the assistant deputy-harbour-master, John Sloan, for whom the defenders are responsible, wrongfully ordered the master of the 'Denia' to remove his vessel to the dock basin, Ayr, to make room for another steamer which was expected to arrive during the night. The dock basin is a notoriously unsafe place for vessels to berth in, being exposed to north-westerly and west-north-westerly winds. It is specially dangerous when a gale is blowing from the south, as the wind almost invariably veers to the west and north-westward, and the dock basin is then exposed to the full reach of the sea without protection from the breakwater. This was well known to the defenders."

The pursuer pleaded;—The pursuer having sustained loss and damage to the amount sued for, through the fault of the defenders, or of those for whom they are responsible, as above set forth, decree ought to be granted as craved.

The defenders averred that the "Denia" was ordered to remove from the crane berth to make room for another vessel; that the berth in the dock basin was safe when it was assigned to her; that at this time the storm, which ultimately proved to be of extreme violence, was unforeseen, and that the "Denia's" moorings were inadequate.

The defenders pleaded;—(2) The damage sustained by the pursuer having been caused, or at all events materially contributed to, by the master or other persons in charge of the "Denia," the defenders ought to be assoilzied, with expenses. (3) The damage sustained by the "Denia" not having been caused by any fault of the defenders, or those for whom they are responsible, the defenders ought to be assoilzied. (4) *Separatim*, the accident condended on being the result of a *damnum fatale*, the defenders are entitled to absolvitor.

The Lord Ordinary (Stormonth-Darling) allowed a proof, which

established the following facts :—The “Denia” loaded her cargo at a crane berth in Ayr Harbour, and by 10 P.M. the hatches were secured, and she was made ready for sea. The wind was blowing strong from the south-east, with rain, and the barometer was falling rapidly, and Captain Watters, the master, decided to remain in harbour all night. The assistant deputy-harbour-master, Sloan, who was a man of experience, and sixty-eight years of age, ordered the master to remove the “Denia” from the loading berth, as it was required for another vessel which was to arrive that night. The master deposed that Sloan ordered him to a berth in the dock basin. Sloan, who was corroborated by a pilot, Houston, stated that he gave the master the choice of two berths, either in the dock basin or in the slip dock, and that the master chose the former. About 11 P.M. the “Denia” was moored to a berth in the dock basin. In the course of the night the wind veered to west and north-west, and increased to a strong gale. Between 2 and 3 A.M. on the following day the vessel was being dashed by the waves against the quay wall, and at 3 A.M. the crew left the vessel from fear that she might sink. Between 5 and 6 o’clock, a hurricane was blowing, and the vessel broke from her moorings, and was seriously damaged.

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William Watters, the master of the “Denia,” deposed that when the vessel had finished loading, the wind was about south-west, and that “it was gradually going round. I fully expected it would go round. When a gale begins in the south or south-west I find as a rule that it goes round to west or north-west in these latitudes. . . . I did not have in view that I would need to lie there at that berth in a gale of wind. My intention was to go into the dock. I said I would go to the basin on condition that they should allow me into the dock when the gate was open, but when the gate was open it was impossible to shift anywhere. . . . Cross.— . . . I objected to shift [from the loading berth]. I said the weather was not fit for shifting anywhere. It was safe enough then, if the wind had remained in the quarter where it was. It was south-south-east about that time. There was no danger in shifting, and the berth I went to at the basin was quite a safe berth so long as the wind remained as it was when I went to it. . . . When the wind is south-south-east it does not always go to the north-west. It sometimes backs towards the east, and sometimes remains in the south. At the time when we shifted I could not tell which way it would go. . . . (Q.) Was there any reason why you should not have tried to take a hawser across and make it fast to a pawl on the west side? (A.) It was not necessary so long as the wind was in the south’ard. . . . When the wind began to veer, and got somewhat into the west, there was no possibility of getting a rope across. The wind shifted suddenly. When it came round to the west there was no pilot in Ayr that would have taken a rope out.”

Captain Peter Barr deposed that he was harbour-master at Ayr from 1883 to 1887, that as a shipowner he had had experience of Ayr Harbour for seven years prior to 1883, and that the berth on the east side of the dock basin was the berth assigned to his firm by the Harbour Trustees, and that it was used all the time he was managing partner of the Ayr Steamship Company. That they had in winter time extreme difficulty in saving vessels from taking damage, but their vessels were prepared with very heavy elm beltings faced with iron. It was not uncommon for them to have ropes run across to the north-west side of the basin to lift the weight off the quay wall. That he would not have shifted the “Denia” to lie at this berth in the face of

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a rising gale. With the wind north-north-west, it was an unsafe berth. With the wind south or south-west, and a falling barometer, his experience was that it invariably blows up to north-north-west to blow out especially with rain. Cross.—This berth was the regular and only berthing place of the Ayr Shipping Company for ten or twelve years.

Walter Bain, a partner of the Ayr Steam Shipping Company and a Harbour Trustee, deponed that the company frequently allowed their vessels to be in this berth in a north-west gale with a rope across the basin; that when it was impossible to send a rope across by a boat, it could be sent by using a heaving line from the opposite side. "My view is, that when she was moored there two things should have been done—a cable should have been procured and stretched across the harbour, and steam should have been kept up. Vessels are not in the habit of lying at this basin berth. It is not a regular berth, but is only used for putting a vessel into before or after loading."

Captain John Mackie deponed that in January and February 1889 he was master of the ship "Margaret," then chartered to the Ayr Shipping Company; that he found their berth in the basin very unsafe when the wind was in the west or north-west. "If it was blowing a gale we generally put a rope across to the other side of the dock to hold her as tight as we could, but I found in all cases that the vessel broke the rope"; that in February 1889 the "Margaret" was damaged severely, the repairs costing £870.

John Sloan, the assistant harbour-master, deponed that the berth was an equipped part of the harbour and very much used. That he offered a berth either at the slip or the basin, but did not recommend one more than the other. It depended on which way the wind was. When the wind is west to north-west the slip is the worst place in Ayr Harbour. He further deponed that he never saw as much damage to shipping in Ayr as was done that night—nearly every vessel was damaged.

Captain John Mathison, who had been for twelve years in command of boats belonging to the Ayr Steam Shipping Company, deponed that he was in Ayr Harbour in command of the "Mona" on 21st December 1894, and sailed about 11 P.M. on that day. The wind was then "a moderate S.W. gale. It got worse as we proceeded. The worst of it was between five and seven in the morning, it was then blowing with hurricane force. When I left Ayr I had not anticipated any such change of weather. I watched the barometer and the signs of the times, but with all my experience I did not expect such a sudden change." He had often occupied the berth in question in all weathers, and had never sustained serious damage. In westerly winds he used a rope across the basin to steady the vessel. He would have had no objection to go to the berth if he had been ordered on the 21st.

Dr Alexander Buchan, secretary of the Scottish Meteorological Society, deponed,—“The question is, what proportion of storms beginning from S.S.E. round to S.S.W. veered round during their continuance to N.W. The following is a summary of the cases examined during twenty Decembers ending 1894. The two lighthouses examined were the two nearest to Ayr, Turnberry and Pladda. In all, 96 storms were reported on by the lighthouse keepers. Of these 41 began from S.S.E., S., or S.S.W. Grouping these 41 cases, the following are the results: (1) storms not attended with any change of direction of wind at all, 6. I am not speaking of the veering of the wind generally, but strong winds rising to storms. (2) Storms which did not veer but backed to east, 4. (3) Storms which veered from the

southward only to the south-west, and did not go further to the north, 9. No. 155.

(4) Storms which veered from the southward only to west, 11; that is to say, 30 did not get beyond west. (5) Storms which veered from southward to N.W., 10; and 1 got to north. Cross.—I have also looked into the question of the storms which commenced in the S.W. Of these five veered to west; two veered to N.W.; and three veered to north—in all ten beginning at S.W. All the storms that began in the S.W. veered to W. and N. (Q.) Is it a matter of familiar experience that storms that begin in the S. or S.W. veer westward and blow themselves out in the N.W.? (A.) Some do and some do not. I have stated the proportion as nearly as I can. From the facts which I have collated I would say that by far the most of the storms that begin in the S.W. finish off in the W. or N.W. I cannot at the present moment point to one contrary instance. Re-examined.—Of the four storms which began at S.S.E., S., or S.S.W., and backed to E., two began from S. to S.E. The great majority of those that moved westward did not get beyond west. In fact there is a common proverb in the west of Scotland that 'the west wind is a gentleman and goes to bed.' It is familiar to us that when the wind goes to the west it tends to fall."

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On 5th February 1897 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"Decerns against the defenders for payment to the pursuer of the sum of £750 sterling, with interest thereon as concluded for." *

* "OPINION.—There can be no doubt about the proposition in law on which this claim of damages rests. It is that managers of a harbour, who provide accommodation for shipping, and invite vessels to use it, are bound to use reasonable diligence to prevent the occurrence of injury to the vessels. They do not insure against accident, but if they fail in using reasonable diligence to prevent it, they are liable in damages.

"This claim, accordingly, is laid on *culpa*, and the *culpa* alleged is that, on a stormy night in December 1894, the assistant deputy-harbour-master, an old man named Sloan, ordered the pursuer's steamer the 'Denia' (248 tons gross register) out of a safe berth into an unsafe one, where she was exposed to the full force of wind and sea, and thereby sustained very serious damage. The defenders say that there is no case in the books in which managers of a harbour have been made liable for injuries arising from stress of weather. That may be; the cases under this head are not very numerous altogether. But I see no difference in principle between liability for a careless order which (for example) sends a vessel aground, and liability for a careless order which deprives her of the very protection against the elements which harbours profess to afford.

"Of course it must be shewn that the order was careless; and one element of the carelessness must necessarily be that the harbour-master could have done better for the ship. In this case it is certain that he could not have done worse; for the proof establishes beyond all doubt that the dock basin berth is the most dangerous berth in the harbour when the wind blows strongly from the west or north-west. It was abandoned principally for that reason by the Ayr Shipping Company in 1892; and Mr Bain, one of the partners of that company (as well as one of the harbour trustees), admits that 'it is not a regular berth, but is only used for putting a vessel into before or after loading.'

"Now, the 'Denia' had just completed her loading, and if she had been waiting in the harbour for any other reason than stress of weather, it might have been quite safe to put her there. But her skipper told Sloan that he was not going to sea because of the gale, and nobody says that he was

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The defenders reclaimed, and argued;—There was no evidence of direct fault on Sloan's part. His order was given in the regular course of harbour control. The "Denia" had a choice of berths, and the dock basin was accepted. But whether this were so or not, her berth was one regularly used, and at least safe at the time she was sent to it. That was sufficient to exculpate the defenders. No doubt it was unsafe in a gale from the north-west, and the Lord Ordinary found that Sloan should have been guided by the probability that the gale would wester. But this was pure speculation, and only a certainty of eventual danger would make the defenders liable for the damage ultimately sustained. The rule for guidance was laid down in the "*Excelsior*."¹ The defenders were not bound to guarantee the safest berth in all weathers. Their duty was to provide reasonably safe accommodation in ordinary circumstances, and to put the control of the harbour in the hands of experienced officials. They had performed their duty, and no fault was proved for which they were liable.²

wrong in that decision. There were all the indications of a dirty night—a rapidly falling barometer, and an increasing gale from the south. Moreover, the scientific and seafaring witnesses are agreed in saying that, when these conditions exist, there is a strong probability of the wind getting more and more westerly, until it dies away in the north-west.

"There is evidence to the effect that, about 11 P.M., when the change of berth took place, the dock basin was safe enough, for the wind was then from the south. But probability must be the guide of harbour-masters as of other people, and it seems to me that Sloan ought to have anticipated that the probable course of the storm would make that berth the worst in the harbour.

"What then ought Sloan to have done? The pursuer's case on record is, that he ought not to have moved the 'Denia' from the berth where she loaded. If he had left her there, she would probably have fared just as the 'Kathleen,' did, which took her place, and that would have meant receiving very little injury. But I do not think it can be said that there was negligence in the mere act of moving her, so long as she was given an equally safe berth elsewhere. Sloan acted as he did from pure routine, without, I believe, bestowing a thought on the prospects of the night; and it was according to strict routine that a vessel having completed her loading should give place at a crane berth to another vessel which was expected to arrive for the purpose of unloading.

"But in my view of the evidence it is vain to say that Sloan might not have found a much safer berth for the 'Denia.' Indeed, his own evidence is conclusive on that point. He says that he offered the master of the 'Denia' a berth in the slip basin on the south side of the harbour, and that the master preferred the other. I have great doubts whether any such choice was distinctly offered. If it had been, I think it would have been averred on record, and it is not. That the slip basin was mentioned as a possible berth either by Sloan or by one of the pilots, I do not doubt, but Sloan himself does not profess that he either thought or said that the slip berth would be the safer of the two, and I have no idea that a harbour-master can evade responsibility for his berthing orders by throwing alternatives at the head of a shipmaster without explanation, and letting him please himself. If he tenders two berths, and does not indicate a preference for either, he must be taken as representing that both are suitable and safe. While, therefore, the rather unsatisfactory evidence as to the offer of

¹ The "*Excelsior*," 1868, 2 A. and E. 268, per Sir Thomas Phillimore, pp. 270, 271.

² Thomson v. Greenock Harbour Trustees, July 20, 1876, 3 R. 1194.

Argued for the pursuer;—The berth to which the “Denia” was ordered was dangerous. If so, the defenders were liable. The pursuer did not maintain that they were bound to give an absolutely safe berth to every vessel in harbour, but if the berth was dangerous the *onus* was on them to shew a necessity for assigning it. They had not discharged this. The “Denia” had no choice of berths. Had this been given it would have appeared on record. The danger was clear. It was virtually a certainty that the wind would wester. Dock rates were paid for safe accommodation, and an owner was entitled to claim that his ship should not be exposed to danger in the berth for which he paid.¹

At advising,—

LORD JUSTICE-CLERK.—The Lord Ordinary in this case has decided that

the slip berth does not avail to relieve the defenders of responsibility, it helps the pursuer by shewing that there was at all events one vacant berth where the ‘Denia’ would have been in comparative safety. I think there was at least one other, because the evidence shews that there were six berths on the north side of the river, and only four of these were occupied on the night in question. A fifth was retained for the ‘Carrick,’ which did not come in that night, but room might quite well have been found for the ‘Denia’ in the sixth if Sloan had wished to do so. The truth is, that he never applied his mind to the subject, because he did not expect the night to turn out so bad as it did. I confess to learning with some surprise that the management of Ayr Harbour admits of an old man like Sloan being left in sole charge during what the defenders themselves describe as ‘one of the most violent storms which have been experienced in Scotland for many years,’ and that no provision is made for summoning the harbour-master, or even the deputy-harbour-master, in such an emergency.

“This leads me to notice in a word the defence of *damnum fatale*. That defence is never effectual in questions of negligence, unless the act of God is such that no human prudence could have foreseen it, or have averted the consequences. In this case the storm was violent, but it was not unprecedented. The statistics kept at Glasgow Observatory shew that during the last twelve years there have been eight gales of greater velocity.

“Another point strongly insisted on by the defenders was that the damage to the ‘Denia’ might have been prevented if, in addition to her being moored fore and aft in the ordinary way to the south side of the basin, a hawser had been passed across and secured to the north side.

“The experience of the witness Mackie, who was captain of the ‘Margaret’ in 1889, goes to shew that even this precaution would not have been effectual, for it did not prevent that vessel receiving injuries which cost £870 to repair. But I am clearly of opinion that, if an extraordinary precaution of this kind was necessary, it was the duty of the harbour-master to order it. By the Harbours Clauses Act of 1847, sec. 52, he is empowered to give directions, *inter alia*, for regulating the manner in which a vessel is to lie in harbour, ‘and its position, mooring or unmooring, placing or removing whilst therein.’ In this case it would have been quite illegal for the ship-master to have drawn a rope across the entrance to a dock without the harbour-master’s express permission. The ropes for mooring are supplied by the ship, but it is for the harbour-master to direct how these are to be used.

“I am therefore of opinion that the defenders’ representative was in fault in ordering the ‘Denia’ to a berth which was likely to become, as it did become, dangerous in the course of a few hours. . . .”

¹ Mersey Dock Trustees v. Gibson, 1866, L. R., 1 E. and I. App. 107, *per* Blackburn, J.

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the vessel belonging to the pursuer was damaged through the fault of the defenders. Although he did not hold them liable for the whole damage, he held that a very large proportion was due to the pursuer—as his Lordship says, sitting as a jury he assessed a certain amount of the total damage. I have come to the conclusion that the Lord Ordinary's interlocutor cannot be sustained. The pursuer's vessel was loaded at an ordinary berth and was ready for sea, and according to the usual practice in that harbour, and indeed in harbours generally, she being ready for sea and wishing to remain in the harbour, it was quite appropriate that she should be removed from the loading-berth and placed in another berth. In ordinary course she would have gone to sea, and we have evidence that one of the vessels in the harbour did go to sea that night. This vessel had the choice of two berths—one at the slip dock, and the other that which she did get. I find from the evidence that the master said that he took that berth in the dock basin provided that when the dock gates were opened he would be allowed to go into the dock and rest there. After he was placed in the dock basin and moored, the wind veered round a considerable number of points from the direction it had at the time he was placed there, and a violent storm arose. The storm was so violent that, as we are informed, every vessel within the harbour that night suffered more or less injury, and of course however safe any berth might be in ordinary circumstances it might be a berth in which a vessel would suffer more damage than a vessel in some other berth. The fault alleged against the Ayr Harbour Trustees is based upon the fact that John Sloan, who is what is called berthing-master, and who had charge of the department for berthing vessels, was an old man, the suggestion being that he was no longer fit for his duty. There is no evidence of that kind. At the time he was doing this work he was sixty-eight years of age. One would have thought that was a very suitable duty for a man who was well accustomed to the sea, had long years of training on the sea, but who was no longer fit for the rough severe work of managing a vessel at sea. As experience leads one to know, there are men of that age fulfilling such duties—not requiring great bodily strength, but only requiring that a man shall still have possession of his faculties and judgment. There are many men of such age in similar situations. Nothing is said by any of the witnesses against Sloan's capacity for work or experience. Therefore I take it that nothing can be said as regards the defenders having a man in their service unfit to do the work. Now, he selected that berth, and I shall assume for a moment there was no choice given to the master of the vessel—that Sloan said that was the berth he was to go to. What do we find as regards the master himself, who was a man of experience? The fault attributed to Sloan was that he ought to have formed a judgment that a storm was coming from a direction that would be dangerous to a vessel lying at that berth. The master himself entertained no such idea. The berth was one which was used regularly for loading purposes, although not for loading such a cargo as he had, and it was used in all ordinary weathers. Now, the master was put there, and he says distinctly in his evidence when he is asked why he did not pass a five-inch warp across to the other side of the dock basin,—“We did not require it when we went into that berth; the berth was quite safe, and therefore we did not require it till the wind

shifted. When the wind began to veer and got somewhat into the west, there was no possibility of getting a rope across. The wind shifted suddenly,"—and then he says that at the time he went to the berth he did not consider he was in any danger. Now, that being so, I do not understand how it can be held that this deputy-assistant, whose duty it was to berth vessels, was in fault because he placed this vessel at a berth which no seaman at the time thought was an unsafe berth. The master did not foresee that any such thing would happen, otherwise he would have taken steps to prevent it. The storm seems to have been of an exceptional character, because we have evidence from the most experienced man probably in Scotland that such a wind as they had here was in ordinary circumstances likely to die down. In the words of this witness "the west wind is a gentleman and goes to bed." Therefore, upon the whole matter, I have come to the conclusion that the injury to this vessel, as to other vessels in the harbour, was caused by the exceptional circumstances of that night, which there was no reason to anticipate, and which indeed appear not to have been anticipated by anybody at the time. Upon the whole matter I have come to the conclusion that the judgment cannot be sustained, and that we ought to assoilzie the defenders.

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LORD YOUNG.—The issue upon which this case was tried, and without any miscarriage whatever, before the Lord Ordinary, as appears from the plea in law for the pursuer, is whether the pursuer sustained loss and damage from the fault of the defenders or of those for whom they are responsible. Upon that issue the Lord Ordinary found for the pursuer and assessed the damages at the sum which he states. Upon a re-trial of the case before us on the same evidence, I am of opinion that the verdict ought to be for the defenders. I think there is no evidence before us in the proof that the pursuer sustained damage through any action or fault on the part of the defenders or of any of their servants for whom they are responsible. I only hesitate arriving at that conclusion because it differs from the conclusion of the Lord Ordinary before whom the evidence was taken. I am always disposed to give great weight to the consideration of the case by the Lord Ordinary. I recognise the inexpediency upon many views, which I need not express, of interfering with a verdict or conclusion in point of fact of the Lord Ordinary before whom the witnesses were examined, if there is reasonable evidence to support it. I have often expressed the opinion, as many other Judges have done, that it is not enough, or even generally sufficient, that you would probably have arrived at another conclusion yourself. I think the case against the Lord Ordinary's verdict must be stronger than that. Having that quite in view, I am of opinion that the verdict of the Lord Ordinary cannot be sustained, and with your Lordship I am of opinion that the judgment should be recalled.

LORD TRAYNER.—The evidence in this case is, on some points, conflicting, but the facts material to the issue seem to me to be well established.

I have no doubt that Sloan, in ordering the master of the "Denia" to change his berth, was acting within his right, and, indeed, in the proper discharge of his duty. The berth in which the "Denia" lay was a loading berth; she had finished loading and was ready for sea; and that berth was

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wanted for another vessel which was known to be coming in (and in point of fact came in) that night to load. In these circumstances it was quite right in Sloan to order the "Denia" out to make way for the coming vessel, and his doing so was in accordance with the general practice which prevails at Ayr Harbour as elsewhere. The master of the "Denia" was well aware of this practice, and he says nothing against it. Having determined not to put to sea that night, the master of the "Denia" was supplied with another berth. The pursuer says it was a dangerous one, and therefore one into which the "Denia" should not have been put. But there was nothing dangerous in the berth itself. It became dangerous only if a storm came on from the west or north-west. Now, on the night of the 2d December there was a storm threatening. The wind began to blow from the south-south-east, accompanied with rain, and there is evidence to shew that in such circumstances there is a great probability that the wind will go round to the west and north-west. Certainty of that there could not be, but according to experience, a great probability. And it so happened upon this occasion. The result was that through the violence of the storm the "Denia" was bumped up against the quay wall where she was lying and received the damage, or part of the damage, for which compensation is here demanded. For that damage, in my opinion, the defenders are not responsible. As I have said, the berth itself was in no way objectionable. It was a perfectly safe berth in an ordinary state of the weather. More than that, according to the evidence of the master of the "Denia" himself, it was a perfectly safe berth at the time he went into it, about 11 P.M. of the 21st, and but for the subsequent violence of the storm, was a berth in which the "Denia" could have remained safely until she went to sea. It was only about 2 or 3 o'clock A.M. of the 22d that the master of the "Denia" found any inconvenience from the "wind going round," and it was between that time and 5 or 6 o'clock of the same morning that the storm attained such violence as to cause the damage complained of. It was the storm, and not the berth, which was the proximate cause of the damage, and for that the defenders are not responsible. That the wind would go round to the north or north-west was perhaps likely, but there was no certainty that it would increase to such a force as it did. On this matter of the probable change of wind, it is worth noticing that the master of the "Denia" says,—“At the time when we shifted I could not tell which way it would go.” Could Sloan be expected to be better informed than the master of the "Denia"?

I think it proved that Sloan gave the "Denia" the best berth at his disposal, and that there was no berth on the north side of the river available. If necessary, I should also be prepared to hold it proved that the "Denia" had the choice of two berths, and that the master chose the one in which his ship was damaged. But my opinion, in giving judgment for the defenders, is chiefly based on this, that the storm, and not the berth, caused the damage; that the berth was safe in the opinion of all concerned at the time it was assigned to and taken by the "Denia"; and that subsequent events imposed no liability on the defenders. It is not immaterial to remember that on the occasion in question scarcely a vessel in harbour on the Ayrshire coast escaped damage that night, irrespective of the kind of berth she occupied.

LORD MONCREIFF.—I agree with all your Lordships that the proof does No. 155.
not warrant a verdict against the defenders.

THE COURT recalled the Lord Ordinary's interlocutor and
assolized the defenders.

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WEBSTER, WILL, & RITCHIE, S.S.C.—GORDON, FALCONER, & FAIRWEATHER, W.S.—
Agents.

SAILING SHIP "BLAIRMORE" COMPANY, LIMITED, AND OTHERS,

No. 156.

Pursuers (Reclaimers).—*Salvesen—Craigie.*

JOHN MACREDIE, Defender (Respondent).—*Sol.-Gen. Dickson—Aitken.*

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Insurance—Marine Insurance—Valued Policy—Total Constructive Loss.

The question whether a ship, insured under a valued policy, is a total constructive loss or only a partial loss, is to be determined by the state of matters existing at the date when action on the policy is raised, and not by the state of matters at the date of notice of abandonment, and that whether the state of matters at the date of the action is due to accident, or the intervention of third parties, or to the exertions of the insurers themselves.

A ship, insured under a valued policy, was sunk in deep water. On 15th April the insured gave notice of abandonment, which the insurers declined to accept. In July the insurers at considerable cost raised the ship and brought her into harbour. The insured then, on 1st December, raised an action against the insurers concluding as for a total constructive loss. The insurers pleaded that the loss was a partial loss only. It was admitted that the ship could not have been raised, brought into harbour, and refitted for a sum within her value when ready for sea, but it was further admitted that at the date of the action the expenditure necessary to right her for sea would be less than her value when ready for sea.

Held that the question whether the ship was a total constructive loss or a partial loss only was to be determined by her condition as at the raising of the action, and consequently that the loss was a partial loss only.

The rule of the English Admiralty Court *followed*; the decision of the Court of Session in *Robertson, Forsyth, & Co. v. Stewart, Smith, & Co.* Feb 10, 1809, F. C. *overruled*.

By five policies of insurance, for a total sum of £15,000 the
"Blairmore," belonging to the Sailing Ship "Blairmore" Company, Limited, was insured for two calendar months in port at San Francisco, and/or San Francisco Bay, and/or its tributaries, commencing on 3d April 1896 and ending on 3d June 1896. Each of the policies contained a clause providing that "the acts of insurer or insured, in recovering, saving, or preserving the property insured, shall not be considered a waiver or acceptance of abandonment."

On 9th April 1896 the "Blairmore" was struck by a sudden squall when lying in San Francisco Bay, and sank.

On 15th April 1896 the owners of the "Blairmore" gave notice of abandonment to the underwriters, which the underwriters declined to accept.

In July 1896 the vessel was raised by the underwriters and docked in San Francisco Harbour.

On 1st December 1896 the Sailing Ship "Blairmore" Company, Limited, and Thomson, Dickie, & Company, shipowners, and marine insurance brokers, Glasgow, the managing owners of the "Blairmore," raised an action against John Macredie, merchant, Glasgow, concluding for payment of £100, being the sum for which the defender had underwritten one of the policies on the "Blairmore." The action was

2D DIVISION.
Ld. Kyllachy.

No. 156. a test action for the purpose of determining whether the "Blairmore" was to be treated as a total constructive loss.

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The pursuers maintained that the "Blairmore" was to be treated as a total constructive loss, in respect that looking to her condition as at the date when notice of abandonment was given (when she was still at the bottom of San Francisco Bay), the cost of restoring her to the condition in which she was before she sank would be greater than her value when restored, the pursuers' averment being;—(Cond. 4.) "The cost of raising and repairing said ship would be about £15,000, and her value after being raised and repaired would be about £9600. The pursuers believe and aver that the underwriters actually expended a sum of £8000 or thereby in raising the vessel, and bringing her into a place of safety."

The defender maintained that the question as to whether a vessel was a total constructive loss was to be determined by her condition as at the date of raising an action on the policy; and he averred that the whole expenditure (stated by him at £7600) necessary to raise the "Blairmore" and bring her into safety in San Francisco Harbour, had been incurred by the underwriters prior to the bringing of the action; and he therefore pleaded (1) the pursuers' averments are irrelevant,—the ground of irrelevancy maintained by the defender being that the pursuers did not aver that the cost of repairing and refitting the "Blairmore," in so far as incurred after she had been brought into San Francisco Harbour (and consequently after the raising of the action), would exceed her value when repaired and refitted.

On 18th February 1897 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that the pursuers' statements are irrelevant as founding a claim under the policy in question for a total loss; therefore sustains the first plea in law for the defender, and dismisses the action, and decerns: Finds the defender entitled to expenses," &c.*

* "OPINION.—The pursuers' company are owners of the ship "Blairmore" of Glasgow, which, in April 1896, stood insured on a time policy for the sum of £15,000; and the present action is brought against the underwriters (or rather against one of their number, who has been selected to try the question), concluding as for a constructive total loss of the ship. There are several defences, but in the first place the defender pleads that the action is irrelevant, in respect that it is not alleged by the pursuers that, as matters stand, and as they stood at the date of the action, the ship is incapable of repair at a cost within her actual value.

"The record is not, perhaps, in the best shape for a judgment upon relevancy—which apparently both parties desire; but I think it may be taken that the following is the state of the facts, as alleged or admitted by the pursuers.

"The 'Blairmore' was, it appears, lying in San Francisco Bay on the 9th April last. On that day she was struck by a squall and sank. She thereby became, at least for the time, a constructive total loss. This, I think, is hardly disputed. At all events, notice of abandonment was duly given to the underwriters; and although that notice was not accepted, but declined, it must, I think, for present purposes, be assumed that, at the date of the notice, the vessel was so placed that, if an action had been at once brought, the owners must have recovered as for a total loss.

"But what happened in point of fact was this: The owners did not at once bring their action; and the underwriters, declining to accept the notice of abandonment, proceeded to raise the ship; and before the action was brought they had succeeded in doing so, and in placing her in safety in San Francisco Harbour. The cost was considerable, amounting, it is said, to

The pursuers reclaimed, and argued;—The question whether there was a constructive total loss was to be determined by the state of matters at the date when notice of abandonment was given, and not by the state of matters at the date when the claim on the policy was judicially made. According to that rule the pursuers prevailed. In England another rule had been accepted, the precise meaning and effect of which would be afterwards considered, but that the date of giving notice of abandonment was the *punctum temporis* was settled to be the rule of the law of Scotland in 1809 by the decision of the whole Court in *Robertson, Forsyth, & Company v. Stewart, Smith, & Company*.¹ It was true that that case was appealed, and that the judgment was affirmed on the ground that the underwriters had accepted abandonment as for a total loss; but nothing was said on appeal in disapproval of the ground of judgment of the Court of Session; on the contrary, Lord Eldon, who with Lord Redesdale heard the appeal, expressly avoided saying anything in approval of the rule laid down in England in *Bainbridge v. Neilson*,² and *Falkner v. Ritchie*;³ and in *Shepherd v. Henderson*,⁴ the only subsequent Scots case in which the question was mooted, opinions were expressed—

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£7600, a cost considerably exceeding what, having regard to the value of the vessel, a prudent owner would have expended for the purpose. Such at least is the pursuers' statement; and, accordingly, it must at this stage be taken as true that but for the high valuation expressed in the policy (a valuation which, in the event of total loss (actual or constructive), fixes the payment to the insured), the underwriters would not have thought of raising the vessel at so great a cost. They did, however, raise her, and she now lies in San Francisco Harbour, not indeed ready for sea, but capable of repair; and that at a cost which, as I have said, the pursuers do not allege would equal her actual value.

"These being the facts, the first question which arises is this: Is it necessary for the pursuers to aver and prove not only that there was a total loss, actual or constructive, at the date of abandonment, but also that that state of matters continued down to the raising of the action?"

"On this head, the controversy between the parties comes, I think, to a very narrow point.

"It was conceded on both sides that the question is one of a kind on which the Scotch Courts, having no established rule of their own, are rightly accustomed to follow the rules established in England. It was also conceded that in the law of England (differing from the law of most maritime states, including France and America) it has long been a settled rule that, in deciding as between total and partial loss, the date to be looked to is not the date of abandonment, but the date of action. All this the pursuers concede. But, according to them, the rule or principle thus expressed means, when examined, only this—that the insurers, equally with the insured, are entitled to the benefit, by way of evidence, of all light which may be derived from anything which may have occurred prior to the date of the raising of the action.

"Now, as to this, I have only to say that I am unable so to limit the English rule. So limited, it would not, as it seems to me, really differ from

¹ *Robertson, Forsyth, & Co. v. Stewart, Smith, & Co.*, Feb. 10, 1809, F. C.; on appeal, July 27, 1814, 2 Dow, 474.

² *Bainbridge v. Neilson*, 1808, 10 East, 329.

³ *Falkner v. Ritchie*, 1814, 2 Maule and Selwyn, 290.

⁴ *Shepherd v. Henderson*, Feb. 25, 1881, 8 R. 518, *per* Lord Craighill, at p. 527, and Lord Young, at p. 529; judgment affirmed, Dec. 1, 1881, 9 R. (H. L.) 1.

No. 156. no decision on the point being necessary—in favour of the date of giving notice of abandonment being the critical date. The question upon the authorities, therefore, stood thus,—on the one hand there was the unanimous and express decision of the whole Court in *Robertson, Forsyth, & Company*,¹ which had never been overruled, and which adopted the rule accepted in France, the United States, and probably every maritime country except England;² on the other hand there was the rule adopted in England. In such a state of matters the question must be regarded as concluded so far as Scotland was concerned by *Robertson, Forsyth, & Company*.¹ In the recent case of *Currie v. M'Knight*³ in the House of Lords, opinions were expressed to the effect that in questions of maritime law the rules laid down in the English Admiralty Court must prevail in Scotland. Where there was neither authority nor principle in the Scots books on any question of maritime law—and that was the case with reference to the question in *Currie v. M'Knight*³—such a doctrine might be reasonable; but it could not be understood to mean that henceforward the English Admiralty rules were to prevail in Scotland, no matter what had been decided in Scotland previously, and even if the English rules

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the French and American rules, which yet it notoriously does. Moreover, on the construction suggested, it would not really be the date of the action, but the date of trial, which would have to be looked to. It is not, therefore, surprising that the pursuers could cite no authority for their proposition. I have looked into the English authorities, and rightly or wrongly, they seem to me to establish quite clearly that, however well justified the notice of abandonment was when given, yet, if before action is brought, the situation has changed, the insurers have the benefit of the change. This is, perhaps, sufficiently apparent from the opinion of Lord Blackburn in the case of *Shepherd v. Henderson*, L. R., 7 App. Cases, 71.

"There is, however, a second point raised by the pursuers, which is perhaps more arguable. Be it, they say, that the insurers may take advantage of any accident or any act of third parties bettering the situation of the vessel at the date of action, this does not imply that the insurers can themselves intervene, and by operations of their own—conducted it may be at exorbitant cost—convert a total into a partial loss, and so, it may be, escape from their just obligations under a valued policy.

"I confess I was at first rather impressed by this argument. But on consideration, I have not been able to find any sufficient ground for it. If the rule be that the question between partial and total loss is in suspense until the date of the action, I have failed to discover any term in the contract of insurance, or any rule of general law, which should disable the insurers from doing their best in the interval between notice and action to improve the situation to their advantage. The vessel is, we shall say, abandoned and derelict. The underwriters send in search of her and tow her into port. Or she is, as here, submerged. They raise her and place her in a graving dock. I do not, I confess, see why, having done so lawfully, they should be bound to discuss with the insured the propriety or cost of their operations; or why, not choosing to do so, they should be bound to charge as for salvage; and to have such charge treated as a charge affecting the vessel. The true position is rather, I take it, this, that the shipowner in the cases figured has had the benefit of a gratuitous, just as he might

¹ Feb. 10, 1809, F. C.; on appeal, July 27, 1814, 2 Dow, 474.

² Arnould on Marine Insurance, 1029, 1030; 2 Phillips on Insurance, sec. 1075; 2 Valin. Tit. Insurance Art. 60; 2 Emerigon, c. 17.

³ *Currie v. M'Knight*, Nov. 16, 1896, reported in the House of Lords reports in the present volume.

conflicted with well-settled principles of the Scots common law. No. 156. Moreover, it was explained in *Currie v. M'Knight*¹ that the English Admiralty rules were of force in Scotland, not because they were English, but because they were part of the general law maritime. It was a curious commentary on this suggested foundation of the doctrine that it was now proposed to use the doctrine as the means of forcing into Scots law a rule which had been solemnly repudiated by the Scots Court, and which had been adopted by England alone among maritime nations.

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(2) But assuming that the English rule was to be adopted in Scotland, that rule—at least as generally and beyond question accepted—went no farther than this—that there were to be taken into account, not merely the facts existing at the date of notice of abandonment so far as known to the insured, but also all facts which the insured came to know after that date, and before the date of the action, provided that they existed at the date of the notice; as where the ship was supposed at the date of the notice to be in possession of the enemy, or to be derelict, but had in fact at that date been recaptured, or brought into port.²

Further, the English rule applied only to cases of capture, and not to cases of loss by the perils of the sea. Here when the notice of abandonment was given, the ship was at the bottom of the sea—unquestionably a total loss. She had ceased in fact to be a vessel. Even the case of stranding or abandoning a vessel at sea might be different. Besides, the test was whether a prudent owner uninsured would have thought it worth while to save,³ and no prudent owner

have had the benefit of an accidental salvage; and that his claim under his policy, which is a claim for indemnity, must be considered in view of that fact.

"It would, of course, be a different matter if the defender's interference with the vessel could be construed as an acceptance of the abandonment; or, what comes to the same thing, could be held as implying an assumption of ownership. But there are two difficulties in the way of that conclusion. In the first place, as has more than once been decided, salvage operations by the insurers do not *per se* imply acceptance of abandonment. They only do so when the whole circumstances justify the insured in so inferring. In the second place, there is in the present policy an express clause providing that 'the acts of the insurer or insured, in recovering, saving, or preserving the property insured, shall not be considered a waiver or acceptance of abandonment.'

"I cannot, therefore, hold that the underwriters were not at liberty, after notice of abandonment, to raise the ship with a view of converting her from a total into a partial loss; or that the cost which they incurred in doing so falls to be treated as if it were a charge by outside salvors affecting the vessel. I should perhaps add that although I have not been able to find any express decision upon this point, it is a point noticed in 'Arnould on Marine Insurance,' 2, 972, 6th edn., and the author's opinion seems to be that the English rule (being what it is) involves as a corollary the right of the insurers to repair as far as they please, after notice of abandonment and before action.

"The result on the whole is that as the ship is now raised and in safety, and as the pursuers do not aver that she cannot be repaired within her actual value, I must hold this action to be irrelevant, and dismiss the same. This, of course, will not prevent the pursuers from bringing, if necessary, another action claiming as for a partial loss."

¹ Nov. 16, 1896, 24 R. (H. L.) 1.

² Bainbridge v. Neilson, 1808, 10 East, 329; Holdsworth v. Wise, 1828, 7 Barn. and Cr. 794.

³ Scottish Marine Insurance Co. of Glasgow v. Turner, March 3, 1853, 1 Macq. 334.

No. 156. uninsured would have thought it worth while to save a vessel at the bottom of sixty fathoms of water.

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(3) Assuming that the rule of the law of England was to be followed, and that it was to be understood in the more extended sense for which the defender contended,—i.e., as entitling the insurers to take into consideration changes of circumstances occurring before the raising of the action on the policy, the only changes which it was legitimate to take into consideration were changes due to accident or to the intervention of strangers—not changes caused by the voluntary acts of the insurers themselves. Tried by this test the pursuers' averments were relevant, for they averred that the cost of restoring the vessel would be greater than her value after she had been restored.¹ The pursuers averred that the cost of raising and repairing the vessel would be £15,000, and that her value when restored would be only £9600. It might indeed be assumed that she could be restored for substantially less than £15,000, or at least that the defender thought she could be so restored, as otherwise the defender would have no interest to defend, since the value in the policy was £15,000 and the underwriters in any view would have to pay the whole cost of restoring her from the position of a ship at the bottom of the sea to that of a seaworthy ship. The question between the parties was this: The pursuers maintained that the whole expenditure necessary to restore the ship to the position of a seaworthy ship incurred on her from the time she sank was to be set against her value when restored; if that was the sound rule, then the pursuers would be entitled to prevail, at least upon the question of relevancy, since the defender did not, it was understood, dispute—at any rate the pursuers averred—that the amount of such expenditure would be greater than the value of the ship when restored. The defender on the other hand maintained that only such expenditure as had been or would be incurred on the ship after the raising of the action was to be set against her value when restored—that was to say in this case, as it happened, only such expenditure as had been or would be, incurred on her after she had been docked at San Francisco. In that view the pursuers admitted that the defender would be entitled to prevail, as they did not dispute that this limited expenditure would be less than the value of the ship when restored. The pursuers' view was the sound one. There was no principle and, apart from the authority, or supposed authority of the law of England, no authority, for the view that the insurers under a valued policy of marine insurance might by their own voluntary act—at it might be (as here) a very large expenditure—convert a total constructive loss into a partial loss, and so escape liability for the full sum in the policy. The defender appealed to the principle of indemnity, but the English rule (whatever its precise scope) was not based on the principle of indemnity, which was this, that the insurer was entitled to meet an action on the policy by an offer to restore the subject insured. That was not the English rule, and was inconsistent with the whole doctrine of total and partial loss. According to the English rule, in any view of it, the insurer, after the raising of the action, had no option to tender restoration of the subject, but must abide by the

¹ Irving v. Manning, 1847, 1 Clark, 287; Arnould on Marine Insurance, 972, 1034, 1048, 1051; Emerigon, c. 17, sec. 6, p. 231; Philipps on Insurance, sec. 1706.

decision as to whether the loss at that date was total or partial. The principle of indemnity gave an intelligible rule—perhaps the best rule. It was also an intelligible rule to say that the rights of parties were to be fixed once and for all by the circumstances existing at the date of notice of abandonment, read it might be in the light of evidence emerging subsequently; and it might be a legitimate extension of that rule to hold that accident, or the intervention of third parties, even if occurring subsequently, should accrue to the benefit of the insurers. The English authorities, rightly construed, went no further. It was nothing else than an arbitrary rule to say that the insurers might by their own acts convert a total into a partial loss, provided they happened to be lucky enough to do so before an action was raised on the policy.

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Argued for the defender;—(1) The law of Scotland on this matter was the same as the law of England, not because it was the law of England—the English common law that was to say—but because it was the rule of the general law maritime, as developed by the English Admiralty Court. There was an obvious convenience in the Scots Courts adopting the rules of the law maritime as developed in England. If indeed a rule on any particular point of maritime law, different from that recognised in England on the point, had been fixed as settled law in Scotland, the rule so fixed would continue to be the law of Scotland, notwithstanding the difference. Nothing said in the House of Lords in *Currie v. M'Knight*¹ was to be understood as implying that the Scots Courts were for the future to disregard any rules of maritime law hitherto recognised by them as settled, merely because these rules differed from the rules recognised in England; but *Currie v. M'Knight*¹ was an undoubted authority for the principle that where the English Courts had settled a rule on any particular point of maritime law and the Scots Courts had no rule on the point, the English rule was to be followed in Scotland. In the present instance there was, no doubt, the case of *Robertson, Forsyth, & Co.*,² as decided in the Court of Session; but although the judgment was affirmed on appeal, the grounds of judgment were not; and by Professor Bell the law of Scotland on the point had been assumed to be the same as that of England,³ and as appeared from the Lord Ordinary's opinion, the pursuers themselves made the same assumption in the Outer-House. The utmost that could be said of *Shepherd v. Henderson*⁴ was that the question, so far as Scotland was concerned, was treated as an open one. In such a state of the authorities the doctrine of *Currie v. M'Knight*¹ applied, and the English rule consequently ought to be followed.

(2) As to what that English rule was, there could, on the English authorities, be no doubt. None of the limitations suggested by the pursuers were recognised by the English decisions. The English rule was a perfectly general one, and was this:—That the question whether there was a total constructive loss was to be determined by the state of matters as at the date of bringing the action on the policy. Neither the cause nor the extent of the original loss, nor the state of matters

¹ *Currie v. M'Knight*, Nov. 16, 1896, 24 R. (H. L.) 1.

² *Robertson, Forsyth, & Co. v. Stewart & Co.*, Feb. 10, 1809, F. C., on appeal, July 27, 1814, 2 Dow, 474.

³ Bell's Comm., 7th edit. i. 655.

⁴ *Shepherd v. Henderson*, Feb. 25, 1881, 8 R. 518, *per* Lord Craighill at p. 527, and Lord Young at p. 529, judgment affirmed, Dec. 1, 1881, 9 R. (H. L.) 1.

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at the date of notice of abandonment, was of any materiality; nor was the English rule confined to the rectification of mere errors of information; nor was it of moment that the state of matters was due to the action of the insurers themselves, and not to accident or to the intervention of third parties.¹ It might be true that most of the English decisions had been pronounced with reference to cases of recapture or cases of the restoration of derelict or stranded vessels, and that there had been few, if any, cases regarding sunken vessels. But that was not because of any rule of law, but simply because till a comparatively recent time the mechanical arrangements for the raising of sunken vessels had not been thought of.

(3) As a matter of principle the English rule was the sound rule, since it was founded on the principle of indemnity, or at least was a closer approximation to the principle of indemnity than the rule for which the pursuers contended. The sum in a valued policy was the standard of indemnity only in the event of it being impossible to tender the ship in such a state that she was capable of being repaired for a sum less than the value in the policy. To hold that the insurer was precluded from taking advantage of his own exertions, the intervention of third parties, or accident, to convert the ship into something worth repairing for less than the sum in the policy, was just to treat the policy as a wager policy pure and simple.²

At advising,—

LORD TRAYNER.—I agree with the Lord Ordinary in thinking that it is now settled in the law of England that a claim made under a policy of marine insurance, in circumstances similar to those presented in the case before us, must be determined by a consideration of the state of matters at the time when the claim is judicially made, and not as at the time of the occurrence out of which the claim arises. It has been stated recently on high authority that the law upon maritime questions is the same in Scotland as in England, and if this view, so broadly stated, is adopted, then we have nothing to do in this case beyond applying to it the rule which, I have said, is now settled in England. As matter of individual opinion I do not concur in that view. Nor do I think it could have been held by Lord Blackburn in 1881, when delivering his opinion in the case of *Shepherd v. Henderson*,³ for there, dealing with the very question we have now before us, he stated the law of England on the point, referred to it as a matter not yet finally decided in Scotland, and declined to express any opinion "as to how it would be in Scotch law."

In this case I arrive at the same conclusion as the Lord Ordinary, for several reasons. First, because there is no rule or principle in Scotland contrary to that which has been settled in England. The only case in Scotland on the point before us is the case of *Robertson, &c. v. Stewart, &c.*,⁴ and the decision in it was contrary to the English rule. That case was affirmed

¹ *Bainbridge v. Neilson*, 1808, 10 East, 329; *Falkner v. Ritchie*, 1814, 2 Maule and Selwyn, 290; *Patterson v. Ritchie*, 1815, 4 Maule and Selwyn, 393; *Brotherston v. Barber*, 1816, 5 Maule & Selwyn, 418; *Lozano v. Janson*, 1859, 2 Ellis and Ellis, 160; *Shepherd v. Henderson*, Feb. 25, 1881, 9 R. (H. L.) 1; *Arnould on Marine Insurance*, 1028.

² *Hamilton v. Mendes*, 1761, 2 Burr. 1198.

³ L. R., 7 App. Cas. 71, 9 R. (H. L.) 1.

⁴ Feb. 10, 1809, F. C.

on appeal,¹ but not upon the ground on which the Court of Session proceeded, that ground being neither approved nor disapproved in the House of Lords. I am unable to say that that one decision, pronounced nearly a century ago, can be regarded as settling a rule which in the administration of Scotch law we are now bound to follow. It is true that there is nothing to shew that that decision was ever questioned; it is equally true that there is nothing to shew that it was ever followed; and it is not improbable that underwriters and others interested in such questions may have regarded the decision as doubtful, because it did not receive the positive sanction of the House of Lords. It is noticeable that Professor Bell,² in referring to this case as one in which, on the general doctrine, the Court of Session had "entirely differed" from the law as laid down by the English Court, expresses no opinion on the question himself. There is nothing, therefore, beyond the decision of the Court of Session in *Robertson's case*³ which can be referred to in support of the argument that the rules of the Scotch law differ from that held in England. The law of both countries applicable to mercantile and maritime questions has been much developed since 1809, and that is another reason for declining to hold a single judgment pronounced in that year as fixing a rule binding upon us now. Second, where there is a well-settled rule on any question in the law of England, and no existing rule or principle in our law with which the English rule conflicts, it is desirable that the same rule should be followed here as there in order that there may not be conflicting rules on the same question prevailing in different parts of the same kingdom, and that even where the doctrine so settled differs from the rules of other states. Third, I think the application of the doctrines of the English law does give full justice to the parties here. To hold that the pursuers are entitled to claim for the loss actually suffered by them, and for nothing more (which is practically what the Lord Ordinary has determined), is a step towards recognition of the view, that in valued policies, as in all other policies of insurance, the contract is one of indemnity only. When valued policies are treated on any other footing, then they are really wager policies—a kind of policy which, for very good reasons, was declared illegal more than a century and a half ago.

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LORD YOUNG.—I am also of opinion that the interlocutor of the Lord Ordinary should be affirmed. The only thing which I desire to say is that we must decide this question according to the law of Scotland, which is the only law with which we are supposed to be acquainted. If, as happens sometimes, a case ought in our opinion to be decided in accordance with English law, when, for example, the case relates to the construction of a will made in English form by an Englishman, we have recognised means for discovering what the law of England is. We can state a case and send it for the opinion of an English Court, or we can take the opinion of English counsel on the case, and so ascertain as matter of fact in the case what the law of England may be. We are very glad to be informed that the law of England is the same as the law of Scotland on any question. In the same way we are glad to know that the law of America or France is the same as ours in any case. It is desirable that the same rule should obtain

¹ 2 Dow, 474. ² Bell's Com. 7th ed. i. 655. ³ Feb. 10, 1809, F. C.

No. 156. in all civilised countries. But it is not an accurate statement to say that the law of England in any branch of it must also be held to be the law of Scotland. We do not know what the law of England is. We do not know the most recent views which have been taken as to what the law of England may be. We do not know what may have been decided in England yesterday or last week. We may discover that the law of England is the same as our law, but we must decide according to the law of Scotland. Here determining the case according to Scots law, I agree that the interlocutor of the Lord Ordinary ought to be affirmed.

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LORD MONCREIFF.—The general question which was argued to us, viz., whether the date of notice of abandonment or of the raising of an action is to be looked to in deciding whether a total loss has or has not been sustained, is still a moot point in the maritime law of Scotland. There is, indeed, one express decision upon the point, viz., *Robertson, Forsyth, & Company v. Stewart, Smith, &c.*¹ In that case the First Division of the Court, affirming the judgment of the Court of Admiralty and the Lord Ordinary, decided in favour of the shipowner, on the ground that the matter must be judged of as at the date of the notice of abandonment. It appears from the report of the opinions of the Judges that the Court considered the question to be entirely new. The judgment was appealed to the House of Lords and affirmed, but not upon the grounds adopted by the Court of Session, the ultimate ground of judgment being that the underwriters had accepted the notice of abandonment.² The case is interesting on account of the doubts expressed by Lord Eldon in the House of Lords as to the soundness of two English decisions,—*Bainbridge v. Neilson*³ and *Falkner v. Ritchie*,⁴—to the effect that the date of the action was the time to be looked to. But in the end the House of Lords waived deciding that question; and subsequently, notwithstanding Lord Eldon's doubts in *Robertson, Forsyth, & Company v. Stewart & Smith and Others*,¹ the cases of *Bainbridge*³ and *Falkner*⁴ were followed in England in a long series of cases. Therefore in England the law has been settled for more than half a century.

On the other hand, the law of many foreign countries, and in particular of France and America, is to an opposite effect.

As regards Scotland, the decision in *Robertson, Forsyth, & Company v. Stewart, Smith, &c.*¹ has not been repeated; neither has there been a decision to the opposite effect.

Mr Bell, in his Commentaries,⁵ contents himself with narrating the history of the case of *Robertson*,¹ and the course of decision in England, without expressing his opinion as to what the law of Scotland is or ought to be. In his Principles,⁶ in which he deals with the effect of notice of abandonment, he says,—“But before acceptance, if what appeared a total loss has become not so, as by recapture, recovery, or partial preservation, the policy then is for indemnity only of a partial loss.” But in support of this he only cites the English decisions, beginning with the case of *Bainbridge*

¹ Feb. 10, 1809, F. C. 165.

² 2 Dow's App. 474.

³ 10 East, 329.

⁴ 2 Maule and Selwyn, 290.

⁵ 1 Bell's Com. 7th ed. pp. 654-655, 5th ed. pp. 608-609.

⁶ Bell's Prin. sec. 487.

v. Neilson.¹ It may be inferred that Mr Bell regarded the matter as settled No. 156. by the current of the English decisions, but there is no later Scottish decision to support this view.

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The matter was very fully discussed in the recent case of *Shepherd v. Henderson*.² But the decision of that question was not essential to the judgment, because the Court of Session held that it was not proved that there was a constructive total loss at the date of the notice.

Lastly, there is no averment or evidence of practice in Scotland.

The point therefore being open, we have to decide whether we should follow the law of England or the law of France and America; we are free to take either course. There are weighty considerations on both sides. For those in favour of the date of notice, I need only refer to the note of the opinions of the Judges in the case of *Robertson, Forsyth, & Company*,³ and the opinion of Lord Craighill in *Shepherd v. Henderson*.⁴ But, on the other hand, there are counter considerations which, on the whole, I am inclined to think should prevail. We are not bound by the English decisions; but looking to our close commercial relations with England, and the fact that our merchant shipping law is regulated by a code applicable to both countries, it would be unfortunate if a different rule on this point obtained in Scotland from that established in England. There are other considerations pointing in the same direction which I need not mention in detail. On the whole matter, I think that, in the absence of any authority in our own law to the contrary, there are sufficiently strong reasons of expediency to lead us to adopt that of England.

So much on the general question; but I am further inclined to think that, on the terms of the policy, the same practical results would be realised.

The policy contains this declaration,—“And it is expressly declared and agreed that the acts of the insurer or insured in recovering, saving, or protecting the property insured, shall not be considered a waiver or acceptance of abandonment.”

Now, the acts here specified are necessarily acts to be done after notice of abandonment has been given, and this seems to imply that, notwithstanding that notice of abandonment has been given, the insurers may do what they can before action raised to diminish their liability and reduce the loss without being held to have accepted the abandonment.

Therefore, I think we should hold that the third and fourth pleas for the defenders are well founded, and that as this action is laid upon the footing of the ship having become a constructive total loss, the action has been rightly dismissed by the Lord Ordinary.

The LORD JUSTICE-CLERK concurred.

THE COURT adhered.

JAMES RUSSELL, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

¹ 10 East, 329.

² Feb. 10, 1809, F. C. 165.

³ 8 R. 518, and 9 R. (H. L.) 1.

⁴ 8 R. 526-7.

No. 157. JAMES F. MACKAY AND OTHERS (John Mackay's Trustees), First Parties.—*Sol.-Gen. Dickson—Burnet.*

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GEORGE D. MACKAY AND OTHERS (Miss Mary Mackay's Trustees), Second Parties.—*D.-F. Asher—D. Dundas.*

Succession—Vesting—Fee or Liferent—Direction to trustees to retain.—

By his trust-disposition and settlement a testator directed his trustees after the death of the longest liver of himself and his wife, to "divide, or convey, or pay and make over the whole estate and effects then belonging to me . . . to and among my children equally, share and share alike, the lawful issue of any of them who may have predeceased taking the parent's share, it being provided in regard to the shares of my daughters that my trustees are hereby directed to hold the share of each daughter while unmarried in trust for her behoof in liferent, for her liferent use allenarly, . . . and on the marriage of such daughter it shall be the duty and right of my said trustees to" settle the daughter's share in accordance with certain directions given by the truster, one of these being that a daughter having no children should have power to dispose by will of one-half of her share, "it being hereby expressly provided and declared that the remaining half of such share shall not vest in such daughter, but shall on her death fall to" the truster's other children.

A daughter survived both her parents, and died unmarried. *Held* that on the death of the truster's widow the fee of the daughter's share vested in her, subject only to the effect of the direction to settle her share in the event of her marriage.

1st DIVISION. JOHN MACKAY, manufacturing chemist in Edinburgh, died on 4th April 1881. He left a trust-disposition and settlement and codicils, by which he conveyed to trustees his whole estate, heritable and moveable.

By the third purpose he directed his trustees to pay the whole income of his estate (except so far as required to meet a provision in favour of his eldest son, John Christie Mackay, and certain annuities) to his wife Mrs Agnes Christie or Mackay, in liferent, for her liferent use only. By the ninth purpose it was provided as follows:—"Immediately after the death of the longest liver of us, the said John Mackay and Agnes Christie or Mackay (until which event happens no right to any portion of the estate and effects hereby conveyed shall vest in any of my daughters), my said trustees shall proceed to realise, so far as they shall deem necessary, the estates and effects hereby conveyed, and at the first term of Whitsunday or Martinmas which shall occur three months after the death of the survivor of us, they shall divide or convey or pay and make over the whole estate and effects then belonging to me . . . to and among my children, except the said John Christie Mackay, equally share and share alike, the lawful issue of any of them who may have predeceased taking the parent's share; it being provided, in regard to the shares of my daughters, that my trustees are hereby directed to hold the share of each daughter, while unmarried, in trust for her behoof in liferent, for her liferent use allenarly, the interest or annual produce thereof being payable to them respectively in equal portions at Whitsunday and Martinmas; and on the marriage of such daughter it shall be the duty and right of my said trustees to take care that the share of the daughter so marrying shall be dealt with and provided for so that the same shall belong to and be held for behoof of the daughter so marrying, exclusive of the *jus mariti* and right of administration of her husband, and as an alimentary fund for behoof of herself during her

marriage; and also that, in case no child or children be born of her marriage, she shall have power to dispose after her own death of the capital sum invested for her behoof, and also of the interest or annual produce thereof, as she shall see fit; but that only, both as regards the capital and interest, to the extent of the one-half of the share of my estate accruing to her, it being hereby expressly provided and declared that the remaining one-half of such share shall not vest in such daughter or daughters, but shall on her or their death without children fall to and be divided among my other children or their issue, in such proportions as such daughter or daughters may direct by any writing under her or their hands; which failing, such share shall fall into and form part of the residue of my estate, and be divided among my other children (the issue of any of them who may have predeceased taking the parents' share), in the same way as is above provided for in regard to the division of the residue of my estate."

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The trustor was survived by his widow, and by four sons and three daughters. His widow died on 18th December 1885.

One of the daughters, Miss Mary Mackay, died unmarried on 14th August 1896, leaving a trust-disposition and deed of settlement and relative testamentary writings, under which her whole estate, including all estate which at the time of her death she was entitled to test upon, was conveyed to trustees, for certain purposes.

On the death of the trustor's widow his trustees had, at the request of the parties interested, continued to hold the trust-estate and divide the income among the beneficiaries.

On the death of Miss Mary Mackay a doubt arose as to whether the fee of a share of Mr Mackay's trust-estate was vested in her, and accordingly a special case was presented by his trustees, as parties of the first part, and Miss Mary Mackay's trustees, as parties of the second part.

The parties of the first part maintained that the fee of a share of Mrs Mackay's estate was not vested in Miss Mary Mackay at the date of her death, and was not carried to the second parties by her trust-disposition and settlement. The second parties maintained that Miss Mackay had a vested interest in the fee which was carried by her settlement, under the ninth purpose of her father's settlement, or otherwise that she was entitled to test upon her share. Alternatively they maintained that the fee of the share in question upon the death of Miss Mary Mackay lapsed and fell into intestacy.

The questions of law for the opinion and judgment of the Court were as follows:—“(1) Had the said Miss Mary Mackay a vested interest in the fee of a share of the said John Mackay's estate, under the ninth purpose of his trust-disposition and settlement? (2) Had the said Miss Mary Mackay a power of disposal by *mortis causa* deed of the said share, or any part thereof? or (3) Does the fee of the said share, to any, and if so to what extent, fall into and form part of the residue of the trustor's estate? or (4) Does the fee of the said share lapse and fall into intestacy?”

The parties cited the undernoted authorities.¹

¹ Muir's Trustees v. Muir's Trustees, March 19, 1895, 22 R. 553; Greenlees' Trustees v. Greenlees, Dec. 4, 1894, 22 R. 136; Lindsay's Trustees v. Lindsay, 8 R. 281; Dalglish's Trustees v. Bannerman's Executors, 16 R. 559; Stewart's Trustees v. Stewart, Jan. 22, 1896, 23 R. 416.

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LORD M'LAREN.—This cases raises a question which has come to be of considerable importance in the construction of wills, the effect of a gift of a share of residue to a son or daughter, followed by an instruction to trustees to hold or retain the share and to pay the income to the beneficiary for life.

The testator, John Mackay, left his estate for distribution to trustees. Under this trust-settlement his widow had a general liferent, and after making provision for payment of legacies and the disposal of the business in which he was engaged, in terms which it is unnecessary to consider, the testator provided in the ninth purpose of his trust for the division of the residue amongst his children. The ninth purpose begins by directing that immediately after the death of the testator and his wife ("until which event happens," he says "no right to any portion of the estate and effects hereby conveyed shall vest in any of my daughters"), the trustees should proceed to realise the estate, and at the first term thereafter it is said "they shall divide or convey or pay and make over the whole estate and effects then belonging to me" (with certain exceptions) "to and among my children, except the said John Christie Mackay, equally share and share alike, the lawful issue of any of them who may have predeceased taking the parent's share." Miss Mary Mackay, whose executors are the second parties to the case, was one of the truster's daughters, and if the trust purpose had stopped here, beyond doubt a share of the residue would have vested in her. But the deed goes on to provide in regard to the shares of daughters that the trustees are to hold the share of each daughter while unmarried in trust for her liferent use alienably, and to pay the interest half-yearly, and that on the marriage of such daughter her share is to be settled. As we are here concerned with the share of a daughter who died unmarried, the subsequent provisions have only an indirect bearing on the question, which is, stated shortly, whether the direction to the trustees to hold the share of Miss Mackay while unmarried in trust for her liferent use, and with a power to settle her share on marriage, amounts to a revocation of the gift of the fee contained in the immediately preceding words. Now, a construction which should treat one member of a sentence as annulling the immediately preceding and related member does not recommend itself as probably expressing what was in the testator's mind, and, least of all, when the subsequent gift is put as a proviso or condition of the first. But the two provisions may quite well stand together if we suppose that the testator, while giving his daughter a share of the capital, was desirous that her share should be held in trust, first, in order the better to secure to her an income for life, and secondly, to enable the trustees to carry out his purpose of settling the money in the event of the daughter's marriage. If this was the testator's intention, then it was not necessary that he should say anything on the subject of the disposal of the fee after the daughter's death, because he had already given her the fee, and by so doing had empowered her to transfer it by will or deed subject to her liferent. And again, it is an argument in favour of vesting under the direction to divide which I have quoted, that unless this direction is held to apply to Miss

Mackay's share, there is no express disposal of the fee of her share in the event of her dying without issue. No. 157.

It was suggested in argument that when a fee is given, a direction to trustees to hold the capital in trust, and to pay the income only to the legatee, is ineffectual. If there had been no direction to settle the shares of daughters in the event of marriage, the observation would be well founded, because then Miss Mackay by bringing an action, or perhaps without an action, might have taken the management of her share into her own hands.

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It was also suggested that the original gift or direction to divide the residue was not a substantive gift, but only an announcement of the principle of equal division as between the children. But this construction seems inadmissible when it is considered that the gift of residue is a gift to sons and daughters, and that so far as the sons are concerned it is the only gift in their favour.

In the present case it may be presumed that one reason, perhaps the chief reason, for putting the daughters' shares under trust, was to enable the trustees to fulfil the trustor's direction to settle the daughters' shares on marriage. A direction to settle on marriage would of course be effectual as a condition of the gift so long as the daughters' shares remained intact in the hands of trustees.

Such a direction is not necessarily inconsistent with the vesting of the fee. Miss Mackay's right was affected by this qualification during her lifetime because she never married, but the existence of the power to settle on marriage would not in my judgment affect Miss Mackay's right of disposing of the fee of her share by a deed or will taking effect after her death.

I may add that there is a considerable body of authority regarding the effect of an original gift with a direction to hold in trust superadded. In the very well considered cases of *Lindsay*¹ and *Dalglish*² the two things were held to be reconcilable. And again in two recent cases, *Greenlees*³ and *Stewart*,⁴ this principle of construction was generalised; and I think it must now be held that an original gift on partition of a residue amongst the members of a family will not be cut down to a life interest by the effect of a subsequent direction to pay the income to one or more of the objects of the gift for life. Of course there may be cases where the primary gift is so qualified in expression as to shew that no higher right is meant to be given than is more fully explained in the sequel, and no rule can be laid down which will dispense with the necessity of carefully considering the effect of all the clauses and provisions bearing on the right conferred. In the present case, my opinion is that Miss Mackay had a vested interest in the fee of her share of her father's estate, subject only to the effect of the direction to settle her share in the event of her marriage, and that the first question ought to be answered in the affirmative. The second question does not arise, and the third and fourth questions may be answered in the negative.

The LORD PRESIDENT, LORD ADAM, and LORD KINNAR concurred.

THE COURT answered the first question in the affirmative and the third and fourth in the negative, and found that the second did not arise.

JAMES MACKAY, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

¹ 8 R. 381.

² 16 R. 559,

³ 22 R. 136.

⁴ 23 R. 416.

No. 158. LIQUIDATORS OF THE EMPLOYERS' INSURANCE COMPANY OF GREAT BRITAIN, LIMITED, Petitioners (Reclaimers).—*Sol.-Gen. Dickson—Lorimer.*

June 9, 1897.
Liquidators of
Employers'
Insurance Co.
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Limited, v.
Benton.

JOHN BENTON AND ANOTHER, Objectors (Respondents).—*W. Campbell—M'Lennan.*

Insurance—Policy—Construction—Insurance of Debenture in Mortgage Company—Failure to pay.—An insurance company guaranteed to B payment of £600 lent by him to a mortgage company on debenture, repayable on 1st June 1897, "in the event of failure to pay on the part of the debtors." The policy contained the conditions that B should pay a premium of £2, 5s. on 1st June in each year, and that the policy should be void in the event of a premium remaining unpaid for fourteen days.

In 1893 the mortgage company went into liquidation, and a reorganisation scheme was assented to by B in July 1894, the insurance company giving their consent in a letter to B, which bore, "This consent will not prejudice your claim under the insurance of your debentures of the" original mortgage company. By this scheme the assets and liabilities of the original mortgage company were transferred to the new company, and B exchanged the debenture which he held for the new company's debentures, which did not mature until 1904.

B did not pay the premium payable on 1st June 1895. In July 1895 the insurance company went into liquidation, and B lodged a claim for the amount of the debenture. *Held (rev. judgment of Lord Stormonth-Darling)* that there could be no "failure to pay" on the part of the debtors in the sense of the policy until June 1897, when the original debenture became payable, and that the policy had lapsed through B's failure to pay the premium due on 1st June 1895.

1st Division.
Ld Stormonth-
Darling.

JOHN BENTON AND ALEXANDER MURRAY holding a debenture for £600 of the Equitable Mortgage Company, Limited, dated 26th May 1892, bearing interest at 5 per cent, and repayable on 1st June 1897, insured the same with the Employers' Insurance Company of Great Britain, Limited.

The policy bore that whereas Benton and Murray were the holders of the debenture mentioned, and were desirous of being insured by the Employers' Insurance Company, to the effect underwritten, "and there has been paid to the company the sum of £2, 5s., being the agreed on premium for such assurance for the period from the 26th day of May 1892 until the 1st day of June 1893, and it has been agreed that the sum of £2, 5s. shall be the future annual premium for such assurance thereafter, and that the same shall be payable on the 1st day of June in each year.

"Now these presents witness that the company, in the event of failure to pay on the part of the debtors, hereby guarantee to the assured payment of the said principal sum of £600 sterling within four months of the date when the same is repayable as above stated, and of said interest thereon at the rate above stated, within three months of the date when the same falls due from time to time, provided notice is given to the company of such failure to pay, in terms of the conditions indorsed hereon.

"Provided always, that this policy is subject to the conditions indorsed hereon, which are to be taken as part hereof, and are hereby declared to be conditions precedent to the right of the assured to sue or recover hereunder."

The conditions indorsed on the policy are, so far as necessary, given *infra*.^{*} No. 158.

The Equitable Mortgage Company went into liquidation on 30th August 1893 and a reorganisation agreement was entered into in March 1894, by which it was arranged that a new company—afterwards called the Equitable Securities Company—should be formed for the purpose of taking over the property and rights of the Equitable Mortgage Company. By this agreement it was provided, *inter alia*, that the new company should issue debentures to creditors of the old company who assented to the plan on their giving up their claims against the old company.

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In July 1894 Benton and Murray, with the authority and consent of the Employers' Insurance Company of Great Britain,[†] assented to the plan of reorganisation, and exchanged the debenture of the old company which they held for ten debentures of £60 each in the new company, repayable in March 1904, and bearing interest at the rate of 4 per cent.

Benton and Murray paid the premium upon their policy of insurance in June 1894, but did not pay a premium in June 1895. The Insurance Company paid them the interest due and unpaid upon their debenture down to 1st December 1894.

* The conditions indorsed on the policy provided, *inter alia*;—"1. This policy will be void . . . (b) If the premium is not paid within fourteen days after it becomes due. . . . (d) If the assured, without the consent in writing of the company, consents to any arrangement modifying the rights or remedies of the assured against the debtors or takes proceedings for recovering the principal sum assured or interest thereon. 2. If the debtors delay payment of any principal or interest for thirty days after the same ought to be paid, or if the debtors stop payment, have a receiving order made against them, become bankrupt, or are by the company known or believed to be in an unsound position, or if the company is called upon to pay any money under this policy, the assured shall, at the request and cost of the company, give to the company all such information as the assured may possess and the company may require as to the issue of the debentures hereby assured and the circumstances under which the assured took the same and the securities and rights available to the assured, and shall also at the like request and cost and upon payment by the company of the principal remaining due upon the debentures and interest at the rate within specified to date of payment, execute all such deeds and writings in favour of the company or its nominees, and do all such things as may be required by the company for vesting in them or their nominees all rights of the assured against the debtors and any property or person whatsoever, and the company may enforce any such rights or remedies in the name of the assured, but at the cost of the company. . . . 3. This policy shall continue from year to year so long as the assured shall pay the premiums hereunder on the days appointed for payment thereof, or before the expiry of fourteen days thereafter, but the company shall not be bound to accept any premium payable after the 1st day of June 1897, or in any way to continue this policy beyond the expiration of twelve calendar months from that date."

† A letter by the Secretary of the Insurance Company to Mr Benton, dated 23d July 1894, bore:—"Referring to scheme of arrangement dated 10th July 1894, and relative proxy, copy of which you will have received from the Official Receiver, we beg to advise that we have had same submitted to us. We approve of the same, and consent to your signing the proxy in favour of the passing of the scheme. This consent will not prejudice your claim under the insurance of your debentures of the Equitable Mortgage Company with the company."

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In July 1895 the Employers' Insurance Company of Great Britain went into liquidation. Benton and Murray lodged an affidavit and claim with the liquidators for £603, 13s. 8d., representing the principal sum insured, with the addition of the difference in the interest payable by the old and the new companies from 1st December 1894 to 13th July 1895. In their claim they stated that they held no security other than the debentures of the new company.

The liquidators rejected the claim, "in respect of the claimants' failure to renew the policy in June 1895."

On 25th August 1896 the liquidators of the Employers' Insurance Company presented a note to the Court for the approval of their deliverances and for authority to pay a dividend.

Benton and Murray lodged answers and objections, in which they averred that when the Equitable Mortgage Company suspended payment and went into liquidation "failure to pay upon the part of the debtors" took place within the meaning of the policy, and the respondents' right to indemnity under the policy emerged. "The liability of the company in liquidation under their said insurance policy having . . . emerged long prior to June 1895, there was no obligation on the respondents to renew the policy in June 1895, as a condition of their claiming indemnity under the policy. The liquidators' proposed deliverance rejecting the respondents' claim in respect of the respondents' alleged failure to renew the policy at that date is therefore unsound in law." They accordingly craved the Court to direct the liquidators to admit their claim to ranking.

The liquidators lodged replies, in which they admitted liability for a sum of £2, 18s., representing the difference in the interest payable on the old and new debentures between 1st December 1894 and 1st June 1895.

On 14th May 1897 the Lord Ordinary (Stormonth-Darling) pronounced an interlocutor disapproving of the deliverance of the liquidators, and recalling the same, directing the liquidators to admit the claim, and authorising them to pay the claimants a dividend, subject to transfer by the claimants to the liquidators of the ten debentures of the Equitable Securities Company, standing in their name, and to the claimants accounting for the interest drawn by them under said debentures.*

* "OPINION.—At the close of the argument in this case on 5th February I asked the parties to ascertain and inform me at what date the Equitable Mortgage Company, Limited, was, as stated in the objections for Benton, 'wound up and dissolved.' It was an American company, and therefore I could not construe the statutes for myself as I would have done if it had been a British company. I have waited three months for the information, and it is not forthcoming. I therefore propose to decide the case without it.

"The question is, whether the respondents have forfeited their rights under the policy of assurance dated 16th June 1892, by failure to pay a premium of £2, 5s. on 1st June 1895. That depends on whether there had been 'failure to pay' on the part of the Equitable Mortgage Company within the meaning of the policy prior to that date.

"I think there had been. The principal sum of £600 advanced by the respondents to the mortgage company was not repayable by the latter till 1st June 1897; but circumstances might quite well occur before that date, making it impossible for the debtors to discharge their obligation when the due date arrived. During the argument it seemed to me that no circumstance could have that effect more clearly than the dissolution of the mort-

The liquidators reclaimed, and argued ;—1. The sum insured was not repayable by the debtor until 1st June 1897, and the policy stipulated for payment of five yearly premiums as a condition of the insurance. The amount of the premium was calculated upon the footing that that number of premiums would be paid. There was no “failure to pay,” in the sense of the policy, until the date when the debenture became repayable,¹ and even if it was certain that there would then be a failure to pay on the part of the debtor, it was nevertheless the duty of the insured to go on paying the premiums

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gage company, and therefore I asked for the date of dissolution. But I think there is enough in the admitted facts to enable me to say that, whatever was the precise date of dissolution, there had been ‘failure to pay’ on the part of the company before 1st June 1895.

“It is admitted by the liquidators that the mortgage company had gone into liquidation prior to June 1894. Probably that circumstance did not by itself constitute ‘failure to pay,’ though it gave the insurance company a right under the second condition indorsed on the policy to make immediate payment of the principal with interest to date, and to demand an assignation of all the rights of the insured. But the liquidators further admit the respondents’ statements regarding what is called the ‘reconstruction of the company.’ These statements are that in March 1894 a new company called the Equitable Securities Company, Limited, was projected to take over the assets and liabilities of the Equitable Mortgage Company under a reconstruction scheme; that in July 1894 the respondents were authorised by the insurance company to accept, and did accept, ten debentures for £60 each from the new company, repayment being deferred till March 1904, and interest reduced to 4 per cent; and that the insurance company expressly agreed that the respondents’ acceptance of these new debentures should be without prejudice to their claim under the insurance of their original debenture with the mortgage company. This latter and most material point is amply borne out by a letter from the insurance company dated 23d July 1894. The effect of this transaction, to which the insurance company became a party, was to create a slightly altered debt and an entirely new debtor. The Equitable Mortgage Company, even if it continued to exist for some time afterwards, could no longer be called on to pay the old debt, for the parties had agreed otherwise, and it could not pay by any possibility, because it had parted with all its assets. There was therefore on its part from that moment ‘failure to pay’ the principal sum, though payment could not have been demanded till 1st June 1897. The risk, which is the characteristic feature of a contract of indemnity, was at an end, for it had become a certainty. The insured had acquired an indefeasible right to recover from the insurer. I fail to see how the respondents could forfeit the right which had thus vested in them by any subsequent act or default of theirs. It was enough that they had kept the policy in force up to the time when the liability of the insurance company arose. After that the company may have had the right (instead of paying up at once and ending the matter) to wait for the stipulated date, paying interest in the meantime. But during that interval there was, so far as I can see, no obligation on the part of the insured to pay premiums. It would, I think, require very special words in a policy of insurance to make premiums payable after the claim had emerged and become indefeasible, and I find no such words in this policy.

“It follows that the liquidators’ deliverance cannot be sustained.”

¹ Laird v. Insurance Securities Co., Limited, March 12, 1895, 22 R. 452; Dane v. Mortgage Insurance Corporation, L. R. [1894], 1 Q. B. 54; Finlay v. Mexican Investment Corporation, L. R. [1897], 1 Q. B. 517; Simpson v. Mortgage Insurance Corporation, 38 Sol. Journal, 99.

No. 158. until the debenture matured. If the Lord Ordinary was right, the respondents would be better off than if the debtor had remained solvent, and the insurance contract was therefore made to give right to more than indemnity. 2. The plea that the sum due to the insured in respect of the deficiency of the interest received by them under the reconstruction scheme might be set off against the premiums was not stated in the respondents' answers. It was inconsistent with their claim, which included a demand for payment of that deficiency. Compensation could not be pleaded in this way in liquidation.¹

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Argued for the respondents;—1. Once it had been ascertained beyond doubt that the debtor could not pay, the risk became a certainty, and in the sense of the policy there was a failure to pay. The meaning of the policy was that the insurance would be renewed from year to year, provided that the new premium was paid. After the reconstruction scheme had been carried through, there was no longer an insurable risk, and there could be no obligation to continue the payment of premiums. The risk became a certainty in July 1894 through the arrangement made with the new company. This arrangement was entered into with the consent of the insurers, and the transaction amounted to an agreement on the part of the insurers to hold that there had been a failure to pay. 2. In any event, the insurance company owed the respondents more in interest than was due to them for premiums, and could not plead that the policy had become void through the premiums not being paid, as they were bound to apply the money in their hands to the payment of the premiums.

LORD PRESIDENT.—The two gentlemen who are respondents in this reclaiming note held a debenture of the Equitable Mortgage Company, which was repayable on the 1st of June 1897, and during the currency of which interest was payable at the rate of 5 per cent per annum. The respondents insured payment of these debentures with the Employers' Insurance Company of Great Britain, now in liquidation, and the obligations of the insurance company and the insured are set out in a policy of assurance which is before us. As I have said, the obligation of the original debtor was to repay the sum lent on 1st June 1897—then and no sooner—and it is natural to suppose, and in fact it is expressed in the policy, that the insurance company were simply to make good this obligation. They “guarantee to the assured payment of the said principal sum of £600 sterling within four months of the date when the same is repayable as above stated.” They also engage during the currency of the debenture,—that is, up to that period,—to guarantee interest thereon at the rate of 5 per cent, within three months of the date when the same falls due from time to time. As the price of this undertaking by the insurance company, it is set forth that the sum of £2, 5s., being the agreed premium for such assurance for the period from 26th May 1892 to 1st June 1893, has been paid to the company, and that “it has been agreed that the sum of £2, 5s. shall be the future annual premium of such assurance thereafter, and that the same shall be payable on the 1st day of June in each year.” Now, it seems perfectly clear that the words of the policy necessarily relate to the

¹ Cowan v. Gowans, Jan. 25, 1878, 5 R. 581.

original obligation of the original debtor, and to the parallel or identical No. 158. obligation of the insured.

I read this, therefore, as an agreement that, in return for these annual payments down to 1st June 1897, the insurers will see the principal sum then payable paid or pay it themselves, and so with regard to the interest falling due during the currency of the same period. The decision of the Lord Ordinary, and the contention of the respondents, is that, because, long before June 1897, the resources of the debtor became practically exhausted, there occurred a "failure to pay" in the sense of the policy. It would be much more accurate to say that it became apparent, at that earlier date, that a failure to pay was inevitable, but then it seems to me that the argument of the Lord Ordinary and the respondents ought to go the length of saying that the manifest impossibility of the debtor company being able to pay the amount of the debenture when it became due precipitated the obligation of the insuring company. The respondents, however, shrink from saying that, and accordingly they are forced to say that, while the contract of insurance continued down to June 1897 so far as the obligation of the insurance company was concerned, the other party was set free by the certainty that that obligation would be prestatable, and that while up to 1st June 1897 the one party was bound, the other was to cease paying premiums. It seems to me that that would be clearly contrary to the reciprocal obligations of the policy, and the language used as to the risk having ceased and a certainty having occurred seems to me to have no relevancy to the construction of the contract. There is nothing unintelligible or irrational in the particular contract to pay after the risk had been turned into a certainty. It may be illustrated as well by the case of a life policy as by any other. Suppose a policy of insurance binds the insurer to pay a certain sum at a certain date, in the event of a particular person failing to survive it, and binds the insured to pay annual premiums down to that date. If the person named in the policy dies before the date in question arrives, it becomes quite certain that the insurer will have to pay on its arrival, but the other party to the contract will none the less have to continue paying the premiums falling due at this late date.

Accordingly, I think that the Lord Ordinary is wrong.

With regard to the argument on compensation, I think it fails in several points. In the first place, it is directly contrary to the theory and terms of the respondents' claim, which is a demand for payment of money which they now say has been applied with their consent in payment of the premiums due under the policy. Then it is not pleaded in their answers, and there are other reasons which seem to strike with equal force against their contention. I am of opinion that the Lord Ordinary's judgment should be recalled, and the deliverance of the liquidators affirmed.

LORD ADAM concurred.

LORD KINNEAR.—I also entirely concur. I think this policy is a contract by which the company gave a positive undertaking to pay the sum of £600 on the 1st of June 1897 if the debtor company failed to pay upon that date, and provided the creditor paid certain specified annual premiums as the consideration for the insuring company's obligation. That seems to

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me the plain and obvious construction of the words of the contract, and it is made clear by a further and more specific statement of the conditions upon which the policy is to be void, one of which is that it becomes void if the premium is not paid within fourteen days after it becomes due.

Now, I agree with your Lordship, that the arrangement made between the creditor and the debtor, with the consent of the insurance company, had no effect either in accelerating the liability of the insurers to pay this sum so as to make it exigible before 1st June 1897, or in discharging the corresponding obligation of the insured to continue to pay the premiums if they desired to retain their right to demand payment. The insurers are barred by their consent to the new arrangement from maintaining that it relieves them of their liability. But they made no new contract with the insured. They are liable under their original contract according to its conditions, and not otherwise. I therefore quite agree in the result arrived at by your Lordship.

LORD M'LAREN was absent.

THE COURT recalled the interlocutor of the Lord Ordinary, and approved the deliverance of the liquidators.

MELVILLE & LINDSAY, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

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THE EARL OF LAUDERDALE AND OTHERS, First Parties.—

Sol.-Gen. Dickson—Macphail.

June 10, 1897.
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MRS MARGARET HOGG AND OTHERS, Second Parties.—*C. J. Guthrie—D. Dundas.*

Superior and Vassal—Entry—Corporation—"Managers and their successors in office."—The Orphan Hospital and Workhouse at Edinburgh, incorporated by royal letters-patent, having purchased certain lands, the superior, by charter of resignation, disposed the lands "to and in favour of the managers of" the corporation "and their successors in office for the use and behoof of the said hospital and their disponees, heritably and irredeemably," and infestment was taken in these terms. *Held* that the entry so given was an entry of the corporation, and was not an entry of individuals as trustees for the corporation.

Campbell v. Orphan Hospital, June 28, 1843, 5 D. 1273, *followed*.

1st DIVISION.

IN 1897 the Earl of Lauderdale and others, the trustees of the Earl, superiors of four husband lands of Quixwood, in the parish of St Bathans, demanded a composition from Mrs Margaret Herriot Hogg and others, then proprietors of these lands, who had obtained an implied entry by the operation of the Conveyancing Act, 1874 (37 and 38 Vict. cap. 94), sec. 4. These proprietors resisted the claim on the ground that apart from the implied entry the fee was full, the vassals being the corporation bearing the name of the Orphan Hospital and Workhouse at Edinburgh, who obtained an entry in 1815.

A special case was presented by Lord Lauderdale's trustees, first parties, and by Mrs Hogg and others, second parties.

The case stated as follows:—By disposition dated 26th May 1806 John Balfour of Balbirnie, in consideration of £7000 paid to him out of the funds of the Orphan Hospital and Workhouse at Edin-

burgh, disposed the lands "to and in favour of the managers of the said Orphan Hospital and Workhouse at Edinburgh, and their successors in office, for the use and behoof of the said Hospital, and their disponees, heritably and irredeemably." No. 159.
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By charter of resignation dated 27th December 1811 James Earl of Lauderdale disposed the lands to "the managers" in the same terms. The tenendas clause bore that the lands were to be holden by the said managers of the Orphan Hospital and Workhouse and their foresaids. The precept of sasine directed "sasine to be given to the said managers of the Orphan Hospital and Workhouse at Edinburgh and their foresaids."

Sasine was taken in these terms conform to instrument of sasine recorded 30th June 1815.

The Orphan Hospital and Workhouse at Edinburgh was in 1742 created an incorporation by royal letters-patent, and declared "as such corporation and by such name to have a perpetual succession."

It was further declared that the corporation should have full power to purchase and enjoy in fee for the use and behoof of the corporation, and to sell and dispose of, lands and other heritages.

It was also declared that the corporation should annually elect out of its members for the time being fifteen persons to be managers, who, or any five of whom, should have the management and direction of all and sundry the estates and effects, real and personal, and other interests and concerns of the corporation.

In 1839 the lands were sold by the then managers of the Orphan Hospital to John Allan, and by a variety of transmissions the property passed to Mrs Margaret Herriot Allan or Hogg and others, who became infest by notarial instrument recorded on 24th March 1873.

The Orphan Hospital and Workhouse still existed as a corporation. All the managers who held office in the year 1811 died long prior to 1st October 1874. It was admitted by both parties that one year's free rent of the lands amounted to £345, 7s. 5d., that if any casualty was exigible it was a composition, and that, in the event supposed, that sum would fall to be paid to the first parties by the second parties.

It was contended by the first parties that the last survivor of the vassals entered in 1811 having predeceased 1st October 1874, the second parties, as proprietors of the lands, were duly entered by the operation of the Conveyancing Act, 1874, sec. 4; and that the casualty of composition was accordingly now due by them to the first parties as superiors of the lands.

The second parties, on the other hand, contended that the intention and effect of the charter of 1811 were to enter the corporation itself as vassal in the lands, or at all events to bar the superior from claiming any other or further payment by way of casualty during the subsistence of the corporation, and that, as the corporation still existed, the fee was full, and accordingly no casualty was due.

The question of law was,—“Is the said sum of £345, 7s. 5d., being a casualty of a composition, due by the second parties as proprietors of the said four husband lands of Quixwood to the first parties as superiors thereof?”

Argued for the first parties;—A composition was payable. The corporation had a corporate style under its letters-patent, and except

No. 159. by that style it could not be vested in property. The entry here was of the managers and their successors in office. *Campbell's case*¹ decided that an entry in these or similar terms was not an entry of the corporation, although in the special circumstances of that case the Court held that the superior was not entitled to demand a composition. In the *Drumsheugh Baths case*² no question on the construction of the title was raised or decided, both parties having assumed that the corporation there had been entered as vassal.

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Argued for the second parties;—A composition was not payable, the corporation being still the entered vassal. The entry of the managers and their successors in office was an entry, or equivalent to an entry, of the corporation. The managers were not named, though that probably would have made no difference, and "successors" was not equivalent to "heirs." There were no individuals, therefore, on whose death the fee might be said to have become vacant. An entry of trustees and their heirs was quite different. That was expressly decided in *Campbell's case*.¹ It could not be said that on the death of a particular manager the fee was in any sense or to any extent in his *hereditas jacens*. There was a perpetual succession of managers, and until that came to an end, which would only be when the corporation came to an end, the fee remained full. The contention of the first parties would involve the payment of a casualty whenever there was a change in the managers; but that was absurd, as there was a change every year. Entries in similar terms to those in the present case had been held or assumed to be entries of a corporation.³

LORD KINNEAR.—The question in this case is whether the casualty of composition is exigible by the superior of certain lands; and the ground upon which his demand is maintained is that the lands have fallen into non-entry by the death of a vassal, who is no more specifically described than by saying that he was the last survivor of a number of persons who were entered as vassals in 1811, and that all of them predeceased the 1st October 1874. It is therefore in consequence of the death of the last survivor of a number of persons entered in 1811 that the superior says that the casualty of composition is now due, inasmuch as the lands are now held by disponees or the successors of disponees of those last entered vassals who had not obtained an entry from the superior before the passing of the Act of 1874. The answer is that in 1811 there was no entry of individual persons upon whose death the fee could become vacant, but that there was a good and effectual entry of a corporation which, as it is still in existence, is still the vassal duly entered. Of course if that be so, so long as the corporation exists, there can be no composition exigible from the pre-

¹ *Campbell v. Orphan Hospital*, June 28, 1843, 5 D. 1273, 15 Scot. Jur. 520.

² *Governors of Heriot's Trust v. Drumsheugh Baths Co.*, June 13, 1890, 17 R. 937.

³ *Hill v. Merchant Company*, Jan. 17, 1875, F. C.; *Gardner v. Trinity House of Leith*, Jan. 23, 1844, 7 D. 286, 17 Scot. Jur. 145; *Governors of Heriot's Trust v. Drumsheugh Baths Co.*, June 13, 1890, 17 R. 937; *Scottish Amicable Society v. Clyde Trustees*, Feb. 18, 1897, 34 S. L. R. 677.

sent proprietors, who but for the Act of 1874 would be still in the position of subvassals under the corporation. No. 159.

Now, the question really depends upon whether the entry in 1811 was or was not the entry of a corporation. Mr Guthrie says, and I think quite rightly, that we are to consider that question upon the footing upon which this case is presented, viz., that there was a good and valid infeftment effected at that time. I am of opinion that it was the infeftment immediately under the superior of a corporation. The law with reference to the entry of corporations is perfectly well settled and clear. The superior is not bound to receive the corporation at all, because the perpetual existence of his vassal may deprive him of his right to casualties; but he may get rid of the disadvantage of having a vassal who never dies in two ways, as the writers on conveyancing point out. He may either make a stipulation which will give him an equivalent for the entries he would have enjoyed on the deaths of successive vassals, or he may enter individual persons as trustees. If he does that, the fee remains full so long as the individuals remain in life, and no longer, and upon the death of each individual or of the last of a number of individuals so entered, the fee passes to the heir of the entered vassal, and must be taken out of his *hereditas jacens* by his successor, who must complete a title in the ordinary way and on the same conditions as if the person entered as trustee had been proprietor of the fee in his own right. These are two ways in which the superior may obviate the disadvantage of having a corporation for his vassal. He may also, if he pleases, enter the corporation as such without making any special stipulations in his charter for payments in place of casualties, and the question is, whether that is not what the superior has done in this case. I think it is.

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It appears to me that there are only two alternative views possible. Either this is an entry of a corporation, or of a perpetual succession of managers for a corporation, which appears to me to be pretty much the same thing, or it is an entry of individuals as trustees. It was suggested in the course of the argument that there might be some case between these two in the shape of an entry of individual managers for the time being and their successors in office, the effect of which, it was suggested, would be to put the successors of the managers actually in office at the date of the entry in exactly the same position as the heirs of individual persons who might be entered as individuals under an infeftment in favour of an individual and his heirs. It does not appear to me that that is a possible mode of completing a title. The entry must be either that of an individual with a descent on his death to his heirs, or that of a perpetual corporation involving no descent. In the case of an entry in favour of managers of an institution and their successors in office, I am unable to see how any successor in office can make up a title on the assumption that he is in the same position as the heir of an individual proprietor. The terms of the entry itself are such as to exclude the transmission to the heirs of the office-holder. There is nothing which can pass into his *hereditas jacens* so as to be taken up by his heir, because the title in his favour is so qualified as plainly to exclude his heirs. If that be so, it appears to me to be quite clear that an entry in such terms as we have here is not an entry of individuals as trustees and their heirs,

No. 159. so as to meet the case suggested by Lord Stair, where, with reference to adjudications, he says,¹—"Incorporations should pitch upon a person and assign their debt to him, expressly to the effect that the lands might be adjudged to him and his heirs for the use and behoof of the incorporation." June 10, 1897.
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I think that, upon a plain construction of the words here, even if there were no further authority upon the matter, it would be quite impossible to hold that an entry in favour of the managers and their successors in office is an entry of particular managers as individuals so as to give the superior casualties upon the death or delinquency of these persons.

But then, I think, there is perfectly sufficient authority to the contrary, and the case of *Campbell*² seems to me conclusive on that question. The question decided there was that an entry in favour of "William McLean and his successors in office for the time being, treasurers of the said corporation," was not an entry of a trustee on behalf of the corporation on whose death composition was exigible. That is the one proposition on which all the Judges are agreed. They differ to some extent as to the true feudal effect and technical character of the entry actually obtained, the Lord Ordinary saying it is the entry of the corporation, and the Lord Justice-Clerk saying that he was quite satisfied with the result of the Lord Ordinary's judgment, but that he could not concur in holding that the corporation had been entered, for he says that "if a society have a corporate style given to it, it cannot be correctly vested with property except by that technical name." Lord Medwyn says that the view of the Lord Justice-Clerk is nearly the same as that of the Lord Ordinary. "He proceeded upon the ground that it was intended to give entry to a corporation. I am quite clear that a conveyance to the treasurer of the institution and his successors is not the same as a conveyance to a trustee and his heirs." Lord Moncreiff gives no opinion as to whether there was an entry to the corporation, but he is quite clear that there is no entry of individual trustees. Therefore it appears to me that the case of *Campbell*² is an authority in favour of the vassals in this case.

I think that the case of *Hill*³ must be taken as an authority also, for although the question does not appear to have been expressly decided there was no doubt expressed in that case that a superior would be entitled to refuse an entry to and in favour of the managers of a corporation, and their successors in office, for behoof of the corporation, just because that would be an entry in favour of the corporation. And the same point was assumed in the case of the *Drumsheugh Baths Company*.⁴

I am therefore of opinion that the question put to us in this case ought to be answered in the negative, and that no casualty of composition is due, inasmuch as by the law in force before 1874, the present vassals would be still holding under the corporation of the Orphan Hospital as mid-superiors between them and the over-superior, and, that being so, the over-superior would not have been entitled to sue a declarator of non-entry because the fee would remain full so long as the corporation exists.

¹ Stair, ii. 3, 41.

² *Campbell v. Orphan Hospital*, 5 D. 1273.

³ *Hill v. Merchant Company*, Jan. 17, 1815, F.C.

⁴ *Governors of Heriot's Trust v. Drumsheugh Baths Co.*, 17 R. 937.

LORD ADAM.—The second parties to this special case are proprietors of No. 159. certain subjects called Quixwood. They were duly infeft in March 1873. The superior now comes forward and claims a casualty of composition on the ground that they are impliedly entered with him by the operation of the Conveyancing Act, 1874, sec. 4. The superior's right to demand a composition depends on whether or not he could have brought an action of declarator of non-entry. That, again, depends on whether or not the fee is full, and to answer that question it is necessary to see what were the terms of entry of the original vassals. We find that by charter of resignation, dated 27th December 1811, James Earl of Lauderdale disposed and confirmed the lands in question to and in favour of the managers of the Orphan Hospital and Workhouse at Edinburgh, and their successors in office, for the use and behoof of the said hospital, and their disponees, heritably and irredeemably. The precept of sasine directs sasine to be given to the "said managers of the Orphan Hospital and Workhouse at Edinburgh, and their foresaids," and infeftment was taken in these terms. The question is whether the managers of the Orphan Hospital still hold the fee of these subjects. I have no doubt that the title might have been taken direct to the corporation, but I am not surprised that it was taken to the managers, for I see that by the constitution of the hospital any five of them are to have the management of the estates and properties of the corporation. That being so, it was natural enough that they representing the corporation should be put into the title. However that may be, the question for us to decide is, whether a destination in the terms I have mentioned is to be read as a gift to the hospital, and whether or not the entry given is to the corporation *qua* corporation. I agree with Lord Kinnear both on principle and authority that it is so. The destination was intended to be, and is in fact, taken for the use and behoof of the corporation, and that being so, the entry is of the corporation. It is not necessary to go over the authorities again, but they clearly shew that that is the legal effect of such a destination. If that be so, then *cadit quæstio*—any further question falls, — for, as we know, a corporation never dies.

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Even if this were not the correct view, there is another, namely, that if we are to read the terms of the destination as one to the managers, and their successors in office, the result is the same. The question is whether the destination implies a perpetual succession. I think it does. When you get a destination to successors in office, then so long as there are successors in office the fee remains full, and it is only when and if all die, and there comes *de facto* to be no successor, that the superior's right to a composition can arise.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

THE COURT answered the question in the negative.

TODD, MURRAY, & JAMIESON, W.S.—H. & H. TOD, W.S.—Agents.

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WILLIAM STIVEN (M'Laren's Trustee) AND GEORGE WILLSHER,
Pursuers (Appellants).—*C. K. Mackenzie—W. Thomson.*
THE NATIONAL BANK OF SCOTLAND, Defenders (Respondents).—
Sol.-Gen. Dickson—John Wilson.

Process—Sheriff—Competency—Declarator of illegal preference—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), sec. 10—The Bankruptcy and Real Securities (Scotland) Act, 1857 (20 and 21 Vict. c. 19), sec. 9—The Sheriff Courts (Scotland) Act, 1877 (40 and 41 Vict. c. 50), sec. 8 (2).—Held (dub. Lord Trayner) that an action praying the Court to find a certain payment by an insolvent debtor within sixty days of bankruptcy to be null and void at common law and under the Act 1696, c. 5, and to find that the payment was an illegal preference, and to set aside the same, was competent in the Sheriff Court.

Bankruptcy—Illegal Preference—Title to sue—Trustee under voluntary trust-deed.—Held (diss. Lord Young) that a trustee under a voluntary trust-deed for behoof of creditors has no title to sue an action to set aside an illegal preference granted by the debtor to the prejudice of prior creditors who have assented to the trust-deed.

Fleming's Trustees v. M'Hardy, March 2, 1892, 19 R. 542, followed.

Held (1) that a prior creditor who alleges that he has been prejudiced by his debtor making a payment after insolvency, and within sixty days of his bankruptcy, has a title to sue for declarator that the payment is null, but (2) (diss. Lord Young) not to sue for payment either to himself or to a trustee for creditors.

Cook v. Sinclair & Co., July 2, 1896, 23 R. 925, followed.

Bankruptcy—Illegal and Fraudulent Preference—Retiring an accommodation bill before maturity—Act 1696, c. 5.—A bank discounted a bill for the drawer, who informed the bank that it had been accepted for his accommodation. Before the bill matured the drawer paid the bill in cash, and the bill was delivered to him. At the time of the payment the drawer was insolvent, and he became bankrupt within sixty days thereafter.

In an action brought against the bank by a prior creditor for declarator that the payment was illegal, it was proved that as at the time of the payment the bank had no knowledge of the drawer's insolvency, and had no reasonable ground for believing that he was insolvent, and that the retiring a bill before maturity was within the ordinary course of a banker's business.

Held that the payment was not an illegal preference within the meaning of the Act 1696, c. 5, and was not a fraudulent preference at common law.

2D DIVISION.
Sheriff of
Forfar.

IN October 1894 John M'Laren discounted with the National Bank of Scotland, Limited, at their branch at Hilltown, Dundee, a bill for £70, 10s., drawn by him upon and accepted by Andrew Gatherer, dated 18th October 1894, payable six months after date. At the date when the bill was discounted, or at all events some time before the bill was retired as after mentioned, M'Laren informed Scott, the bank-agent, that the bill had been accepted by Gatherer as an accommodation bill, and not for value.

On 13th March 1895 M'Laren was insolvent, and issued a circular calling a meeting of his creditors for 19th March 1895.

On 15th March 1895 M'Laren retired the bill, there being yet thirty-seven days of its currency to run, by paying cash to the bank, receiving 1s. 5d. of rebate and the bill. The bank had no other claim against M'Laren, the balance on his current account being, to the extent of a few shillings, in his favour.

On 19th March 1895 a meeting of M'Laren's creditors was held, and a trust-deed was granted by him for behoof of his creditors, William Stiven, accountant, Dundee, being the trustee. Creditors

whose claims amounted to £1000, and who were creditors prior to the date when the bill was paid to the bank, acceded to the trust. No. 160.

On 4th May 1895 M'Laren was rendered notour bankrupt.

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In June 1895 Stiven, as trustee under the trust-deed, and George Willsher, wine-merchant, Dundee, a creditor of M'Laren prior to 15th March 1895, when the bill was retired, raised in the Sheriff Court at Dundee an action against the National Bank of Scotland, Limited, in which they prayed the Court,—“To find to be null and void at common law, and also under the Act 1696, c. 5, a transaction whereby the said John M'Laren transferred to the defenders on or about the 15th day of March 1895, a sum of £70, 10s., and to find that said transaction was an illegal preference, and to set aside the same, and to grant decree against the defenders ordaining them to pay to the pursuers, or alternatively, to the said William Stiven, as trustee fore-said, and as representing the creditors of the said John M'Laren, the sum of £70, 10s. sterling, with interest thereon at the rate of 5 per centum per annum from the said 15th day of March 1895.”

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The pursuers, in cond. 3, averred,—“The prepayment of said bill to the defenders, who knew of the insolvency and imminent bankruptcy of the said John M'Laren on the 15th day of March, was on the part of the said John M'Laren with the object of giving a preference to the defenders, and was entirely voluntary, within sixty days of his notour bankruptcy, and in satisfaction or further security of the debt of the said John M'Laren to the defenders, which was not due or exigible, and it is accordingly voidable under the Act 1696, c. 5. It was also collusive and fraudulent, and it was illegal and in prejudice of the rights of the said George Willsher and the other prior creditors who are represented by the said William Stiven.”

The pursuers pleaded;—1. The pursuers are entitled to decree as craved, because (a) the prepayment in question having been made by the said John M'Laren voluntarily within sixty days of his notour bankruptcy in satisfaction of a debt not then due or exigible, is voidable at the instance of the pursuers or one of them under the Act 1696, c. 5. (b) The prepayment being illegal and fraudulent and not in the course of business, but after suspension of payment, and in prejudice of the rights of the said George Willsher and of other prior creditors represented by the said William Stiven, is voidable at common law.

The defenders pleaded;—1. No title to sue. 2. The pursuers' statements are irrelevant and insufficient to support the conclusions of the petition. 4. The transaction in question being payment of a debt for value received in the ordinary course of business, and not a voluntary deed granted either for the satisfaction or further security of the defenders, is not reducible under the Statute 1696, c. 5. 5. There being no fraud or collusion on the part of the defenders, the payment made to them is not reducible at common law.

A proof before answer was allowed.

The facts above narrated were proved. It was also proved that no notice had been given to the defenders or Scott of the circular calling the meeting of creditors, and that neither the defenders nor Scott were aware at the time of the payment that M'Laren was insolvent, nor had they reasonable grounds for thinking that he was insolvent; that the retiring of a bill before maturity either by the drawer or acceptor thereof by payment of its contents was well known in banking business and of not infrequent occurrence, and was a transaction within the ordinary course of the business of a banker.

No. 160. On 4th July 1896 the Sheriff-substitute (Campbell Smith) pronounced this interlocutor:—" . . . (5) Finds it not proved that the payment in cash now sought to be set aside was contrary to the Act 1696, c. 5, or that it was fraudulent at common law; (6) Finds *separatim* that the leading pursuer took the estate of the truster *tantum et tale* as he possessed it, that he is possessed of no rights in it that did not belong to John M'Laren, and that John M'Laren could have had no title to sue the present action: Therefore assoilzies the defenders from the conclusions of the action."

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On appeal, the Sheriff (Comrie Thomson) dismissed the appeal, and adhered to the interlocutor appealed against.*

The pursuers appealed, and argued;—I. By getting payment in cash of an immature bill the defenders had acquired a preference over the other creditors to which they were not entitled by law. The transaction was (1) null and void under the Act 1696, c. 5. In order to avoid the operation of the Act it behoved the defenders to shew that the transaction fell within one of the three recognised exceptions as being (a) a cash payment; or (b) a payment in the ordinary course of business; or (c) a *novum debitum*. Now, the third exception was not pleaded, and the transaction could not be said to fall within the first and second exceptions. It was not a cash payment of a debt due and prestable, which it was admitted¹ would be effectual in the absence of fraud, and it was not a payment in ordinary course. The only period at which in the ordinary course of business a creditor could legally demand payment of a bill (and that was the test to be applied) was at its maturity. Payment of a bill some weeks before its maturity was not a payment in ordinary course. Even if the transaction were held to be one in ordinary course, that did not make it good if there was collusion on the debtor's part in order to give a preference,² and it was not necessary to the operation of the Act that the creditor should be proved to have been in knowledge of the debtor's impending insolvency.³ It was enough if the debtor inclined to favour him and give him a preference over other creditors. Here, knowing himself to be insolvent, M'Laren, two days after he had issued his circular to the creditors, retired the bill with the defenders when there were still thirty-seven days to run upon it. That was just such a preference as the Act struck at.⁴ *Loudon Brothers*⁵ had

* "NOTE.— . . . When the defenders discounted the bill they practically bought it. When the contents of the bill are paid before expiry, it is bought back again, the bank making a rebate or allowance off their original discount in proportion to the unexpired currency of the bill. Such a transaction is in the ordinary way of banking business, and I do not think that it can be said that the defenders took payment by way of deposit as security."

¹ *Coutts' Trustee v. Doe & Webster*, July 8, 1888, 13 R. 1112.

² *Bell's Com.* vol. ii. 201.

³ *Pattison v. Allan*, Dec. 3, 1828, 7 S. 124, *per* Lord Newton, 126.

⁴ *Guild v. Orr Ewing & Co.*, Jan. 16, 1858, 20 D. 392, *per* Lord President (Colonsay), 397, 30 Scot. Jur. 200; *Mitchell v. Rodger*, June 26, 1834, 12 S. 802, 6 Scot. Jur. 449; *Speir v. Dunlop*, May 30, 1827, 5 S. 729; *M'Cowan v. Wright*, March 10, 1853, 15 D. 494, *per* Lord Wood, 512, 25 Scot. Jur. 306; *Tamplin v. Diggins*, Dec. 14, 1809, 2 Campbell, 311, *per* Lord Ellenborough, 314; *Rose v. Falconer*, Jan. 26, 1868, 6 Macph. 960, 40 Scot. Jur. 550; *Morley v. Culverwell*, 1840, 7 M. and W. 174, *per* Baron Parke, p. 182; *Blinchow's Trustee v. Allan*, Jan. 22, 1831, 9 S. 317, 3 Scot. Jur. 201.

⁵ *Loudon Brothers v. Reid & Lauder's Trustee*, Dec. 7, 1877, 5 R. 293.

no application, unless the Court could come to the conclusion that there was no intention to give a preference. (2) The transaction was null and void at common law. It was a voluntary act done by one conscious of his insolvency, and in order to confer a preference on one of the creditors. Where these elements concurred, fraud was presumed,¹ and it was unnecessary that complicity on the part of the creditor should be proved.²

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II. The pursuer Stiven had a good title to sue the action in the interests of the creditors whom he represented, and in any view Willsher's title was good. He was a prior creditor, and was entitled to reduce the transaction and to have the money restored to the general fund.³

Argued for the defenders;—(1) As regarded the Act 1696, c. 5, the case fell within the first two exceptions. The transaction was a cash payment, and in the ordinary course of business. The defenders got no advantage from being paid by M'Laren, because they could look to Gatherer.⁴ If there was any preference it was one in Gatherer's favour. It had been nowhere decided that a cash payment of an immature bill was outside the ordinary course of business. It was proved in this case that retiring a bill before maturity by the drawer or acceptor by payment of its contents was a transaction in the ordinary course of a banker's business. The fixed term of payment was adjoined to the bill solely in the debtor's interest, and it did not prevent his paying the bill sooner if it suited him to do so.⁵ In retiring the bill, then, before its maturity, there was nothing outside the ordinary course of business, and there was therefore no preference to the defenders in contravention of the Act 1696, c. 5.⁶ Further, the Sheriff was right in holding that the transaction was a *novum debitum*. The bill was a negotiable instrument, and M'Laren had bought it from the bank. The cases of *Blincoe's Trustee*,⁷ *Mitchell*,⁸ and *Speir*,⁹ were cases where the debtor deposited money in bank in order to meet bills when they became due. They obviously did not apply here, where M'Laren had paid for the bill and taken it away with him. In *Guild's case*¹⁰ all the Court said was that some payments in cash might be struck at by the Act. *Tamplin's case*¹¹ was like *Speir's*⁹ case, a case of deposit. (2) The transaction was not challengeable at common law. No fraud had been proved on M'Laren's part, or any interest to give an undue preference to the defenders. (3) The trustee had no title to sue the

¹ Goudy on Bankruptcy, 2d ed. p. 39.

² *Guild v. Orr Ewing & Co.*, 20 D. 392, *per* Lord President (Colonsay), p. 398; *M'Cowan v. Wright*, 15 D. 494.

³ *Cook v. Sinclair & Co.*, July 2, 1896, 23 R. 925.

⁴ *Dominion Bank v. Bank of Scotland*, July 19, 1889, 16 R. 1081, and June 9, 1891, 18 R. (H. L.) 21.

⁵ *Forbes on Bills of Exchange*, p. 142, sec. 8; *Byles on Bills*, 15th ed. p. 297.

⁶ *Pattison v. Allan*, 7 S. 124; *Loudon Brothers v. Reid & Lauder's Trustees*, 5 R. 293.

⁷ *Blincoe's Trustee v. Allan*, 9 S. 317.

⁸ *Mitchell v. Rodger*, 12 S. 802.

⁹ *Speir v. Dunlop*, 5 S. 729.

¹⁰ *Guild v. Orr Ewing & Co.*, 20 D. 392.

¹¹ *Tamplin v. Diggins*, 2 Campbell, 311.

No. 160. action for payment, for this was a voluntary trust-deed, and he took the estate *tantum et tale* with M'Laren, who had made the payment, and who could not challenge it.¹ Willsher, as a private creditor, had equally no title to demand payment to the trustee or himself of the sum sued for.²

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The cause was taken to avizandum, but was subsequently put out for further hearing on doubts suggested by Lord Trayner as to the competency of the action.

Argued for the pursuers;—The action was not such an action of reduction as was incompetent in the Sheriff Court. It was not an action to reduce a deed with penal consequences for non-appearance. It was an action with petitory conclusions for restoration to the *status quo ante*. It was competent under the Bankruptcy Act of 1856 and 1857,* and so far as it was an action of declarator, it was also competent under the Sheriff Courts Act, 1877.†

Argued for the defenders;—The action was incompetent so far as regarded the reductive and declaratory conclusions. If the title to sue was upheld, it was not disputed that the action was competent so far as regarded the petitory conclusions.³

At advising,—

LORD YOUNG.—(After stating the facts)—There is no objection upon record to the competency of the action. There is an objection to the title to sue. The case was argued before us upon its merits, and when we had the case at avizandum we thought it fitting that there should be an opportunity given to the parties to discuss the question of the competency of the action at the instance of those parties in the Sheriff Court, and the case was accordingly put out for hearing upon that matter, and I think it will be necessary for us to express our opinion upon it, for if the action is incompetent of course there are no merits which can be dealt with.

I am of opinion that there is a title to sue, and I am of opinion that the action is competent. The ground upon which a doubt occurred as to the

¹ Fleming's Trustees v. M'Hardy, March 2, 1892, 19 R. 542.

² Cook v. Sinclair & Co., July 2, 1896, 23 R. 925.

³ Moroney & Co. v. Muir & Sons, Nov. 5, 1867, 6 Macph. 7.

* The Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), sec. 10, enacted,—“Deeds made void by this Act, and all alienation of property by a party insolvent or notour bankrupt, which are voidable by statute or at common law, may be set aside either by way of action or exception, and a decree setting aside the deed by exception shall have the like effect as to the party objecting to the deed as if such decree were given in an action at his instance.”

The Bankruptcy and Real Securities (Scotland) Act, 1857 (20 and 21 Vict. c. 19), sec. 9, enacted,—“The tenth section of the first hereinbefore recited Act” (the Act 19 and 20 Vict. c. 79) “shall be taken to apply to actions and exceptions as well in the ordinary Court of the Sheriff as in the Court of Session.”

† The Sheriff Courts (Scotland) Act, 1877 (40 and 41 Vict. c. 50), sec. 8, enacted,—“The jurisdiction powers and authorities of the Sheriff and Sheriff-substitute of Scotland shall be, and the same are hereby extended to . . . (2) actions of declarator for the purpose of determining any question relating to the property in or right of succession to moveables where the value of the subject in dispute does not exceed £1000.”

competency was that this is an action of reduction, and that a reduction of this kind is not competent in the Sheriff Court, and that as to an action for payment, the trustee under a voluntary trust for creditors, although the creditors accede, takes *tantum et tale* with the truster, and that he cannot sue an action on the ground that this payment, which the truster could not have challenged, he having made it himself, was contrary to the Act of 1696 or contrary to the common law. My opinion is against that contention. I think, in the first place, that a reduction is not necessary in order to challenge a preference as being contrary to the Act of 1696, cap. 5, or contrary to the rules of the common law. It is enough to have an action in which it may be shewn that the preference complained of was a preference given contrary to the provisions of the statute, or contrary to the rules of the common law. There is no deed to be reduced; there is no fact to be established except that the circumstances were such that the Act of 1696 applies to the payment, and that it was contrary to the provisions of the Act, or that the payment was fraudulent and a violation of the rules of the common law. I see no objection to the facts necessary to establish either of these propositions—there being no deed in the way which requires to be removed—being established without the necessity of a reduction. Indeed, there is nothing here to reduce but only an averment of facts which require to be established, shewing, as the pursuer contends, that the payment which he complains of and seeks restoration against was a violation of the statute or of the rules of the common law. Even if there had been a deed to set aside or a deed standing in the way, I think it is now quite established under recent legislation and in practice that in the Sheriff Court the Sheriff can inquire as to the propriety of granting a deed under circumstances averred and established, and as to whether or not it should be disregarded, without the necessity of a reduction to set it aside and declare it to be null and void, extinguishing the deed and putting it out of existence. I think there is abundance of authority for that. But there is no deed here, and there is therefore nothing to be established in the case at the instance of the trustee for creditors whose debts were due prior in date to the payment, restoration of which he seeks, except facts which shew that money was paid to the defenders in the case contrary to the statutory rule or contrary to the common law rule, and that he ought to have the money for distribution among the creditors. The consent of the whole creditors would not be necessary; in a matter of competency it is sufficient that any prior creditors are parties to the action. If the Sheriff-substitute was of opinion that the trustee had no title as representing prior creditors, I entirely differ from him. I think that a trustee who represents prior creditors who have committed their estate, or the estate which is liable to them for the payment of their debts, to his management for their behoof, has a title to sue in any matter of this kind in which they are interested. He suing for behoof of the creditors who had assented to the trust would have a title to bring an action against any debtor to the estate. It is not a voluntary trust revocable by the truster, for it is assented to by the creditors and exists for their behoof and has been acted upon. They have omitted a proceeding which they might otherwise have taken for their behoof, but if there were any technical difficulty through that (I am of opinion that there is none) it

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No. 160/ would in my judgment be obviated by one of the prior creditors individually being also a pursuer in the action.

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Therefore, being of opinion that the action is competent, as the parties originally assumed it to be, stating and pleading nothing to the contrary, we have to consider whether the judgment of the Sheriff on the merits is or is not well founded, and that question is just, whether upon the facts as established—for there has been a proof—we can affirm cond. 3. I am of opinion that we cannot. In any challenge of a proceeding of this kind I think we must look to the truth and substance of the matter, and I think that the substance of the matter is that this accommodation bill, which the bank's customer got his father-in-law to accept, was neither more nor less than a security to the bank for the payment of the balance of his account due to them. It did not pay that balance. If the bill had run on to maturity, and had been paid, then it would have paid the balance to the amount of it; but if not paid, it paid nothing, and was in substance merely a security in the hands of the bank. I have noticed the fact that, as matter of book entry, it was entered in the bank as discounted to M'Laren, and the amount put to the credit of his account. Well, I think that is provisional, and would not interfere with the substance of the thing. It was not meant, and I think could not legitimately be held in practice that the bank was in any different position from this, that they had M'Laren as their debtor for £70, 10s., with an accommodation bill accepted by his father-in-law in security of the debt. I may just observe in passing that if M'Laren had gone to the bank and paid £70, 10s. towards the extinction of the debt due by him on his account, there could have been no possible challenge of that under the Statute of 1696 or at common law, and when he goes to the bank and says that his father-in-law desires to have back that accommodation bill and states that he is willing to pay the £70, 10s. on the bill being given to him, I think he was in the exercise of his right. I do not inquire how he got the money; he may have got it in a manner which was not in the exercise of right, but he was possessed of the money, and he was entitled to go to the bank and say, "I want that bill given up, and here is the amount, the whole amount of it." And the bank were entitled—I do not consider whether they were bound, although I rather incline to think that they only acted legitimately, and would not have acted legitimately if they had acted otherwise—to give up the bill on payment of the whole amount, even six weeks before they could have enforced payment of the bill. I think there is a great deal in the Sheriff's view that this was merely a purchasing of that bill by M'Laren for cash for the full value of it. I think that is the substance of it, and that in that there is nothing contrary to the Act of 1696, and nothing fraudulent at common law which would entitle us to set aside the transaction, or rather, I should say, entitle prior creditors, or their trustee, legitimately acting for them, to have restoration of the money so paid.

I am therefore of opinion here upon the facts as averred, and upon the evidence on which these facts rest, which must be judged of by us in this concluded case, that no case has been made out entitling the pursuer to have this payment set aside or the prayer of this petition granted. The way to have set aside a payment of this kind is to have the money restored. I

think the term reduction is not very applicable to it except in the familiar enough sense of reduction—restoration. There is nothing to reduce ; there is only restoration of the money, which is payment of the money. And that is the conclusion here ; the summons seeks for decree against the defenders, ordaining them to pay to the pursuers, or alternatively to William Stiven, as representing the creditors of the said John M'Laren, the sum of £70, 10s., with interest from a certain date. The facts upon which that conclusion rested must be established to the satisfaction of the Court before the payment prayed for can be ordered. I am of opinion that the facts entitling them to that order or decree for payment have not been established, and that therefore the judgment of the Sheriff should be affirmed, this appeal being refused, with expenses.

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I should like to say that I think there is no declarator here, and no declarator is necessary. There is a conclusion in the petition—a superfluous conclusion in my opinion—to find that the payment was contrary to the statute, and contrary to the common law. I think a finding to that effect is just a finding in law, and that the proper conclusion in the prayer is the latter part of it, to conclude for payment to the pursuers of the sum mentioned. In an interlocutor proceeding on a proof the Sheriff would have to find in point of fact so-and-so, and find in point of law that the payment was in violation of the statute and against the common law. I think that is no declarator in the proper sense, but merely a finding in point of law.

LORD TRAYNER.—The doubts which I expressed in the course of the debate as to the competency of this action as laid have not been removed, but as I understand none of your Lordships share in my doubts, but, on the contrary, are of opinion that this action is competent, I do not think it necessary to say anything on that subject. On the question of title to sue, I do not concur in the views expressed by Lord Young. I agree with the Sheriff-substitute that the pursuer Stiven had no title to sue this action as laid, and that the pursuer Willsher had no title to sue or insist in the petitory conclusions. These questions, I think, are decided by the cases of *Fleming's Trustees*¹ and *Cook*.²

On the merits of the action I agree with the result at which the Sheriffs have arrived. It is not proved, in my opinion, that at the time when the bill in question was retired the defenders or their agent Mr Scott knew that M'Laren was insolvent, or had reasonable ground for believing him to be so. At that date the balance on his account with the defenders was at his credit. I regard the payment made to the defenders on 15th March 1895 as a cash payment of a debt due although not then exigible, but a payment at the same time which the defenders were not entitled to refuse. I think it is (as a general rule) the right of every debtor to pay off his obligation and insist upon a discharge of it before the date on which the creditor could exact payment or performance, provided the period fixed for performance has not been so fixed in the interest of the creditor. Here the date of payment on the bill was a date fixed in the interest of the debtor, and of him alone, and the benefit thus conceived in his favour he was entitled to

¹ 19 R. 542.

² 23 R. 925.

No. 160. renounce. Accordingly I think M'Laren, who was an obligant on the bill in question to the defenders, was entitled, before the expiry of its currency, to take it up, and the defenders could not refuse to take payment and deliver up the bill. I am satisfied also that the defenders, in receiving payment from their debtor, and delivering up the bill before it had matured, were acting in the ordinary course of their business. Such a transaction (although not so frequent as the retiring of bills on their due date) is quite well known, and not infrequent—so well known and recognised that banks have a fixed rate of rebate which is paid to the debtor retiring his bill before maturity. I would be slow to impose on the bankers the duty, in every case where a debtor proposes to pay his bill before maturity, of inquiry into the circumstances of their debtor before they accepted payment, with the risk that if they did not do so the transaction might be held to be an illegal preference. In this case I think there was a cash payment made by a debtor to his creditor in the ordinary course of business, and such a payment is not struck at by the Act 1696, c. 5. I think further that there is no room for the suggestion that this transaction was a fraud at common law.

June 12, 1897.
M'Laren's
Trustees v.
National
Bank of Scot-
land, Limited.

LORD MONCREIFF.—I am not prepared to hold that the petition is incompetent. It is true that the trustee, being a trustee under a private trust-deed, who has not obtained the consent of all the creditors, has no title to sue—*Fleming's Trustees v. M'Hardy*,¹ and it is also true that here the private creditor has no title to demand payment to himself or to the trustee of the sum sued for—*Cook*.² But *quoad ultra* the pursuer Willsher, the private creditor, has a good title to insist on the remaining conclusion of the action, provided that conclusion is competent and separable, and not merely ancillary to and dependent upon the petitory conclusion.

Now, admittedly reduction is not competent in the Sheriff Court, and until 1877 actions of declarator were also incompetent in the Sheriff Court. But I do not read the first part of the prayer of the petition as a conclusion for reduction. Reduction is not necessary; there is no deed to be reduced, and the prayer consists merely of what is in substance a declarator that the transaction in question amounts to an illegal preference, and a prayer that it should be set aside. This, I think, is competent in the Sheriff Court under section 10 of the Bankruptcy Act of 1856, and section 9 of the Bankruptcy Act of 1857, and section 8 (2) of the Sheriff Court Act of 1877. In regard to the latter statute, it is true that the creditor is not entitled to payment of the whole sum sued for, but he has an interest in that sum, and the statute says that actions of declarator shall be competent in the Sheriff Court for the purpose of determining any question of property in moveables where the value does not exceed £1000. It may be that the pursuer, the private creditor, might have to institute further proceedings before he could make his right good, but I think that he was entitled to sue the action to the effect of having the preference declared null.

The only defenders called in this action are the National Bank of Scotland, and the only transaction which is sought to be reduced is a payment

¹ 19 R. 542.

² 23 R. 925.

of £70, 10s. made to them by M'Laren on 15th March 1895 for the purpose No. 160.
of retiring a bill due five weeks later, viz., 21st April 1895, on which his
name appeared as drawer, and that of his father-in-law, Gatherer, as acceptor. June 12, 1897.
M'Laren's
Trustee v.
National
Bank of Scot-
land, Limited.
Clearly this was a bill drawn for the accommodation of M'Laren.

The result of the authorities is that payment by anticipation by a person insolvent of a debt not yet exigible may or may not, according to circumstances, be reducible under the Act 1696, c. 5, or at common law. *Prima facie*, a payment so made indicates an intention to give the creditor a preference. But this presumption, such as it is, can be redargued, and if it can be shewn that the payment was made in the ordinary course of trade, or of the dealings between the parties, it will stand.

If this had been simply a payment of a debt due to the bank, there is a considerable body of evidence to shew that M'Laren was insolvent when he made it, and knew himself to be so; that the payment was not made in the ordinary course of dealing; and that it was made for the protection of Gatherer, the acceptor on the bill. But in order to the reduction of such a transaction, it must be shewn that the creditor has received a preference, and on this point I think the pursuers' case against the bank fails. The bank did not merely receive payment of a debt and discharge it; they held a document of debt upon which Gatherer's name appeared as acceptor, and this document they gave up to M'Laren in return for the sum in the bill. Now, it is not proved that Gatherer was not good for the money, and if he was good for it the bank gained nothing by the transaction. The preference, if preference there was, was one in favour not of the bank but of Gatherer, who is not a party to this action.

Given another good name on the bill and ignorance on the part of the holder of the drawer's insolvency, such a transaction cannot be set aside *quoad* the holder—*Mitchell v. Rodger*, 1834.¹

If, however, it were proved that the bank were aware of M'Laren's insolvency, and were parties to a transaction by which Gatherer was benefited at the expense of M'Laren's other creditors, the transaction could not stand. On this point I confess I have felt some difficulty. There are passages in Mr Scott's own evidence and in his letters which the appellant's counsel relied on with some force, as indicating that Mr Scott knew, or should have known, that M'Laren was insolvent; and the question is, whether it is proved that this knowledge amounted to certainty or merely to suspicion. On the whole, I do not think it is proved that he knew that M'Laren was insolvent, and therefore the bank must be assoilzied.

LORD JUSTICE-CLERK.—In regard to the title to sue I agree with the opinions of Lord Trayner and Lord Moncreiff. If the case had to be decided on its merits, I would agree with the opinions of all your Lordships.

THE COURT pronounced the following interlocutor:—"Recall the interlocutors appealed against: Find in fact (1) that in or about the month of October 1894 the now deceased John M'Laren discounted with the defenders, at their branch office, Hilltown, Dundee, a bill for £70, 10s., drawn by him upon and accepted

¹ 12 Shaw, 802.

No. 160.

June 12, 1897.
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land, Limited.

by Adam Gatherer, Laurencekirk, dated 18th October 1894, and payable six months after date; (2) that the said John M'Laren, at the date when the said bill was discounted, or at all events some time before said bill was retired as after mentioned, informed David Peebles Scott, the defender's agent at their said branch office, that said bill had been accepted by the said Adam Gatherer as an accommodation bill, and not for value; (3) that on 13th March 1895 the said John M'Laren was insolvent, and issued a circular calling a meeting of his creditors, to be held on 19th March thereafter, and that he was rendered notour bankrupt on 4th May 1895; (4) that on 15th March the said John M'Laren retired the foreshaid bill, there being yet thirty-seven days of its currency to run, by paying in cash to the defenders, at their said branch office, the full amount of said bill, less the amount of 1s. 5d., being the rebate to which he was entitled on account of retiring said bill before maturity, and that said bill was then delivered to him; (5) that when said bill was retired as aforesaid no notice had been given to the defenders or their agent, Mr Scott, of the circular which had been issued calling a meeting of M'Laren's creditors, and that neither the defenders nor their agent, Mr Scott, were aware that M'Laren was insolvent, nor had reasonable grounds for thinking that he was insolvent; (6) that the retiring of a bill before maturity, either by the drawer or acceptor thereof, by payment of its contents, is well known in banking business, and of not infrequent occurrence, and is a transaction within the ordinary course of a banker's business: Find in law (1) that the pursuer William Stiven, as trustee under a voluntary trust-deed granted by the said John M'Laren, has no title to sue this action; (2) that the pursuer George Willsher, as an individual creditor of the said John M'Laren, has no title to sue or insist in this action to the effect of obtaining decree in terms of the petitory conclusions of the petition; (3) that the payment of £70, 10s. to the defenders by the said John M'Laren as aforesaid was not an illegal preference within the meaning of the Act 1696, cap. 5, and that such payment was not a fraudulent preference at common law: Therefore assoilzie the defenders from the conclusions of the action, and decern."

J. DOUGLAS GARDINER & MILL, S.S.C.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

No. 161. PHILIP MUSGRAVE (Surveyor of Taxes), Appellant.—*Sol.-Gen. Dickson*
—*A. J. Young.*

June 16, 1897.
Inland
Revenue v.
Magistrates of
Dundee.

MAGISTRATES AND TOWN-COUNCIL OF DUNDEE, Respondents.—
Johnston—Salvesen.

Revenue—Income-Tax—Public Free Library—"Buildings used solely for the purposes" of Institution—Subscription Library—Exemption—Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 61, No. 6.—Section 61, Rule 6, of the Income-Tax Act, 1842, exempts from duties under Schedule (A), "any building the property of any literary or scientific institution, used solely for the purposes of such institution."

In the buildings of the Dundee Free Library accommodation was given to books belonging to the Dundee Subscription Library, and the expenses

attending their safekeeping and circulation among the subscribers were defrayed out of the revenues of the Free Library. In consideration of the accommodation and services so given, each book, after being in circulation for a year, became the property of the Free Library. No. 161.
June 16, 1897.

Held that the buildings in question did not fall within the above exemption, inasmuch as they were not used "solely" for the purposes of the Free Library. Inland
Revenue v.
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Dundee.

AT a meeting of the General Commissioners of Income-Tax for the Dundee District of the County of Forfar, held at Dundee on 3d December 1896, the Magistrates and Town-Council of Dundee appealed against an assessment, under Schedule A of the Income-Tax Acts, for the year 1896-97, on £500 made upon them as occupiers of a portion of the buildings known as the "Albert Institute," Dundee. 1st Division.
Court of
Exchequer.

It was contended on behalf of the Magistrates and Town-Council that the Albert Institute buildings, being used as a free library, reading-room, museum, and permanent art gallery, without any payment demanded or made for admission, or for any instruction afforded by lectures or otherwise therein, they were exempt from taxation.

The Surveyor of Taxes contended that the Albert Institute did not come within the exemption granted under the above recited Act, in respect that in one of the rooms of the Free Library, and under the control of the librarian of the Free Library, there was a Subscription Library of 1500 volumes, with a membership of about 220, each member paying an annual subscription of one guinea; that the subscribers appointed a committee of management annually, and the books of the library, after being one year in circulation, were then handed over to and became the absolute property of the Free Library.

The Commissioners, after hearing parties, discharged the assessment. Thereupon the Surveyor of Taxes asked and obtained a case for the Court of Exchequer. The case stated as follows:—"The Magistrates and Town-Council of Dundee are the proprietors of the property known as the Albert Institute, in the city of Dundee, which is administered under sections 18 to 27, both inclusive, of the Public Libraries Consolidation (Scotland) Act, 1887.

"The Public Libraries Acts for Scotland were adopted by the town of Dundee in the year 1866, and since then the Albert Institute buildings have been occupied (except in so far as otherwise occupied) and administered by the Free Library Committee, duly appointed annually under and for the purposes of the Public Libraries Acts.

"In 1876 a Subscription Library was formed by a number of gentlemen in Dundee. The subscription was £1, 1s. per annum; and by the third rule of the rules of the Dundee Subscription Library it is provided that 'The chief librarian and clerk of the Free Library Board shall act as librarian and clerk of the Subscription Library, the books of which shall be in his custody.' Rule 4 provides that 'The Committee of Management to be elected by the subscribers at the annual meeting shall consist of thirteen persons, of whom the Provost shall be chairman, the treasurer shall be a member *ex officio*, four of the members to be elected must also be members of the Free Library Board for the time being (if they are subscribers), and seven shall be chosen from the general body of the subscribers.' Rule 12 provides that 'The books of the Subscription Library shall be kept separate

No. 161. from those of the other libraries, and also marked with a distinctive label for twelve months after their purchase, at the expiry of which time they shall be stamped with the seal of the Dundee Free Library and Museum, and all right and property in them on the part of the subscribers shall cease and determine; it being understood that in consideration thereof the expenses attending their circulation and safe-keeping shall be defrayed from the ordinary revenues of the Free Library Board.'

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"The books belonging to the Subscription Library are kept in a public room of the Albert Institute buildings, not reserved for the members of the Subscription Library, but open to and used by the public. These books occupy four, and rarely five, of the many bookshelves in the said room. They never exceed 1500 in number. On the other shelves in that room there are over 15,000 books of the Free Library Lending Department.

"Any member of the public wishing a book from the Subscription Library for any special literary purpose at once gets it on application to the librarian as a matter of favour, but not as a matter of right; and there is not, on the part of the members of the Subscription Library, any exclusive possession of any room whatever."

The question for the opinion of the Court of Exchequer was—"Whether, in the circumstances above mentioned, the Albert Institute, Dundee, or any part thereof, is exempt under section 61 of 5 and 6 Vict. cap. 35?"

At advising,—

LORD PRESIDENT.—In accordance with the *Manchester*¹ case, the building in question is the property of the Free Library of Dundee, established under the Public Libraries Acts; and the question is whether it is used solely for the purposes of that institution.

In my opinion, the case shews distinctly that it is not. It is used also for the purposes of another institution, viz., the association or club which owns the Dundee Subscription Library. That society consists of people who are not content with the books of the Free Library, and buy with the subscription of the members other and I suppose newer books. The society have an arrangement with the Free Library by which the Subscription Library is housed in the buildings in question, and gets the services of the chief librarian of the Free Library, in return for which it hands over each book it buys after retaining it for a year only. This seems a very sensible arrangement for both parties. The Subscription Library getting house room and services for nothing is able to devote the whole of the subscriptions to the purchase of books, while the Free Library gets in return some £220 worth of books each year. It is a very suitable friendly treaty between two literary institutions; but it has no effect in identifying the two, which are necessarily distinct.

The only theories upon which it could be said that to use the building for the purposes of the Subscription Library is to use it for the purposes of the Free Library are two,—(1) It is said that, as the rent paid in books for room and services is applied to the Free Library, the use is for its purposes. But this would prove too much, for it would equally apply to the money

¹ Mayor, &c. of Manchester v. M'Adam [1896], L. R., Appeal Cases, 500.

rent which might be paid by a chess club or a lodger. (2) It is suggested that reading, or the promotion of reading, is the purpose of the Free Library. This seems to me much too vague. I think the purposes of the institution, in the sense of the Act, are the purposes of the Free Library of Dundee, as a concrete literary institution, which pursues its ultimate object according to its statutory constitution. Lending out to guinea subscribers books bought with funds not belonging to the Free Library, and according to the rules of a private society, is not one of the purposes of a Free Library established under the Free Libraries Acts.

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I am for reversing the decision of the Commissioners and sustaining the assessment.

LORD ADAM.—In this case the Magistrates and Town-Council of Dundee appealed against an assessment laid upon them under schedule A of the Inland Revenue Acts as occupiers of a portion of certain buildings known as the “Albert Institute,” Dundee. The Commissioners sustained the appeal, and we have now to say whether their determination was right.

The appeal was rested on that part of rule 6 which allows an abatement “on any building the property of any literary or scientific institution used solely for the purposes of such institution.”

It appears from the case that the buildings in question are the property of the Magistrates and Town-Council of Dundee, and are used for the purposes of the Public Free Library.

Having regard to the *Manchester Free Library* case in the House of Lords, I am constrained to hold that the Public Free Library is a literary institution, and that the buildings in question are, in the sense of the Act, the property of that institution, although feudally vested in the Magistrates and Town-Council.

But to entitle to exemption it must be further shewn that the buildings are used solely for the purposes of such institution, i.e., of the Public Free Library.

It appears that there is in Dundee another institution called the Dundee Subscription Library, which has upwards of 200 members, and who acquire about 1500 volumes annually.

These volumes are accommodated in the buildings in question. They remain the exclusive property of the Subscription Library for one year, and are under the custody of the chief librarian and clerk of the Free Library Board, who acts as librarian and clerk to the Subscription Library. It appears to me to be clear that the buildings are used for the accommodation and for the purposes of the Subscription Library, and therefore that they are not used solely for the purposes of the Public Free Library.

The arrangements with the Subscription Library may probably be an advantageous one for the Free Library, but I do not think that we have anything to do with that—the only question, as I think, being whether the buildings are used solely for the purposes of the Free Library. I do not think they are, and on that short ground I think that the determination of the Commissioners is wrong.

LORD KINNEAR concurred.

No. 161. LORD M'LAREN was absent.

June 16, 1897. THE COURT reversed the determination of the Commissioners and
Inland sustained the assessment.
Revenue v. SOLICITOR OF INLAND REVENUE—MORTON, SMART, & MACDONALD, W.S.—Agents.
Magistrates of Dundee.

No. 162. DAVID TOD, Appellant.—*C. J. Guthrie—Aitken.*
COMMISSIONERS OF INLAND REVENUE, Respondents.—*A. J. Young.*

June 16, 1897. *Revenue—Stamp—Conveyance on Sale—Decree under Heritable Securities*
Tod v. Inland Act, 1894 (57 and 58 Vict. c. 44), sec. 8—Stamp Act, 1891 (54 and 55
Revenue. Vict. c. 39), secs. 54, 57, and 62.—*Held* that an instrument for completing
a feudal title in the form of an extract of a decree by a Sheriff under section
8 of the Heritable Securities Act, 1894, declaring the debtor's right of
redemption under a bond and disposition in security to be extinguished
and the creditor vested in the property at a price under the sum due on the
bond, was not a decree whereby property was transferred "upon the sale
thereof" in terms of section 54 of the Stamp Act, 1891, and was accordingly
not liable to an *ad valorem* duty, but that it fell under section 62 of the Act,
in respect that it had the effect of transferring and vesting in the creditor,
otherwise than by sale or mortgage, a right of property which had pre-
viously been vested in the borrower, and was liable accordingly to a stamp-
duty of ten shillings.

1st DIVISION. DAVID TOD of Eastwood Park, Renfrewshire, the holder of a bond
Court of and disposition in security, obtained in January 1897, under section 8
Exchequer. of the Heritable Securities Act, 1894, a decree in absence from the
Sheriff of Lanarkshire, declaring that the debtors had forfeited their
right of redemption, and that the pursuer was vested in the security
subjects as absolute proprietor. With the view of completing his
title in terms of the statute by recording an extract of the decree,
Mr Tod submitted an extract of the decree to the Commissioners of
Inland Revenue for their opinion as to the stamp-duty with which it
was chargeable.

"The Commissioners were of opinion that the decree of Court in
question was chargeable, in terms of section 54 of the Stamp Act,
1891, with *ad valorem* duty as a conveyance on sale, and that under
section 57 the sum upon which such duty was chargeable was £27,000,
which sum is set forth in the instrument as the 'price' of the sub-
jects. They accordingly assessed the *ad valorem* conveyance on sale
duty of £135 upon the instrument."

Mr Tod declared himself dissatisfied with the determination of the
Commissioners, "on the ground that the instrument was not a 'con-
veyance on sale' within the meaning of section 54 of the Stamp Act,
in respect that the property in question was not 'upon the sale
thereof' vested in him by the instrument, but that, on the contrary,
it had vested in him on the recording of the bond and disposition in
security, and all that the decree did was to take away the debtor's
right of redemption, with the consequence that his right became
absolute. He therefore contended that the extract decree, if subject
to any duty, was subject to only the deed-duty of 10s.," and required
a case for the opinion of the Court of Exchequer.

The case stated the question to be,—“Whether the said instru-
ment, in the circumstances above set forth, is liable to be assessed and
charged with the said *ad valorem* conveyance on sale stamp-duty; or, if
not, with what other duty, if any, it is liable to be assessed and charged?”

The case set forth the terms of the instrument, being an extract of No. 162. the decree in absence,—“At Glasgow, the 26th day of January 1897, in an action in the Sheriff Court of the county of Lanark, at Glasgow, June 16, 1897.
Tod v. Inland
Revenue. at the instance of David Tod, Esq., of Eastwood Park, Renfrewshire, pursuer; against—[here the names of persons representing the debtors in the bond were given]—defenders; the Sheriff in absence found and declared that the defenders had forfeited the right of redemption reserved to the granters in a bond and disposition in security for the sum of £22,000 sterling, dated . . . and that the said right was extinguished as from and after the said date hereof, and that the pursuer had right to and was vested in All and Whole . . . as absolute proprietor thereof, but subject always to the burdens, . . . at the price of £27,000 (the sums due under the said bond and disposition in security at the term of Whitsunday 1896, being £28,483, 2s. 2d.), and decerned; and granted warrant to record this extract decree in the Register of Sasines.—Extracted at Glasgow, this 9th day of February 1897, by me, Sheriff-clerk-depute of Lanarkshire.—ALEX. PEARSON, Sheriff-clerk-depute.”

The case contained no statement of the circumstances in which the decree had been obtained.

The Heritable Securities Act, 1894 (57 and 58 Vict. c. 44), sec. 8, enacts,—“Any creditor who has exposed for sale under his security the lands held in security, at a price not exceeding the amount due under the said security, and under any prior security, and any security or securities ranking *pari passu* with the exposor's security (exclusive of the expenses attending the exposure or prior exposures), or at any lower price, and has failed to find a purchaser, may apply to the Sheriff for decree in the terms of Schedule D hereto annexed, and the Sheriff may after service on the proprietor and on the other creditors, if any, and after such intimation and inquiry as he may think fit, grant such application and issue decree in the said terms. On such decree being pronounced, and an extract thereof, in which said lands shall be described at length, or by reference, recorded in the appropriate Register of Sasines, the right of redemption reserved to the debtor shall be extinguished, and the creditor shall have right to the lands disposed in security in the same manner and to the same effect as if the disposition in security had been an irredeemable disposition as from the date of such decree, and upon registration of an extract of such decree in the appropriate register the lands shall be disencumbered of all securities and diligences posterior to the security of the said creditor; or instead of granting such decree the Sheriff may, upon any such application being made to him as aforesaid, appoint the lands held subject to the security to be re-exposed for sale at a price to be fixed by him, and in that event the said creditor shall have right to bid for and purchase the said lands at such sale; and in the event of the creditor purchasing, the Sheriff may issue decree in the form and to the effect aforesaid, or the creditor may grant a disposition of the lands to himself in the same manner as if he had been a stranger.”

Schedule (D) annexed to the Act is in these terms:—

“The Sheriff having resumed consideration of the said petition, finds and declares that X Y [the debtor in the bond] has forfeited the right of redemption reserved to him in the said bond and disposition in security, and that the said right is extinguished as from and after this date, and that A B [design him], the petitioner, has right to, and

No. 162. is vested in, the lands described in the said bond and disposition in security, dated and recorded as aforesaid, as absolute proprietor thereof, but subject always to the burdens and conditions contained or referred to in the said bond and disposition in security at the price of £ [here mention the price at which the lands were last exposed, or the price at which the lands have been bought in, as the case may be], and decerns; and grants warrant to record the decree to be extracted hereon in the Register of Sasines."

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"*Note.*—The extract decree is to describe the subject."

By the first schedule of the Stamp Act, 1891 (54 and 55 Vict. c. 39), there are charged the following stamp-duties, viz. :—

(a) "Conveyance or transfer on sale of any property (except such stock as aforesaid) :

"Where the amount or value of the consideration for the sale does not exceed £5, £0 0 6"
and so on.

"And see sections 54, 55, 56, 57, 58, 59, 60, and 61.

(b) "Conveyance or transfer of any kind not hereinbefore described, £0 10 0
and see section 62."

In the body of the Act the said sections 54, 55, 56, 57, 58, 59, 60, and 61 occur under the head "Conveyance on Sale," and the said section 62 occurs under the head "Conveyances on any occasion except sale or mortgage."

Section 54 of the Act is as follows :—"For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any Court or of any Commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof, is transferred to or vested in the purchaser, or any other person on his behalf, or by his direction."

Section 57 of the Act is as follows :—"Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty."

Section 62 of the Act is as follows :—"Every instrument, and every decree or order of any Court or of any Commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property; provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings."

Argued for the appellant;—The instrument fell under neither sections 54 nor 57 of the Stamp Act of 1891. (1) It was not a "conveyance on sale."¹ The appellant had the real interest in the subjects under section 8 of the Heritable Securities Act, 1894, and he only required the decree of the Sheriff to vest him in the indefeasible and irredeemable right to them. That decree did not convert the bond

¹ Phillips and Another v. Morrison and Another, 1844, 13 L. J. Exch. 212; Belch v. Commissioners of Inland Revenue, Feb. 24, 1877, 4 R. 592; Anderson v. Commissioners of Inland Revenue, Oct. 19, 1878, 6 R. 56.

and disposition in security into "a conveyance on sale"; indeed, the decree was only pronounced after the failure to sell. (2) The 57th section was inapplicable,¹ because there was here no conveyance and no transfer. Moreover, the section did not impose a duty. Section 62 was the section which exactly applied to the decree, as it had the effect of transferring and vesting in the appellant a right of property which had previously been vested in the borrower.

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Argued for the Inland Revenue;—Taken together, sections 54 and 57 covered the case. [LORD KINNEAR.—A sale is a consensual contract where property is transferred for a price. You have here property transferred, and also a price, but where is the consensual contract?] There was a consensual contract to this extent that the creditor was entitled to use the remedy which the law allowed him. The instrument bore *ex facie* that the property was acquired for a price. This was a "conveyance on sale," and nothing else.²

At advising,—

LORD PRESIDENT.—Proceedings under the 8th section of the Heritable Securities (Scotland) Act of 1894 are novel, but they are simple and intelligible. Given a bond and disposition in security, and an unsuccessful exposure under the power to sell, and the Sheriff may declare the right of redemption extinguished and the creditor vested in the lands. The question which we have to determine is, whether the Sheriff's decree to this effect is a decree upon a sale.

Prima facie, there is no sale. On the contrary, the decree is pronounced because there is no sale. It is impossible to say when, where, and to whom the sale took place upon which the decree is pronounced.

It was attempted to evolve, out of the combined effect of the bond and disposition and the decree, something which could be called a sale. This seems to me much too far-fetched, and is inconsistent with the business-like views of the Stamp Act itself. In one view (and that is the view of the argument) a bond and disposition in security itself may be represented as a conditional sale. But the Act sharply distinguishes from sale the class of contracts embodied in security writes, and groups them under the title "Mortgage." The question therefore comes to be whether the unsuccessful exposure to sale and the application to the Sheriff constitute a sale in the sense of the 54th section; and I am of opinion that those words are entirely inapplicable. The case is provided for under section 62, which contemplates a class of decrees importing conveyances which are not on the occasion of a sale or mortgage.

LORD ADAM.—The question in this case is, what is the amount of stamp-duty payable on the instrument set forth in the print. Now, that instrument is an extract decree by the Sheriff of Lanark, by which he found and declared—(Reads). That is the instrument in question in this case. Now, that decree, it appears to me, is in entire conformity with the terms and

¹ Scottish Equitable Life Assurance Society v. Inland Revenue, Nov. 23, 1894, 22 R. 85; Alpe on Stamp Act, 1896, p. 114; Huntingdon v. Commissioners of Inland Revenue [1896], L. R., 1 Q. B. 422.

² John Watson & Son, Limited, v. Inland Revenue, Oct. 22, 1895, 23 R. 18; Huntingdon v. Commissioners of Inland Revenue [1896], L. R., 1 Q. B. 422; Foster v. Commissioners of Inland Revenue [1894], L. R., 1 Q. B. 516.

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provisions of the 8th section of the Heritable Securities (Scotland) Act, 1894, and as your Lordship has said, the proceeding being somewhat novel, the instrument was laid before the Commissioners to ascertain what stamp was exigible, and the Commissioners were of opinion that the decree of the Court in question was chargeable, in terms of the 54th section of the Stamp Act, 1891, with *ad valorem* duty. The question for us is whether that determination is right or wrong. On that I agree with your Lordship that this instrument does not fall within the 54th section of the Act, which it is said to do by the Commissioners. Of course the conveyance on sale there described is said to include every instrument and decree of Court "whereby any property or any estate or interest," &c.—(Reads). Now, the question is whether this is a transfer on a sale. I can find with your Lordship no evidence of sale in the matter. We should naturally look in the case of sale for a seller. Who is the seller? There is no disposition contained in this instrument at all, no conveyance by any seller whatever. There is no disponee. All that is done by this instrument is that the Sheriff, under powers conferred upon him, has declared a certain right of reversion forfeited. That does not appear to me to partake at all of the character of a transfer on sale. Therefore I agree with your Lordship that the determination of the Commissioners in this case is wrong, and that the case falls expressly within the 62d section of the Act, which provides—(Reads). It is by a decree of the Court, and not a sale at all, that this property is declared to be vested in the proprietor. I therefore agree with your Lordship.

LORD KINNEAR.—I am of the same opinion. I think it clear that the right arising to the creditor under the 8th section of the Heritable Securities Act, 1894, is not a right which arises from sale. A sale of land is a consensual contract by virtue of which the seller becomes bound to convey the land which is the subject-matter of the contract to the buyer for a price, and the conveyance on sale must be a conveyance which is executed in the performance of such a contract. There is no such contract here. The appellant acquired a totally different kind of right from the original owner of the property. He acquired a right in security only, which is a totally different thing from the right of property acquired by a purchaser upon a sale. Then the Heritable Securities Act comes in and gives him what your Lordships have described as a novel remedy, and which certainly is a remedy which did not belong to creditors by the law of Scotland before the passing of that statute. The statute provides a new and very ready method by which a creditor may be enabled to make the subject of a security available for the payment of his debt, and in the application of that method he has obtained a decree from the Sheriff extinguishing the right of his debtor—the right of the owner of the land—and vesting the right of property in the creditor. That appears to me to be certainly not a right arising upon a sale, for the reasons which your Lordships have already given. It is agreed by both parties that it is not a conveyance upon a mortgage, but nevertheless it is a decree which has the effect of transferring and vesting in the appellant a right of property which had previously been vested in another person,—that is, in the borrower. It appears to me, therefore, that it falls directly

under the language of the 62d section of the statute, and that the duty No. 162.
chargeable must be in accordance with that section.

LORD McLAREN was absent.

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THE COURT pronounced the following interlocutor:—"Reverse the determination of the Commissioners: Assess the duty of 10s. on the instrument in question, being the duty chargeable upon a conveyance or transfer other than a conveyance or transfer on a sale, under section 62 of the Stamp Act, 1891; and ordain the Commissioners of Inland Revenue to repay to the appellant the sum of £134, 10s., being the excess duty paid."

SMITH & WATT, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

JAMES WINGATE & COMPANY, Appellants.—*Johnston—Deas.*
INLAND REVENUE, Respondents.—*Sol.-Gen. Dickson—A. J. Young.*

No. 163.

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Revenue—Income-tax—Company resident abroad trading in Scotland—
Agent for foreign company assessed in his own name—Income-Tax Act, 1853 v. Inland
(16 and 17 Vict. c. 34), *Schedule D—Income-Tax Act, 1842 (5 and 6 Vict.*
c. 35), sec. 41.—The shipping company "Chanaral" (owners of the ship
"Chanaral") was incorporated under Norwegian law in Norway, and had
its registered office in Christiania, where the books were kept, and the two
managers resided. The managers held two of the ninety-five shares of the
company, the remainder being held by shareholders in Scotland. J. W. &
Company, Glasgow, effected the whole of the chartering, kept the whole
accounts, and intromitted with the whole funds, and paid on behalf of the
management from the profits of the first voyage a dividend direct to the
shareholders. Prior to April 1896 the ship had made one voyage from
Rotterdam to various ports, ending at Liverpool. Income-tax assessment
under Schedule D having been imposed upon "J. W. & Company for the
ship 'Chanaral'" for the year ending 5th April 1896, J. W. & Company
appealed. *Held* (1) that the company was resident abroad; (2) that the pro-
fits were derived from trade in this country, and were liable to assessment;*
and (3) that the assessment was right in point of form, it being unnecessary
to designate J. W. & Company expressly as agents for the company.†

AN assessment for income-tax, under Schedule D, having been 1st DIVISION.
imposed for the year ending 5th April 1896, on "James Wingate Court of
& Company, North Court, Royal Exchange, Glasgow, for barque Exchequer.
'Chanaral,'" they appealed to the Income-Tax Commissioners for the
City of Glasgow, on the ground that the ship did not belong to them,
but to a company in Norway for whom they were agents. "The Com-

* The Income-Tax Act, 1853 (16 and 17 Vict. c. 34), enacted that duties were to be paid, Schedule D, "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom. . . ."

† The Income-Tax Act, 1842 (5 and 6 Vict. c. 35), enacted, section 41,—
"Any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name . . . of any factor, agent, or receiver having the receipt of any profits or gains arising as herein mentioned and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain and in the actual receipt thereof."

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missioners were of opinion that, although the management was nominally located in Norway, the vessel was really controlled and managed by the appellants in Glasgow, and accordingly refused the appeal."

J. Wingate & Company obtained a case for appeal.

The following facts were stated in the case:—

"(1) The barque 'Chanaral' is owned by a limited company registered in Christiania, and is not on the register of any port in the United Kingdom.

"(3) The share list is kept in Christiania, whence all share certificates are issued; but these are not valid until confirmed by the signature of James Wingate & Company, who own twenty-three of the ninety-five shares into which the capital of the company is divided. Seventy of the remaining shares are held by shareholders resident in Scotland, and two by the managers in Norway.

"(4) By article 5 Messrs Bernard A. Ellingsen and Narve Ellingsen, of Christiania, are elected managers, with the first named as director; but chartering, and all voyage receipts and disbursements, are dealt with by Messrs James Wingate & Company. Messrs Ellingsen attend to all the requirements of the Norwegian company law, and have power to negotiate freights in Norway. They have also appointed the captains and crew.

"(5) The appellants (James Wingate & Company) have effected the whole of the chartering. They also keep the accounts and intromit with the whole funds, having paid, on behalf of the management from the profits of the first voyage, direct to the shareholders the one dividend (30 per cent) yet paid. Messrs James Wingate & Company have received and retained all funds until required for payment of expenses or dividends.

"The books of the company are kept in Norway, and are compiled from the statements transmitted from Glasgow by Messrs James Wingate & Company, who keep the accounts here.

"(6) The 'Chanaral' is an old vessel, having been built in 1862, and purchased from Messrs T. R. Shallcross & Company of Liverpool. She has never been in Norway since the present owners bought her.

"(7) Under the freight charters which appellants entered into without consulting the management in Christiania, the first voyage began at Rotterdam, embraced London, Mauritius, Abrolthos Islands, and Queenstown, and ended at Liverpool."

By the articles of association of the company, which were appended to the case, it was provided,—“Sec. 1. The Shipping Coy. 'Chanaral' the aim of which is to carry on trade, is a limited liability company. The share capital of the company is Kr. , divided into

shares, each Kr. , which are fully paid up. . . .

"Sec. 3. The management is situated in Norway, and is registered in Christiania.

"Sec. 4. The management consists of two Norwegian shareholders elected for one year at the time of the ordinary general meeting. The general meeting decides which of the elected managers is to act as director of the management. . . .

"Sec. 6. No share is valid without being signed by the managers, and also confirmed by the signature of the firm James Wingate & Coy., Glasgow. . . .

"Sec. 9. The director of the management gets 1 per cent of the gross amount of every freight, and has therefor to keep account and office, and pay the other manager.

"Sec. 10. All the chartering is done by the firm of James Wingate & Coy., and in Norway by the director, for which he is paid the usual full commission, &c. No. 163.

"Sec. 11. The managements pay dividends after each round voyage is ended, reserving a sufficient amount to cover all usual running expenses for the next voyage. June 16, 1897.
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"Sec. 12. The ordinary general meeting is held annually in Christiania, after notice being given a fortnight previous. . . .

"Sec. 13. The extraordinary general meeting is held at Christiania as often as the management considers it necessary, or the owners of at least one-half of the share capital demand same, after a fortnight's previous notice. . . ."

Argued for the appellants;—The case shewed that the company was neither resident in the United Kingdom nor did it carry on its trade there. It was incorporated and registered in Norway, its office and books were there, and its managers were Norwegians. Its trade could not be said to be in this country, for although the appellants effected the contracts of affreightment, they could do nothing without the sanction of the managers in Norway.¹ On either of the alternatives of the argument for the Crown, the mode of assessment was wrong. If the Crown were right in arguing that the company was not resident in Scotland, but carried on trade there, the form of assessment was wrong, for the company should, under section 41 of the Income-Tax Act, 1842, have been assessed as represented by the appellants in the capacity of agents, not the appellants as individuals. If, on the other hand, the Crown were right in arguing that the company was resident in Scotland, then the company should have been assessed directly.

Argued for the Inland Revenue;—Under Schedule D they could assess the company either as resident here or as carrying on their trade here. (1) The company was not Norwegian. No doubt it was registered in Christiania, but the holders of ninety-three of the shares resided here, and the whole business of the ship was carried on in Glasgow.² (2) Alternatively, while the company was resident abroad, its business was carried on here. The form of assessment was right under section 41. It was well known that the appellants were the agents for the ship, and it was thus unnecessary to state expressly that they were the agents.

At advising,—

LORD PRESIDENT.—In my opinion the facts found in this case prove to the hilt that wherever this company resides, and in whatever other places it may exercise its trade, it at least exercises that trade in Glasgow. The company is (I quote from the bye-laws) "a shipping company, the aim of which is to carry on trade." From this it might be inferred, but the laws of the company also plainly say, that its profits are made by contracts of

¹ Grainger v. Gough, 1896, L. R., App. Cases, 325; The San Paulo (Brazilian) Railway Co., Limited, v. Carter, 1896, L. R., App. Cases, 31, per Lord Watson, p. 40; Calcutta Jute Mills v. Cesena Sulphur Co., 1876, L. R., 1 Exch. Div. 428, per Kelly, C. B., p. 444; Sulley v. Attorney-General, 1860, 5 H. and N. 711.

² The San Paulo (Brazilian) Railway Co., Limited, v. Carter, 1896, L. R., App. Cases, 31, per Lord Davey, p. 41; Erichsen v. Last, 1881, L. R., 8 Q. B. Div. 414, per Jessel, M. R., 417; Attorney-General v. Borrodale, 1814, 1 Price, 142.

No. 163. **affreightment:** and it seems to own only one ship, the "Chanaral." The case succinctly states what is done in Glasgow—"The appellants (James Wingate & Company) have effected the whole of the chartering. They also keep the accounts and intromit with the whole funds, having paid on behalf of the management, from the profits of the first voyage, direct to the shareholders, the one dividend (30 per cent) yet paid. Messrs James Wingate & Company have received and retained all funds until required for payment of expenses or dividends." Even supposing that any show could have been made of trade exercised elsewhere, it seems to me that these facts prove affirmatively that the trade is exercised in Glasgow. But, in fact, no such operations are carried on anywhere else.

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These things being so, and the company being, *prima facie*, a Norwegian company, the Revenue authorities very naturally assessed the Messrs Wingate as the agents of a non-resident company. Their right to do so depended on the combined effect of Schedule D of the Income-Tax Act of 1853 and the 41st section of the Income-Tax Act of 1842, and was necessarily based on two propositions of fact,—(1) That Wingate & Company were in receipt, as agents of the "Chanaral" Company, of profits accruing to the company from trade exercised at Glasgow; and (2) that the "Chanaral" Company were not resident in Great Britain. It is perfectly plain that both are necessary, and that it is only if the principal is not resident in the United Kingdom that there is any warrant for assessing the agent.

Unfortunately, the Revenue authorities and the Commissioners seem to have lost sight of this, and in the debate before us the argument for the Crown at first was that the company was truly resident at Glasgow, and not in Norway. I mention this untoward history merely for the purpose of saying that, while my opinion is that, on the facts stated, this company is not resident in Scotland, this question was never properly argued, except in so far as the two Crown counsel might be regarded as contradictors of one another. My opinion on this point is rested simply on these grounds—the company is constituted under Norwegian law; its registered office is in Norway; there are kept its books; there the ship is registered; and there two of its principal officers reside. It is true that the vast majority of its shareholders are British, and that its business is in the main conducted in Glasgow. But, on the other hand, Great Britain is the centre of the carrying trade of the world, and the best point from which to run a vessel, however owned; and although it may well be conjectured that equally legitimate reasons might have led to the registration of the company in this country as to its registration in Norway, still I am unable to disregard the fact that, *prima facie*, this is a Norwegian company, and I do not find adequate grounds for holding that in fact it is resident in Great Britain.

It is perhaps necessary to say that, assuming the 41st section to apply, the assessment seems right enough in point of form. It might perhaps be still more correct to lay the assessment on Messrs Wingate expressly as agents for the company; but I do not think that the statute is departed from when they are assessed for the profits of the "Chanaral" without their relation to the company being expressly specified.

I am for refusing the appeal.

LORD ADAM.—The appellants Messrs Wingate & Company appealed against an assessment made upon them under Schedule D of the Income-Tax Acts in the sum of £505 in respect of the barque "Chanaral."

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The assessment, as I understand, was imposed under the second branch of Schedule D, which enacts that income-tax shall be payable for and in respect of the annual profits and gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any trade exercised within the United Kingdom.

The "person" in this case to whom the profits are said to have accrued is a limited company called the Shipping Company "Chanaral," to whom the barque "Chanaral" belonged. This company is said not to be resident in the United Kingdom, and the assessment has been imposed on Messrs Wingate & Company as being the factors or agents of the company in terms of the 41st section of the Income-Tax Act of 1842. The case seems to raise two questions of fact—(1) Whether the company has its residence out of the United Kingdom? for unless it be so there is no warrant for imposing the assessment on the Messrs Wingate & Company; (2) Whether it carries on trade within the United Kingdom?

With reference to the first of these questions, it appears that the company is a liability company registered at Christiania according to the law of Norway, and having its registered office there; that the share list is kept there, whence all share certificates are issued; that two gentlemen, Messrs Ellingsen of Christiania, are the managers of the company, who attend to all the requirements of Norwegian law and have power to negotiate freights in Norway, and that the books of the company are kept there. It further appears from the articles of association that the annual general meetings of the company are held at Christiania, and that extraordinary general meetings are also held there. That being so, I cannot doubt that this company has its residence in Christiania, and is not resident in the United Kingdom. I think it is also clear that it carries on business or trades within the United Kingdom.

The following facts are found in the case, viz., that the "Chanaral" has never been in Norway since the company bought her; that the appellants have effected the whole of the chartering, and that the freight charters were entered into by them without consulting the management in Christiania; that they have kept the accounts and intromitted with the whole funds, and have received and retained all funds until required for payments of expenses or dividends.

In these circumstances it appears to me not doubtful that the company, through their factors or agents, the appellants, have traded within the United Kingdom, and apparently hitherto within the United Kingdom only, although that is not material, and that profits or gains have accrued to them from the exercise of such trade, and that therefore they are chargeable under Schedule D in respect of such gains.

The company not being resident in the United Kingdom, section 41 of the Act of 1842 directs how the assessment shall be imposed in respect of such gains. It enacts that the company shall be chargeable in the name of any factor or agent, in the like manner and to the like amount as if the

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The assessment bears to be imposed in respect of the profits of the barque "Chanaral." It is not disputed that the appellants are factors or agents of the company. I think therefore that the company were chargeable for these profits in the names of the appellants, as was done.

On the whole matter I am of opinion that the determination of the Commissioners should be affirmed.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT refused the appeal, and affirmed the determination of the Commissioners.

THOMAS LIDDLE, S.S.O.—SOLICITOR FOR SCOTLAND OF THE BOARD OF INLAND REVENUE—Agents.

No. 164. THOMAS CLAVERING, SON, & COMPANY, Pursuers (Respondents).—*Balfour—Younger.*

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Clavering,
Son, & Co. v.
Hope.

JOHN ALFRED HOPE, Defender (Respondent).—*R. V. Campbell—Clyde.*

Agent and Principal—Brokerage—Purchase of iron—Carrying over—Averaging purchases—Broker acting as principal.—A employed an iron broker to buy in Glasgow iron market 1000 tons of pig-iron for himself, and 500 for B. The broker on 25th August bought 1000 tons from Fullarton at 46s. 7d. per ton, and 500 from Dick at 46s. 9½d. He allotted 500 of the first lot, and the whole of the second lot to A, and 500 of the first lot to B, at 46s. 8d. as the average price of both lots. An advice-note sent to A bore this price, and gave the names of Fullarton and Dick as the sellers.

At the end of a month, when the price fell to be paid, and the warrants to be delivered, A not having provided funds to take up the warrants, the broker did so with his own funds, and "carried over" in one of the modes usual in the Glasgow market, thus:—He filled up a bought-note in his own name as purchaser from A of the 1000 tons at 49s. 3d. (the market price of the day), payable that day, and at the same time filled up a sale-note in his own name as seller to A at the price of 49s. 6d. payable at the end of a month,—the 3d. extra charged per ton being to cover store rent and interest for the month. Those notes were sent to A, with an account shewing the difference between the original price at which A bought and the market price at the date of carrying over.

Similar transactions followed, adverse differences being put to A's debit.

In an action raised by the broker against A for the balance of his account, A, with reference to the purchases for average prices, pleaded that no such contracts had been made with the sellers, that they could not have been enforced by him against them, and were not binding on him. With reference to the carrying-over contracts he contended that the broker was not entitled without his authority to depart from his position as broker and act as a principal in dealing with him.

It appeared from the advice-notes and letters sent to the defender that the pursuers had disclosed the mode in which they fixed the average prices and carried over, and that the defender had never objected to the course followed by them.

The Court (*aff. judgment of Lord Stormonth-Darling*), *held* that the

pursuers had carried through the transactions honestly as brokers without having any personal interest therein, and *repelled* (1) the defence founded on the system of averaging prices, the Lord Justice-Clerk and Lord Young holding that it was legitimate, Lord Moncreiff holding that it had been acquiesced in; and (2) the defence founded on the system of carrying over on the ground that the defender had acquiesced in it.

Robinson v. Mollett, 1875, L. R., 7 Eng. and Ir. App. 802; and *Maffett v. Stewart*, March 4, 1887, 14 R. 506, *distinguished*.

ON 19th August 1896 Thomas Clavering, Son, & Company, merchants and iron brokers, Glasgow, raised an action against John Alfred Hope, iron-merchant, Carlisle, carrying on business at Whitehaven under the firm of J. A. Hope & Company, of which firm he was the sole partner, and against whom arrestments had been used *jurisdictionis fundandæ causa*.

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The summons concluded for payment of the sum of £551, 8s. 5d., as the balance of an account alleged by the pursuers to be due to them by the defender on a series of transactions in the Glasgow iron market between 26th August 1895 and 20th May 1896, in which they had acted as the defender's brokers.

The pursuers averred that in August 1895, and subsequently, they had "on the order and instructions of the defender, bought and sold various quantities of iron, and from time to time, on his instructions, carried over for him from one settlement day to another quantities of iron of which the defender was not prepared to take delivery and pay for. In the case of each transaction a contract-note was sent to the defender, and in the case of carrying over, a memorandum was sent to the defender stating the terms on which the carry over was effected. These contracts and memoranda and the course of dealing were the same as in the previous series of transactions, and the defender approved thereof, or at least throughout acquiesced therein, and he made no objection to the same or to the accounts which were regularly from time to time rendered by the pursuers to him until immediately before the raising of this action. . . . In many cases, in carrying over iron for the defender the pursuers, in accordance with the course of dealing between the parties and the custom of the Glasgow market, which was well known to the defender, contracted as principal with the defender, and in such cases they sent him proper and enforceable contract-notes, and these the defender in every case accepted without objection. . . ."

The pursuers pleaded;—(2) The transactions in question having been carried out in accordance with the agreement between the parties and the custom of the Glasgow market, the pursuers are entitled to decree as concluded for. (3) The said transactions having been carried out in accordance with a course of dealing and custom of trade well known to and acquiesced in by the defender, he is barred from challenging the same.

The defender in his answers averred;—"The relation between the parties in all the transactions was that of principal and agent, in which the defender, as principal, had, and was entitled, to rely on the pursuers as his brokers acting for him to the best of their ability. It was the business and duty of the pursuers as brokers for the defender to protect the defender's interest, to enter into contracts for him with third parties in the like position as himself for the precise amounts ordered by the defender to be bought or sold at the most favourable prices obtainable in the interest of the defender, and on call to disclose the

No. 164. names of these third parties and the precise contract prices in each transaction on behalf of the defender, so that the defender might sue such third parties if necessary. The defender relied on the pursuers' June 16, 1897. Clavering, Son, & Co. v. Hope. attention to this business and duty during his dealings with them. The pursuers, as the defender has now ascertained, failed in their said business and duty, and have without authority acted as principals in selling or buying to and from the defender. While pretending to act as brokers for defender they were, unknown to him, at the time dealing with the defender at rates fixed by themselves and in their own interest. The alleged custom of the Glasgow market is not known and not admitted. It is not, in any event, binding on the defender, and it is invalid and ineffectual to change the relation between the parties. . . . The defender believes and avers that the pursuers did not purchase for him the iron which they purported by their contract-notes to buy, and that in carrying over the contracts the pursuers in point of fact paid nothing, or at all events sums much smaller than those charged in the accounts."

The defender pleaded;—(4) The transactions covered by the account sued on not having been in fact entered into, or at all events not being such as the defender could have enforced against any third parties, the defender should be assoilzied. (5) The account sued on being overcharged, and not being a true account as between broker and principal according to the agreement between the parties, the defender is entitled to absolvitor. (7) The alleged custom of the Glasgow market is invalid and ineffectual to change the relation between the parties, and is not in any event binding on the defender.

At a proof the following facts were established:—

In August 1895 the defender instructed the pursuers to purchase in the Glasgow iron market for himself 1000 tons of iron, and for a friend, Mr Eadon, 500 tons.

On 26th August the pursuers purchased 1000 tons from John Fullarton at 46s. 7d. per ton, and from James Dick 500 tons at 46s. 9½d., and allotted 500 of Fullarton's and 500 of Dick's to the defender, and 500 of Fullarton's to Eadon, in both cases at the price of 46s. 8d. as the average price.

The pursuers then sent to the defender (along with a letter stating the terms on which they would act for him *) the following advice-note. The words in italics were written, the others printed.

"This contract is made subject to the rules and usages of the Scotch Pig-Iron Trade Association.†

"Glasgow, 26th August 1895.—Bought for Messrs J. A. Hope and

* "Dear Sir,—We have bought for you to day 1000 tons W. C. Hematite pig-iron at 46s. 8d. cash in a month.

"It is understood you are to pay us in cash on this and other purchases 1s. per ton margin, this margin always to be kept up, otherwise we retain to ourselves the right of closing out the iron at will.

"We allow you a return commission of $\frac{1}{8}$ per cent on this, and also upon all orders you may send from others, subject to our approval, and upon the same being properly carried out; that is to say, we charge for buying and selling 10s. per cent, returning you 2s. 6d. per cent—this however does not apply to the carrying over from month to month of the iron, but the c/o does not affect the above arrangement.

"This agreement only holds on the conditions being carried out. Hematite closes firm, 46s. 10½d. month."

† This note was upon all the advice-notes after mentioned.

Company one thousand (1000) tons of G.M.B. West Coast Bessemer Hematite pig-iron, Nos. 1, 2, and 3, in equal quantities at 46/8 (forty-six shillings and eightpence stg.) sterling per ton nett. Cash here on the 26th September (or sooner in buyers' option on giving 3 days' notice) against storekeepers' warrants for the iron f.o.b. usual ports. 1/4 per cent brokerage.—Sellers—Jno. Fullarton, 500 tons. Jas. Dick, 500 tons. Thos. Clavering, Son, & Coy. No. 164.
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In making the purchases, the pursuers did not give up to the members of the Scotch Pig-iron Trade Association the names of their clients for whom they bought, and the sellers would not have taken them.*

On 25th September (the 26th being a holiday) the defender not having sent money to take up the warrants, it became necessary for the pursuers to carry over. They accordingly paid for the warrants, of which they then obtained delivery. They then filled up bought notes in their own name as purchasers from the defender, at the market price of the day 49s. 3d., and sold notes as sellers to him for delivery on 25th October at the price of 49s. 6d., the extra threepence being to cover store rent for the iron, interest, and trouble. The pursuers, at the same time, credited the defender with the difference between the price (46s. 8d.) they had paid for the warrants and the price (49s. 3d.) at which they bought from him.

At the same time the pursuers sent to the defender the following carry-over notes, along with the account given below:†—

“C/o. 141 Buchanan Street, Glasgow, 25th September 1895.—Bot. from Messrs J. A. Hope & Co. one thousand tons of g.m.b. west coast Bessemer hematite pig-iron, Nos. 1, 2, and 3, in equal quantities, at

* Among the rules of the association were the following:—“16. (a) When a member buys from or sells to another member, and the names of constituents (if any) are not given up by the one to the other, the members shall be personally liable to each other for the due implement of their transactions; but, in the case of a member acting as a broker either buying from or selling to another member, and giving up the latter's name to his constituent or principal, such broker shall be relieved of responsibility to said constituent or principal for the due implement of the particular transaction. (b) The responsibility of constituents or principals, the one to the other, for completion of transactions made on their account by members, can only be secured or obtained by giving up on both sides of the names of principals when the contract-notes are sent; and if this is not done, the members, and also principals or constituents, shall forfeit any remedy which otherwise they might have had.”

† “Glasgow, 26th Sept. 1895.

“Messrs J. A. Hope & Co.

“In account with Thos. Clavering, Son, & Co.

“1895.
 “Sept. 26. To 1000 tons Hem. at
 46s. 8d., cont. 26th
 Aug., £2333 6 8
 „ 1/4 per cent
 brokerage
 on £2333,
 6s. 8d., 5 16 8
 „ Balance, 123 6 8
 —————
 £2462 10 0

“1895.
 “Sept. 23. By 1000 tons Hem. at
 49s. 3d., c/o cont. of
 date, £2462 10 0
 —————
 £2462 10 0

“E. & O. E.

Sept. 23. By balance, £123 6 8”

No. 164. 49s. 3d. (forty-nine and threepence) sterling per ton nett. Cash here to-day (or sooner in option on giving days' notice) against storekeepers' warrants for the iron f.o.b. usual shipping ports. THOS. CLAVERING, SON, & Co."

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"C/o.—Sold to Messrs J. A. Hope & Co. one thousand tons of g.m.b. west coast Bessemer hematite pig-iron, Nos. 1, 2, and 3, in equal quantities, at 49s. 6d. (forty-nine shillings and sixpence) sterling per ton nett. Cash here on 25th October (or sooner in buyers' option on giving three days' notice) against storekeepers' warrants for the iron f.o.b. usual shipping ports. THOS. CLAVERING, SON, & Co."

It is not necessary to refer in detail to the other ten purchases subsequently made by the pursuers for the defender. They were carried through in substantially the same way. In some cases the name of the seller was mentioned, and in others it was not. In some cases where an average price was fixed, the separate prices of the different lots purchased were mentioned.*

The carrying over was in all cases carried out in precisely the same way as in the first case. In the correspondence between the parties during the course of the transactions various letters by the pursuers to the defender shewed that they were holding the iron for him, and that they had not obtained credit from the original sellers or advances from third parties upon the warrants to enable them to carry over.

William Wilson, iron-merchant and iron-broker, secretary to the Iron Trade Association, deponed,—“ . . . According to the rules and practice of the association, members of the association always contract with one another as principals, whether they are in fact dealing for themselves or whether they are dealing as brokers. . . . When a contract is entered into, the buyer comes under an obligation to take delivery of a certain quantity of iron on a certain day, and when that day arrives that quantity of iron must be taken delivery of in some way or other and the money found for it. When a broker receives from his client instructions to carry over his stocks, there

* In the advice-note sent to the defender on 4th September 1895 the price was stated to be 49s. 1½d., which was disclosed on the face of the note to be the average between 500 tons bought from Crawford & Company at 49s. 1½d. and 500 bought from Neilson Brothers at 49s. 2d.

On 6th September 1895 an advice-note sent to the defender intimated the purchase for him of 1000 tons at 50s. 4½d., and gave the sellers' names—Davis, 500 at 50s. 4½d; Herbertson, 500 at 50s. 5d.

On the same day another advice-note intimated the purchase of another 1000 tons at 50s. 9d., and gave the names of the sellers as Sanders & Company, 500 tons at 50s. 6d.; Crawford & Company at 51s.

At the same time the following letter was sent by the pursuers to the defender:—“ We received your wire this morning to buy 2500 Eadon and 2000 self, month, at best. The market opened excited with an eager throng of buyers, and it was exceedingly difficult to get on with business. . . .

“ We bought for you 500 tons at 50s. 4½d. and 500 at 50s. 5d. month, and for Mr Eadon 1000 at 50s. 4½d. and 500 at 50s. 5d. We could not manage more.

“ We wired you we were retaining and hoped to do better in the afternoon, at all events we will do our very best. Afternoon market opened very excited and irregular, and a perfect scramble for hematite.

“ We succeeded in buying for you 500 at 50s. 6d. and 500 at 51s. one month, and for Mr Eadon 500 at 50s. 6d. and 500 at 51s., and wired you. It opened at 50s. 1½d., 51s., 50s. 8½d. cash, and 50s. 4d., 50s. 3d., 50s. 6d., 51s. 3d., 51s. one month.”

are several ways in which the order may be fulfilled. The broker No. 164. may ask another member of the association on what terms he will take up 500 tons of iron and hold it for a month; or, as I do very often, he may pay for the iron himself and hold it for his client for the month. In that case the broker becomes the principal as with his own client. My invariable habit is to carry over in that way; I am never a broker in continuations. That method is quite common on the Exchange, but not invariable. If the client has a good and substantial broker to deal with, that method of carrying over is more beneficial to him than the other. . . . When a client asks me to have iron continued or carried over, I generally find the money for it either out of funds in my possession, if I happen to have as much, or my banker is behind me to advance me money to a certain extent against the warrant; and I send my client a carry-over note buying the iron from him at the settlement price of the day on which his lot is due, and reselling it at the higher price, the difference between the two prices representing the interest on the money value of the iron and the store rent chargeable for the month. . . . When iron is carried for a month, the usual rate per ton which is added to the price of the iron is one-eighth per cent, that is understood. The higher price consists of an addition for interest, rent, and a modicum of reward for labour. I generally add an equivalent to one-eighth per cent for labour. The amount of the interest and rent depends on the market rate for money at the time. I could not say that 3d. per ton would be invariably a fair charge; it might or it might not. Store rent is a fixed rate from year to year. A statement has been put before me which I was asked to check, and my attention was directed to the fact that an overhead addition of 3d. per ton per month had been made to the market price in September 1895, and in looking over my books I find that the charge of 3d. per ton was quite within what I would have considered to be then a fair charge. It would rather be less than one-eighth per cent, with interest and rent. . . ."

J. M. Clavering, junior partner of the pursuers' firm, deponed,—
 "We got a warrant from the selling broker in the transactions which we entered into for the defender. (Q.) Where is it? (A.) We acted as principals for him afterwards. We could not keep a specific warrant for him, but if he had paid his money he would have got the warrant. He could have got the warrant on three days' notice at any time for the amount of iron he bought. . . . (Q.) If he had given you three days, say about May, before the closure, would you not just have had to go into the market to buy? (A.) No; I would have given notice to the person who was lending me the money on the warrant, or if I had it in the bank I would have gone for it and got it, just as we are in the habit of doing. Any warrant would do as long as it was for the same quality of iron; the warrants are all the same. (Q.) Supposing you did not have a warrant which would meet one of these particular contracts, what would you do? (A.) We are bound to have it. (Q.) Could you not meet your obligations by just going into the market and buying? (A.) We could buy a warrant, but that is not the way it is done,—by us at anyrate. . . ."

The defender deponed,—
 ". . . It was a most improper method for the pursuers to adopt, to buy different quantities and to sell to me at the average price—a most unusual and unheard of thing to do. The contract-notes, Nos. 18 to 103 of process, which were sent to me, did not reveal that that was done, and there is not a word in the

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correspondence to shew that that is the practice. The injury done to me by the adoption of that method was, that if there was a shortage of warrants, I could not identify my iron, and could not insist on calling it up, and so get my backwardation; whereas the pursuers would have the warrants at their command, and could step in and take the backwardation themselves. The broker by that method takes from me all the advantages I possess from being a bull. When I am a bull, as I was in this account, I look to my profit not merely from the rise in the price of iron, but from the operation of the account from contingencies which may arise on a shortage of warrants. The bull makes his profits out of the 'squeeze' more largely than by the rise in the market. . . . The usual mode of carrying over is for the broker to sell to the person from whom he has purchased for his client, and then to re-purchase; or he may arrange with some third party on the market. The advantage of carrying over in the open market is, that it gives the client the chance of the backwardation; he can call the iron up in three days, and make the man who cannot deliver pay the backwardation. If the carry-over is conducted in the right way, by arrangement with the seller or somebody in the open market, then the broker never leaves his position as broker, and his only interest in the matter is to get his commission. If he is acting as a broker, watching his client's interest, and having no personal interest but that of getting his commission on the transaction, he would take the chance of making profit either by selling out or by backwardation, or in other ways, and it was for that very purpose that I kept the pursuers posted up with my address from hour to hour. It is all-important to the client that the broker should have no interest in the transaction beyond his commission. I expected that the pursuers would watch my interest and call up my warrants, and sell out or claim backwardation, as suited the state of the market. I never heard of such a practice as is alleged by the pursuers, of a broker buying his client's iron and then re-selling it to him. . . . I was never told in any way that they were buying my iron and selling it back again, until I saw it in the condescendence. . . ."

As regarded the form of the bought and sold carry-over notes, he deponed that he did not scrutinize them very carefully; that they did not convey to his mind the idea that the pursuers were buying the iron from him and selling it to him as principals; that he occasionally looked at the documents to see that the price stated accorded with that contained in the newspapers; that he was not aware that brokers on the Glasgow Exchange dealt with one another as principals in making purchases for clients. He also deponed that he did not notice at once that no brokerage commission was charged on the carry-overs, but that as soon as he did he wrote to the pursuers asking them to charge it.

On 16th February 1897 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"The Lord Ordinary having considered the closed record, proof, and productions, repels the defences: Decerns against the defender in terms of the conclusions of the summons."*

* "OPINION.—This is an action by a firm of iron brokers in Glasgow for the balance of an account said to be due to them by the defender on a series of speculative transactions in the Glasgow iron market, between 26th August 1895 and 20th May 1896. The employment is admitted by the defender, and the accuracy of the figures is not disputed. But the main

The defender reclaimed, and argued;—It was established that the pursuers, while professedly acting as his brokers, had during the whole series of transactions assumed the position of principals, thereby placing themselves in a position in which their interests and their duty conflicted.¹ (1) As regarded the original purchases.—It was a broker's duty to make contracts for his principal in his principal's name. Unless he did this he deprived his principal of the power of enforcing the contract with the seller. Rule 16 (b) of the Scotch Pig-Iron Trade Association (quoted *supra*, p. 947, note), shewed that this was the practice in the association. The broker must at least establish privity of contract between his principal and third parties in order that the former might have the rights of an undisclosed principal against the latter. The pursuers here had failed in their duty in these two respects. To take the first contract as an instance, the defender could not have compelled Dick, who sold to the pursuers 500 tons of iron at 46s. 9½d. to deliver to him 500 tons at 46s. 8d. The system of averaging the prices obtained from dealings in the market was outside the duty of a broker.² It was bad brokerage. (2) As regarded the carry-over contracts.—The pursuers did not deny that they had acted not as brokers but as principals. Instructions to carry over meant to carry over as

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defence is that the pursuers, while professing to act as the defender's brokers, committed a breach of their employment by contracting with him as principals.

"The parties were not strangers to each other in August 1895. They had had other transactions, extending over a period of years, for the purchase and sale of iron, from which the defender had derived considerable profit.

"The terms on which the business was to be done in this particular series of transactions are contained in the letter set out in cond. 1. It was contemplated that there should or might be a carrying over of the iron from month to month, but the precise mode of doing so was not prescribed, except that the return commission of 1/8th per cent payable by the pursuers was not to apply to it. An attempt was made by the defender to shew that the return commission was to be larger, but in face of the correspondence and the accounts rendered to him from time to time the attempt entirely failed.

"The first purchase of iron was made on 26th August 1895. It consisted of 1000 tons at 46s. 8d., deliverable in a month. The sellers were disclosed on the face of the advice-note sent to the defender—Fullarton for 500 tons, and Dick for 500 tons. Contracts are produced for these purchases, from which it appears that on the same day the pursuers bought 1000 tons from Fullarton at 46s. 7d., and 500 tons from Dick at 46s. 9½d. The extra 500 tons thus bought were allocated to Mr Eadon, whose order was forwarded by the defender along with his own, the whole truly forming one order, and the price charged against the defender was within a fraction of the proper average of the prices in the contracts with Fullarton and Dick. When the month was about to expire the pursuers, in default of instructions from the defender to take up the iron, had to carry it over, and it is as to their mode of doing so that the chief question arises. What they did was to pay out of their own pockets the price of the iron which the defender had bought, and to send him two advice-notes marked *c/o* (*i.e.*,

¹ Maffett v. Stewart, March 4, 1887, 14 R. 506; Gillies v. M'Lean, Oct. 16, 1885, 13 R. 12; Robinson v. Mollett, 1875, L. R., 7 Eng. and Irish App. 802.

² Maffett v. Stewart, 14 R. 506.

No. 164. brokers in the ordinary way.¹ No usage of trade could entitle them to carry over as principals unless the defender was aware of the usage and acquiesced in its application to his transactions.² If the pursuers imagined that they were entitled to act out of the ordinary course, that was a misunderstanding as to the law in regard to the matter, and a misunderstanding could never be a custom of trade.³ In any view, no general custom of the kind was proved to have prevailed. The ordinary method of arranging carry-overs for clients was for the broker, acting strictly as broker, to arrange that the purchase should be carried over by the original seller or by third parties in the market. This was important, for in the event of a sudden scarcity of iron, the defender had the power to call up the iron on three days' notice, and to get the "backwardation" in the event of the seller's failure to deliver; but if the pursuers were sellers to him as principals, they would have an interest not to advise him when to call up the iron, but to put the "backwardation" into their own pockets. It was not proved that the pursuers had always a warrant ready to meet their

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carry over), and dated 25th September 1895, one bearing that 1000 tons were bought from the defender by the pursuers at 49s. 3d. (which is admitted to have been the market price of the day) for immediate settlement, and the other bearing that the same quantity was sold to the defender by the pursuers at 49s. 6d. for settlement on 25th October. These c/o notes are Nos. 25 and 26 of process. The 3d. added to the price in the sold note represents the usual charge of one penny per ton for storage rent, together with interest on the money advanced by the pursuers to pay for the iron which they had bought for the defender on the 26th August.

"The transactions which followed were all more or less of the same nature. In the case of some, when iron was bought for the defender the advice-note sent to him did not contain the name of the seller, in others it did. In every case there was an actual purchase of iron in the market corresponding to the defender's order. Sometimes the iron so purchased corresponded exactly in quantity to the order, and no averaging of price was required. Of this the order of 29th August is an example (comp. No. 19 with Nos. 160 and 161 of process). Sometimes the averaging was disclosed on the face of the advice-note sent to the defender. Of this the order of 4th September is an example (comp. No. 21 with Nos. 163 and 164 of process). But the carrying over was always done in precisely the same way as on the first occasion, and the pursuers make no disguise of it on record that in the act of carrying over they contracted as principals with the defender.

"Before I consider whether this circumstance ought to forfeit the pursuers' whole right to remuneration (for to that extent is the defender's argument carried) I shall deal with the plea that the pursuers failed to establish privity of contract between the defender and the sellers of the iron.

"In so far as this plea is founded merely on the fact that the defender's name did not appear on the contract-notes with the sellers, it is plainly untenable. I know of no absolute and unvarying rule of law that in every kind of market, whatever be its custom, a broker must always from the first disclose the name of the principal for whom he buys. In this market it is the custom (and the defender must have known it perfectly well) for the

¹ Maffett v. Stewart, 14 R. 506, *per* Lord Shand, p. 524.

² Robinson v. Mollett, L. R., 7 Eng. and Irish App. 802.

³ Anderson v. McCall, June 1, 1866, 4 Macph. 765, *per* Lord Justice-Clerk (Ingis), 769, *et seq.*

obligations to the defender. They were in a fiduciary position; they had not fulfilled their trust, and the law would not inquire whether they had done injury, but would assume it.¹ It was said that the defender must have known and acquiesced in the course of dealing in connection with the carry-overs. There was nothing in the carry-over notes which, in respect of their acceptance without demur, could bring home to the defender a new contract based on different principles altogether. The absence of brokerage commission was not sufficient to establish such knowledge.² Much was made of expressions in the correspondence which it was argued must have brought home to the defender knowledge of the pursuers' mode of effecting the carry-overs. But he was entitled to assume that the pursuers were acting in the ordinary course as his brokers and not as principals, and he not unnaturally read the correspondence as containing nothing more than threats to exercise the broker's right to sell out his clients' goods in order to save himself from loss.

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brokers to deal with one another as principals. There was always iron bought from third parties to meet the defender's orders, and the source from which it was to come was either mentioned in the advice-notes sent to him or it was entered in the pursuers' books. If he had desired to obtain the information with a view to taking up the iron (which he never did), he could have got it at any time. The occasion never arose for disclosing his name, but at the lowest he had, as against the sellers, all the rights of an undisclosed principal, and these would have been subject to no qualification except that the sellers would have had as against him all the rights and equities which they would have had as against the pursuers.

"A certain amount of colour is given to the argument by the fact that in a few cases the prices were averaged so that the price in the defender's advice-notes did not precisely correspond with the price at which any one seller had agreed to sell. Of course, if the defender ever required to proceed against the sellers, he must have done so at their price and not at his own. But this would have made either no difference in the result or so little as not to be worth considering. Thus in the defender's advice-note of 4th September the price was stated at 49s. 1½d., which was disclosed on the face of the note as being the average between one half of the quantity bought from Crawford & Co. at 49s. 1½d. and the other half bought from Neilson Brothers at 49s. 2d. That is an instance where there would have been no difference in the result. In the case of the first purchase on 26th August, to which I have already referred, the defender's accountant was at pains to shew that the average in the defender's advice-note ought to have been a fraction over 46s. 7½d. instead of being 46s. 8d., but he frankly admitted that the difference between these figures on 1000 tons would only have been about 10s., and that, I say, is a difference not worth considering. It is to be observed that the defender had ample notice that the system of averaging prices was being adopted in some cases, and this circumstance alone is sufficient to differentiate the case from *Maffett v. Stewart*, 14 R. 506, in which four Judges out of seven were of opinion, in point of fact, that a broker who had adopted an undisclosed system of averaging prices had failed to shew that any definite transaction had been entered into solely on the defender's behalf. Indeed, I do not read that case as containing any general doctrine at all.

"I now come to the question whether the pursuers' system of carrying

¹ *Huntington Copper Co. v. Henderson*, Jan. 12, 1877, 4 R. 294, per Lord Young, 299.

² *Re Wreford*, Jan. 15, 1897, 13 Times Law Reports, 153.

No. 164. Argued for the pursuers ;—The defender's whole case was based upon the sweeping averment that the pursuers, while professedly acting for him as brokers, had really been carrying on a private speculation with his funds. There was no proof whatever of this. The pursuers had, upon his instructions, purchased and paid for the iron ordered by him ; the purchases were appropriated in their books, and intimated each day to the defender ; the warrants for each lot of iron bought were always available to the defender if he chose to pay for the iron. They had from time to time carried over the purchases on his orders, and lastly, they had to sell the iron at less than its purchase price. The cases relied on by the defender had no application. They were illustrations of the rule that no one in a fiduciary position is entitled to place himself in a position where his duty and his interests conflict. Here the pursuers had no interest adverse to their duty. The only interest they had in the transactions was to secure their commission. In *Maffett's*¹ case (1) there was no purchase of stock to fulfil an order, the broker having already bought stock in a block ; (2) there was no appropriation, as here, of stock to any par-

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over is enough to vitiate their whole claim. The rule of law to which the defender here appeals is undoubtedly a salutary one, and I should be sorry to say anything to disparage it. It is that the usage of a particular market is of no avail against a principal who is ignorant of its existence, if it really changes the intrinsic character of the contract of agency into which he has entered. The most apposite illustration of the rule is the case of *Robinson v. Mollett*, 7 Eng. and Ir. App. Cas. 802. The circumstances there were, that a merchant in Liverpool instructed a tallow broker in London to buy certain quantities of tallow for him ; the broker did not buy the specified quantities from any person, but he proposed to allot these to his client out of larger quantities belonging to himself which he had bought both before and after the date of the order. On this tallow being tendered to the client, he at once rejected it. The House of Lords held that this system converted a broker employed to buy into a principal selling for himself, and thereby gave him an interest wholly opposed to his duty.

"The mere statement of the case shews how different are the circumstances with which we have here to deal. The pursuers from time to time had orders from the defender to buy 9000 tons of iron on his behalf, and they bought these quantities from third parties in terms of their employment. Again, they had orders to sell these quantities, and they sold them, with a resulting loss of £791, 13s. 4d. That loss would have been exactly the same whatever mode of carrying over had been adopted. The pursuers' mode had no doubt the effect of converting them for the time being into principals, but it gave them no interest opposed to their duty, because the only advantage which they gained from it was the uniform sum of 3d. per ton, representing storage rent and a moderate sum of interest on the money advanced.

"There was no element in it of the pursuers unloading their own property, or arbitrarily fixing a price for it ; the price was a market rate fixed each day by an official of the market. They certainly did not adopt the system from any desire to take advantage of a falling market at the defender's expense, for, on 25th September, when the first carry-over was made, prices had risen, and if the defender had sold out then, he would have retired from the field with a profit of about £120.

"There was another mode in which the process of carrying over might have been accomplished. The pursuers might have got the original sellers or other persons in the market to take up the iron, in which case they them-

¹ *Maffett v. Stewart*, 14 R. 506.

ticular client; and (3) the broker so dealt with the stock throughout the currency of the accounts that in the result there was a large shortage in the mass of transactions. In *Gillies's*¹ case the ground of judgment was, that the broker had failed to enter into real transactions for his principal. In *Robinson's*² case part of the tallow from which the broker intended to supply his client's order had been already purchased by him prior to receiving the order. (1) As regarded the original purchases.—Iron, as ordered by the defender, was bought for

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selves would have been entitled to charge a commission of 1/8th per cent, but state No. 246 of process, and the evidence of Mr Wilson, the secretary of the Iron Trade Association, shew that this mode would have been more expensive to the defender than the mode adopted. The evidence of Mr Wilson also shews that the mode adopted is well known in the market; it is that which he himself invariably follows. I think the pursuers have succeeded in proving that it is usual and reasonable; and the only kind of criticism upon it which the defender made in his evidence was that it might have enabled the pursuers to do things which nobody says they did, and might have prevented the defender from doing things which he never attempted to do.

"But it seems to me that the conclusive answer to the defender's argument is that he had ample notice of the pursuers' mode of carrying over, and did not object to it at the time. He was no novice either as a 'bull' or as a 'bear' in the iron market, and his protestations of ignorance do not impress me favourably.

"The member of the pursuers' firm who was examined says that the very same system was followed in their former dealings with the defender, and Nos. 154 and 155 of process bear out his statement, for these are bought and sold notes in exactly the same terms as those sent to the defender after 26th August 1895. Even if there had been no prior course of dealing, the terms of the notes were, I think, a plain announcement that the pursuers had themselves taken up the iron. They bore that the iron was bought from and sold to the defender by the pursuers, and they contained no charge for commission. Moreover, the pursuers' letter of 30th September said distinctly,—'It is quite impossible for us to go on holding your iron'; and there were subsequent letters to the same effect. It is a mere play upon words to say that any differences went into the pursuers' pockets. Inasmuch as they had paid for the iron which the defender had bought, they were of course entitled to be recouped, and for that purpose to take not merely the prices which were paid when the iron was ultimately sold on the defender's order, but to recover from him the amount by which the latter prices fell short of the former. That was merely reimbursement, not profit. The only sums which in any proper sense went into the pursuers' pocket were the commissions which were due on the original purchases and the ultimate sales, plus the carry-over charge of 3d. per ton, representing storage rent and interest; and the latter charge, or its equivalent, would have been payable to any person who advanced the price and took up the iron.

"Even if the case had been one of an isolated transaction, and the defence had been stated at once, it would have been stated in much less favourable circumstances than the defence in *Robinson v. Mollett*. But to sustain it after a course of dealing extending over years, and in circumstances which (in my opinion) clearly point to knowledge on the part of the defender, would be to pervert a salutary rule of law to uses for which it was never intended. I shall therefore repel the defences, and give decree as concluded for, with expenses."

¹ *Gillies v. McLean*, 13 R. 12.

² *Robinson v. Mollet*, 7 Eng. and Irish App. 802.

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him, and at the prices authorised by him, and he could have enforced the contracts for it against the pursuers, and he also had materials for a claim against the selling broker, or the constituent behind him, if he had one. The orders received by the pursuers were cumulative orders for the defender himself and for his friends, and the system of averaging was not only justified but was the only workable system for ascertaining the price. The defender's argument was based on a misconception as to the purpose and effect of an advice-note. An advice-note was not a contract but a notification to the client of a contract made for him. In all cases the information contained in these documents was accurate. (2) As to the carry-over contracts.—There was no particular method ordained by law for effecting them. The transaction could be done either with the original selling broker, or with a third party, or with the broker himself. The commonest way of effecting the carry-over was for the broker himself to take over the purchase and hold it for his client; indeed it was incumbent upon him to do so if neither the original seller nor a third person was willing to do so. Now, was he in such circumstances to forfeit his rights under his brokerage contract? The answer to the argument as to the broker's adverse interest in case of a scarcity of the commodity bought was that in this case the defender could have had the warrants for his iron had he desired to take it up. But, in any view, the evidence was irresistible, that the defender knew and acquiesced in the method in which the carry-overs were effected. The form of the contracts was sufficient notice to him, and the expressions in the correspondence, coupled with the absence of a brokerage commission in the carry-over contracts, must have shewn him that the pursuers were acting as principals in the carry-overs. It was proved that he was no novice in buying and selling in the iron market. The Lord Ordinary's judgment was right.

At advising,—

LORD JUSTICE-CLERK.—The defender, who has been in use for a considerable time to engage in speculations in the Scottish iron market, employed the pursuers as brokers to buy certain quantities of iron, partly for himself and partly for others named by him to them. These purchases he directed from time to time to be carried over from one settling day to another. The pursuers being unable to obtain a settlement with the defender for their claims against him, have raised this action. The defender pleads that they are not entitled to decree against him, and this upon two grounds—(1) that they did not make purchases for him at the prices stated, and (2) that they did not continue in the character in which he employed them, but became truly principals in the transactions, which was contrary to their duty under his contract with them as brokers.

As regards the first of these contentions, the course of procedure seems to have been this—The pursuers having received the defender's order to buy a certain quantity of iron for himself and a certain quantity for a friend, went into the market and purchased such lots as they found offered. They then struck an average of the prices at which they had been able to obtain the iron, and charged the defender with the price so ascertained. It is therefore true that the price so notified to him did not always exactly correspond with the price at which any individual lot was bought, but, on the other hand, they did charge him with the proportion of the whole

lumped price applicable to the quantity he had desired them to purchase for him. The question is whether that was a proceeding of which the defender can complain as being a wrong done to him in breach of the pursuers' duty as brokers. I am unable to see any ground for so holding. If the brokers' clients, whoever they might be, sent to him a number of orders which reached him at one time, and he went into the market to buy, and could only get the quantities required by making several purchases, some of which were at different prices from others owing to the rapid fluctuations of the market, it is difficult to see how he could act fairly by his clients otherwise than by putting together the prices of the whole and charging each with his proportion applicable to the quantity he ordered. That was truly the price at which he obtained the goods, for it could hardly be said that the first lot he obtained was to go to the client whose order, by the accident of his picking up a particular letter first from his desk, came first before him, to the detriment of other clients whose instructions had reached him by the same post. In this particular case, where the defender ordered a purchase for himself and others, the actual orders were simultaneous, and accordingly I can see nothing but what was fair and right in this mode of stating the purchases, and nothing to exclude the pursuers from maintaining their claim on the employment of them by the defender to make the purchases which they did.

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The defender maintains that the course which the pursuers followed placed him in the position that he had no contracts made for him by them that he could have enforced—that the contracts of which they professed to give him notice by the advice-notes bore to be for prices not the same as those at which they made the contracts. This certainly is so. It is conceivable that in certain contingencies the defender, if he had required to work out his purchases from the sellers himself, might have had to pay in some cases more than the price at which the pursuers notified him of the purchases, the difference arising from the mode of averaging which they adopted. If it were necessary in the circumstances of this case to deal with any such question, it would, I think, be not unattended with difficulty. If any question had arisen of the enforcement by the defender of contracts entered into by the pursuers for him, I am not prepared to say that there might not have been serious questions not easy of solution. But here in actual fact no such questions did arise. The ventures into which the defender entered through the pursuers were worked out, the defender being unable to shew that any prejudice resulted to him from anything that was done in their initiation. The course which the pursuers took was in every way an equitable and a just one, and the working out of the transactions having taken place without any difficulty such as is suggested, I am unable to see ground for holding that the defender is entitled to throw upon the pursuers loss incurred in carrying on his business, they all through acting in an open and straightforward manner, which in no way tended to cause loss or to increase loss in the speculations ordered by him to be entered into and carried on from time to time with his knowledge, and without any objection.

But, secondly, it is said that the pursuers cannot maintain their claim because of the course they took in carrying over transactions which the

No. 164. defender was not prepared to settle at the proper settling time. The mode in which they proceeded is shewn in the documents produced. These were —(His Lordship read the carry-over bought and sold notes quoted above). These documents are most plain upon the face of them, and I am unable to accept the view that they were not perfectly understood by the defender. The transaction is plain enough. The pursuers buy from the defender at the market price of the day, and sell to him for a settlement on a later date at a price 3d. per ton higher than that price,—the sum of 3d. being divisible into 1d. for storage rent for the time, and 2d. for interest on money. And the pursuers, in their letters to the defender following on these bought and sold notes, refer again and again to their holding the iron as the defender's iron. "We cannot continue to hold your iron," they say, time after time. I agree with the Lord Ordinary in thinking that it cannot be taken off the defender's hands that he did not understand and acquiesce in this mode of dealing with his business, which is proved to be a mode usual in practice, and which could not prejudice the defender. Indeed, it appears that it worked out more cheaply to him than another mode would have done.

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I do not lay weight on the evidence that this is a mode of working out carrying-over transactions which is customary in the association of which the pursuers are members. For although it is the fact that the documents upon the face of them bore that the transactions were "subject to the rules and usages of the Scotch Pig Iron Trade Association," the defenders may not be bound by the procedure of that association to submit to anything that would truly change the character of the agency-contract undertaken by the pursuers.

I accept to the full the principle that a broker is not entitled to allocate goods belonging to himself as fulfilment of his instructions to buy for his client in the market. But that is not the nature of the proceeding here. The pursuers in the first instance made the purchases from principals, and notified these purchases as the fulfilment of the defender's orders. It was only when settlement was not made by the defender that the course was followed which was disclosed in the bought and sold notes to which I have referred. The mode of carry over brought nothing to the pursuers, except the 2d. per ton on each occasion, and this coming in lieu of a business commission was, it appears, more favourable to the defender. And, as I have said, it was known to him, and, I hold, acquiesced in by him.

I think that the pursuers have been successful in shewing that this is a usual and accepted mode of dealing with carry-over transactions. The pursuers admit that the warrants for the iron were lodged with their bank. But if the defender had supplied them with funds to meet any of the purchases, the warrants could have been exchanged for the money and made over to him. There is nothing in the evidence tending to shew that the defender had not the iron he had ordered available to him at any time he might come forward with the price and seek delivery. And I think the defender has failed to shew any damage that resulted or could result to him from the procedure which was fully disclosed to him, and to which he stated no objection.

I think there is great force in the argument used by Mr Balfour, that a broker in such a case as this might be placed in an enforced position to

do as was done here. For if he could not find a buyer for the carry-over No. 164. on reasonable terms, he might be compelled to pay himself, and so become a buyer. For he had either to pay or find a buyer or take over himself.

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The result of my opinion is that I move your Lordships to refuse the reclaiming note, and to adhere to the interlocutor of the Lord Ordinary.

LORD YOUNG.—I am of the same opinion, and I concur generally in the note of the Lord Ordinary in which he explains the grounds of his judgment.

I think this is not only an honest claim on the part of the pursuers, but that upon the facts it is a good legal claim, meaning thereby that the legal objections to it are not well founded. I think that the defence is not well founded in law, and that it is clearly not well founded in fact, and that on the grounds which the Lord Ordinary and your Lordship have both explained. It is established to my satisfaction, as well as that of the Lord Ordinary and of your Lordship, that the pursuers here never upon any occasion in the conduct of the defender's business acted on their own account for themselves, or with a view to their own profit or taking the risk of loss. In everything which they did, although they got occasionally into the position of a principal, they were acting upon employment as brokers, and doing the business of their client as such, and solely with a view to their client's interest, and with no eye to their own. It is matter of certain fact upon the evidence that brokers dealing in this commodity upon the Glasgow Iron Exchange or in the Glasgow iron market act as principals with respect to each other—that is to say, that while they may look to their clients or employers for relief and indemnity, they are bound to each other as principals, and that when one broker buys from another, although the one is buying and the other selling really in the interest and for behoof of third parties who employ them, they stand to each other in the relations of principals who must fulfil their contracts. Now, when the pursuers were instructed as brokers to purchase iron for the defender, and they did purchase it, they were under obligation as principals to fulfil that contract. They were ordered to purchase a certain quantity—take the first instance in 1895 of this renewed employment—they were instructed to purchase a certain quantity of iron deliverable in a month. The purchase price was communicated to the defender. I do not deal with the fact of averaging at this moment, but lay that aside. They purchased the goods for the defender, although they were bound as principals to the party from whom they bought, and when the month elapsed it was for the defender, who had given instructions in the matter, to provide them with money to take up the iron if he wished to have it. There is nothing to give the least countenance to the suggestion as a possibility—there is nothing to give the least countenance to it as a matter of fact—that had he desired to implement this purchase, and been prepared to send money to his brokers to pay for the iron and to take it up, he could not have got it at the market price which was paid for it, and of which he had got notice. But that did not suit him; he did not wish to take it up, and therefore it had to be carried over, but his brokers being bound as principals to the seller had to pay for it, although they were not supplied with money by their client to pay for it. They had two courses open to them no

No. 164. doubt. The one was to pay for it themselves and hold it for their client for a month, or get somebody else to supply the money and take it and hold it for their client for a month. It is, according to the evidence, a common way—I rather think it is the most common and the most beneficial way for the client and the broker—that the broker should pay for it with his own money and hold it over for his client. Well, there is the opportunity to advance the argument,—“Ah, then he becomes a principal.” I do not think there was anything wrong in that; I think it was according to the pursuers’ employment that when they were instructed to carry it over they should do it in a way beneficial to their client. It was certainly as much to his advantage as any other method would have been. In regard to repetitions, it is just the same thing. It is according to the evidence that every repetition of it was upon the most moderate terms which prevailed upon the Iron Exchange at the time. It could not have been done more cheaply for their client and in the interest of their client. With respect to the defender’s statement that he did not know, I know nothing about the defender any more than about the pursuers, and I am always sorry to concur in any observation, or to make any observation, which imputes what is discreditable to anybody, but I must concur in the observation of the Lord Ordinary in his note, that the “defender was no novice either as a ‘bull’ or as a ‘bear,’ and his protestations of ignorance do not impress me favourably.” That means in plainer language that the Lord Ordinary did not believe him, and I certainly do not believe him. I think he knew what was being done perfectly well. I marked in the course of the discussion, I think, three passages, and there are others. To turn to the letter dated 30th September 1895—Clavering, Son, & Company to J. A Hope & Company,—“We have your favour of yesterday’s date, and your wires of this morning. It is quite impossible for us to go on holding your iron. You must either pay us the margin in a proper way or we shall certainly sell.” That is a pretty distinct intimation that they were holding it. Then the next letter I had marked is dated 14th October 1895, and in it the pursuers say,—“We enclose account shewing how you stand, and we shall be glad of a cheque to bring us up to the point agreed upon, for with our small commission we cannot afford to run risks.” Then in another of the same date they say,—“We send you an account shewing £462, 6s. 2d. This is keeping the agreed-on margin of 1s. per ton and differences due. We hope you will send us this amount, as we cannot hold on to the iron and take the risk of the market.” And in a letter dated 17th October 1895 they say,—“We are disappointed at not hearing from you according to your promise when here. We cannot hold the iron unless the margin is paid and kept up. We wired you the price this morning,” and so on. Now, it is impossible, I think, to differ from the Lord Ordinary in disregarding the protestations of the defender here that he did not know they were holding the iron at all, or really had anything to do with it except buying as mere agents or selling as mere agents. I think they were agents, according to the custom of the market, of their client, the defender, in carrying over the speculative operations which he had employed them for, and that he knew thoroughly all that was being done, in his interest, and in his interest alone, and without the pursuers having any eye whatever to speculation for themselves.

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As to averaging, I may say that I concur, and do not dwell upon the subject, in the view of the Lord Ordinary. I think when an order is sent by a man, by a friend, or by himself alone, for a certain quantity of iron, it is quite fair and legitimate in the broker to buy it in what he considers the most favourable circumstances, and to the best advantage of his client, and if the prices of different quantities which may not correspond with the exact quantities ordered for any one of them are different, it is altogether legitimate to average these, and to charge two, three, or four clients with the fair average of the prices that have been paid in making the purchases upon their account. That really is the whole case, and I repeat that, in my opinion, it is proved clearly that this is an honest action by honest brokers for a sum due to them for business done by them in the interest of their client alone, and without any reference whatever to themselves except as regards their commission; that the defender knew that, and that the defence upon the technical grounds—for I call them so—which was stated to us is not a defence which any Court would willingly support if they could legitimately see their way to do justice to the party who was acting honestly in the matter.

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LORD TRAYNER.—I think this case is attended with considerable difficulty. I cannot concur in the views expressed by the Lord Ordinary, but I think the conclusion at which he has arrived is in accordance with the justice of the case.

LORD MONCREIFF.—Notwithstanding the able and ingenious argument for the reclaimer, I agree in thinking that we should affirm the Lord Ordinary's interlocutor. The proof does not disclose that the defender sustained any loss in consequence of the pursuers' operations as his brokers; but this would not avail the pursuers if it were proved that they failed to discharge their duty as brokers and departed from the rules and regulations of the Exchange without the knowledge and consent of their principal. I am satisfied, however, that on all points the defender fails; and first as to the original contracts. The state in Appendix A shews that the contracts in question, ranging from 26th August 1895 to 3d February 1896, both inclusive, were eleven in number. It is distinctly proved that all these were *bona fide* purchases made by the pursuers on the employment of and for the defender. The defender makes various objections. He says that in some cases he was not given the names of the sellers; that in others the price named to him was an average of two lots purchased by the pursuers; and that the quantities which were represented to have been purchased for him were in some cases only parts of larger quantities purchased by the pursuers. He maintains that in these circumstances he would have had no direct right of action against the sellers, who might have refused to carry out a sale of less than the whole quantity agreed on with the pursuers, or at a different price. If a question had arisen with the original sellers there might have been some practical difficulty in enforcing these sales. But it is sufficient to say that no question ever arose with the original sellers, because the sales were all carried out and the warrants obtained by the pursuers for cash paid on behalf of the defender, and the iron was there if the defender chose to take it up.

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As to the practice of averaging, there is evidence to shew that the defender was well aware that this was being done. (Compare letter pursuers to defender of 6th September 1895 with contract-notes of same date; and see also contract-note of 4th September 1895.)

In regard to the carrying-over, the defender's objection is that the pursuers acted as principals, and that therefore, according to the authorities, they are not entitled to recover. The pursuers' answer is, that in doing so they acted in accordance with the practice of the Scottish Pig Iron Trade Association, and that the defender was throughout apprised of their position by the terms of the carry-over contracts which the pursuer sent to him. I think that this is borne out by the evidence and the documents. The practice is thus described by the witness Wilson, secretary of the Iron Trade Association—(His Lordship read the passage from Mr Wilson's evidence quoted above).

Now, if it had been shewn that this practice was unknown to the defender, and that he was not aware that the pursuers were following it in carrying over, he might not have been bound, even although no loss was caused, by that system being adopted. The form of the carry-over contracts must have made it quite plain to the defender that the pursuers were acting as principals, because they all bear to be "bought from" and "sold to" Messrs J. A. Hope & Company, and not bought for or sold for them. The pursuers say—and there is no evidence to the contrary—that they had warrants with which they could at any time have implemented the sales had their client desired it.

The facts of the case being as I have stated, it is clearly distinguished from the cases relied on by the defender—*Robinson v. Mollett*¹ and *Maffet v. Stewart and Others*²—especially in this respect, that here it is proved that the defender was from time to time apprised both in regard to the averaging of prices and the footing on which the contracts were carried over. In agreeing that the Lord Ordinary's judgment should be affirmed I proceed not so much on the complete *bona fides* of the pursuers, which I think has been established, as upon the thorough knowledge which I am satisfied the defender had of the mode in which his interests were being attended to.

THE COURT adhered.

MORTON, SMART, & MACDONALD, W.S.—DRUMMOND & REID, S.S.C.—Agents.

No. 165.

ANDREW MUIR (William Brown's Trustee), First Party.—

Sol.-Gen. Dickson—Craigie.

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JOHN BROWN AND TUTOR AD LITEM, Second Parties.—*W. Campbell—Graham Stewart.*

Minor—Heritable and Moveable—Conversion—Sale of heritage by factor loco tutoris—Minor's power to test on proceeds of sale.—A minor pubes may dispose by will of moveable property belonging to him as a *surrogatum* for heritage.

A factor loco tutoris to A B during A B's pupillarity sold as an act of administration an inn to which A B had succeeded as heir-at-law. After attaining puberty A B executed a will disposing of his whole property.

Held that although the proceeds of the sale were to be regarded as a

¹ L. R., 7 Eng. and Irish App. 802.

² 14 R. 506.

surrogatum for heritage, being in fact moveable property belonging to A B, No. 165. he was entitled after puberty to dispose of it by will, and had done so.

Observed that if the property had not been sold, A B would have been on attaining puberty entitled to sell it, and to dispose of the proceeds by will. June 18, 1897.
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JOHN BROWN, innkeeper, Cross Keys Inn, Perth, died on 5th September 1894, intestate, predeceased by his wife, and survived by eight children—four sons and four daughters. William, born on 7th June 1882, was the eldest son. 1ST DIVISION.

At the date of his death John Brown was possessed of the Cross Keys Inn, Bridgend, Perth, in which he carried on business as an innkeeper, and of moveable estate amounting to somewhat less than £200.

William, as his father's heir in heritage, succeeded to the inn. On 6th November 1894 William James Wood, accountant, Perth, was appointed factor loco tutoris to William Brown, and, for some time after his appointment, he carried on the business of innkeeper in the inn by the aid of a servant. Wood presented an application to the Sheriff of Perthshire for power to sell the inn, suggesting, in view of the great risk attending licensed property, that the property should be sold. He also set forth that, if the property lost the licence, as might easily occur through the neglect or fault of the barman, the result would be a very serious loss to the estate, as a very small rent could be got for it if deprived of the licence, and further that, as the personal estate of the deceased was of small value and there was a large family, William Brown or the applicant might be called on to alimnt the other children; and that, while a price could then be obtained sufficient, if safely invested, to maintain them in comparative comfort, the result of the licence being lost would be most disastrous to them all. The Accountant of Court, on 30th January 1895, having reported favourably on the application, power to sell was granted by the Sheriff, and, on 25th March 1895, the inn was sold for £2140, and the free proceeds of the sale were invested by Wood in name of his ward, partly on heritable security and partly in Three per Cent Canadian Inscribed Stock.

William Brown attained the age of fourteen on 27th June 1896. On the 30th July 1896 he executed a holograph settlement in the following terms:—"I hereby assign my whole property, in the event of my death, to Andrew Muir, brewer, Perth, as my trustee and executor, in order that he may realise the same, and divide it equally among my brothers and sisters who may then be alive.—WILLIAM BROWN, 30th July 1896."

William Brown died on 29th October 1896, survived by three sisters and two brothers.

Questions having arisen as to the succession to the free proceeds of the sale of the inn, this special case was presented by (1) William Brown's executor, and (2) his heir-at-law, his immediate younger brother John, who was in pupillarity.

The case, after setting forth the above facts, further stated,—“When the said William Brown executed said settlement, as well as at the date of his death, he had no interest in any estate other than the free proceeds of said sale. He was aware that the heritable property had been sold. Prior to his making the said settlement, he was informed by his legal adviser that, if he died intestate, his property might fall to his younger brother, and he thereupon stated his desire that his estate should be divided equally among his brothers and sisters, and he thereafter executed the said settlement.”

No. 165. The first party maintained that the free proceeds were moveable estate in the person of William Brown, at the date of his death, in respect (a) that the sale of the inn was in reality a compulsory one; (b) that the free proceeds fell to be administered in terms of the settlement of William Brown, he having approved of and ratified the sale; and (c) that, in any event, the proceeds were carried by the deceased's settlement. The second party, on the other hand, maintained that the free proceeds were heritable estate in the person of his brother William Brown, at the date of his death; that no part thereof was carried by his settlement, but that the proceeds fell to him as his brother's heir-at-law in heritage.

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The questions of law submitted for the opinion of the Court were,—
“1. Are the free proceeds derived from the sale of the said Cross Keys Inn payable to the first party, in order that they may be distributed by him in terms of the settlement of the said William Brown? or
2. Do said free proceeds now fall to the second party as heir-at-law in heritage of the said deceased William Brown?”

On 18th March 1897 the Court appointed Mr James Adam, advocate, as tutor ad litem to the second party, and he by minute adopted the special case as adjusted on behalf of his ward.

Argued for the first party;—No doubt there must be “weighty reasons”¹ for the sale by a tutor of his ward's estate in order to operate conversion. But these existed here. The sale was not a mere act of temporary administration during the subsistence of the curatory, but it was a compulsory sale which the tutor was bound to make. The sale having then operated conversion, the proceeds were moveable, and the deceased had ratified it on attaining minority by assigning his whole property (and the proceeds of the inn were all that he had) to be divided, in terms of his settlement, amongst his brothers and sisters. In any view, the rule that a minor could not convey heritage only applied to subjects which were proper heritage, *e.g.*, it did not apply to subjects which were heritable *destinatione*.²

Argued for the second party;—(1) Nothing short of a compulsory sale was sufficient to convert property *quoad* succession from heritable to moveable. Here the most which could be said was that the sale was expedient in the interests of the estate; but mere expediency, even although it amounted to a duty in the tutor, was not sufficient. The sale of the inn then did not operate conversion, and the proceeds were heritable in the person of the deceased at the time of his death. (2) The deceased had not adopted the sale. In the first place, he had no power to do so so as to enable him to test upon the price. It was well settled that a tutor could not change what was heritable into moveable in order to enable his ward to regulate his succession by testament on his arriving at puberty, a minor pubes not being entitled to make a settlement of his heritage.³ In the second place, the

¹ Ersk. Inst. i. 8, 17; Accountant of Court v. Gilroy, May 21, 1872, 10 Macph. 715, 44 Scot. Jur. 392; Buntine's Curator, July 13, 1870, 8 Macph. 976.

² Brand's Trustees v. Brand's Trustees, Dec. 19, 1874, 2 R. 258, *per* Lord Gifford, 271, and March 16, 1876, 3 R. (H. L.) 16.

³ Sharp v. Crichton, July 19, 1671, M. 16,285; Advocate-General v. Anstruther, July 2, 1842, 13 D. 450, *per* Lord Ivory, 454; Fraser on Parent and Child, p. 261; Erskine's Inst. i. 7, 18; McLaren on Wills and Succession, vol. i. 238.

deceased had not in fact adopted the sale. In order to such adoption the deceased must have ratified the sale by some overt act. All he had done was to express his desire that his brothers and sisters should succeed to his estate, and that was not enough.

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LORD ADAM.—The facts which raise the questions, or rather the question, of law in this case are simple.

William died on the 29th October 1896. He was possessed of no other property than the proceeds of the sale of the inn.

The question of law is whether the proceeds of the sale of the inn were validly disposed of by the settlement executed by the minor.

The parties to the case are Mr Muir, the trustee named in the settlement, of the first part, who maintains the validity of the settlement, and John Brown, William's immediate younger brother and heir-at-law, who maintains that the proceeds of the sale in question were heritable estate in the person of his brother, and were not carried by the settlement.

Now, I think that if William had died intestate, the proceeds of the sale, being the *surrogatum* for heritable estate belonging to the pupil sold during his pupillarity, would have gone to his heir-at-law. The sale was not a compulsory sale. I do not in the least doubt that the sale was a most expedient act by the tutor in the interest of his pupil, but nevertheless it was a mere act of administration, which it is quite settled does not affect the heir's right of succession.

But that is not the question in this case. The question is whether a minor who is in possession of what is in fact moveable estate, although it may be the *surrogatum* for heritable estate sold during his pupillarity, may not deal with it just as freely as he may with any other moveable estate belonging to him. He may invest it as he pleases; he may spend it as he pleases; and I see no reason why he may not dispose of it by will if he pleases. Moreover, it will be observed that even if the Cross Keys Inn had not been sold during his pupillarity, it was in the minor's power to have sold it, and if he had done so, to have disposed of the proceeds by will. When on attaining minority he found that the property had been already sold, and the price was in his possession, I see no reason why he should not equally have the power of disposing of it by will. No decision to the contrary effect was cited to us. I am therefore of opinion that the settlement in question was habile to convey the price of the inn to the trustee, and that the first question should be answered in the affirmative.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

THE COURT answered the first question in the affirmative.

CARMICHAEL & MILLER, W.S.—JOHN HAY, Solicitor—Agents.

MRS ELLEN MURRAY, Pursuer (Appellant).—*D. Dundas—Abel.*
RENNIE & ANGUS, Defenders (Respondents).—*Balfour—Salvesen.*

No. 166.

Contract—Offer and Acceptance—Implied Condition—Undue delay in accepting.—In an action for implement of an offer to execute the mason Rennie & work required for the erection of a house in Aberdeen made by the defen- Angus.
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No. 166. der to the pursuer's architect on 10th June, and accepted by the pursuer on 21st June, the defender maintained that there was no concluded contract, in respect (1) that his offer had not been accepted within seven days as provided by one of a number of "conditions of tendering" agreed to by the architects and builders of Aberdeen; (2) and that in any view there had been undue delay in accepting his offer.

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The condition founded on was in the following terms:—"7. That architects shall within seven days from date of lodging estimates (either by advertisement or otherwise) inform the contractors who have tendered for work as to who has been successful, and that contractors shall be held bound to abide by their estimates for the same time." After a proof *held* (1) that the so-called "conditions" were not to be regarded as implied conditions in building contracts in Aberdeen, but rather as rules for the guidance of architects; (2) that even if they were to be regarded as conditions, condition 7 contemplated cases where the whole tenders fell to be received by a definite date, and fixed seven days for the architect considering them, and did not apply to the defender's offer; and (3) that the offer had been accepted without undue delay, and was binding.

Question whether the offer might have been accepted at any time until it was withdrawn?

1ST DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

MRS ELLEN MURRAY, wife of John Murray, builder in Aberdeen, having resolved to erect a dwelling-house there, had plans and specifications, and schedules of quantities prepared, which were submitted to various tradesmen in Aberdeen.

On 9th June 1896 a schedule of quantities of mason work, which bore to be for the house to be erected for Mrs Murray, and to be taken out by Messrs D. & J. R. M'Millan, architects, Aberdeen, was submitted to Rennie & Angus, masons in Aberdeen, who were members of the Master Masons' Association.

On 10th June Rennie & Angus wrote to Messrs M'Millan making offer to execute the mason work for £690.

Eleven days after, viz. on 21st June, Rennie & Angus received a letter from Mrs Murray accepting their offer, but Rennie & Angus declined to go on with the work.

Mrs Murray then, with concurrence of her husband, brought an action in the Sheriff Court at Aberdeen for implement of the contract, and for damages.

The defence was that the offer had not been accepted in due time.

The defenders averred that by "conditions of tendering made by the architects in Aberdeen and the respective associations connected with the building trade, and forming a condition of the present contract, it is provided '7. that architects shall within seven days of the date of lodging estimates (either by advertisement or otherwise) inform the contractors who have tendered for the work as to who has been successful, and that contractors shall be held bound to abide by their estimates for the same time.'"

* A copy of the "Conditions" was produced and put in evidence by the defenders. They were entitled,—“Conditions of tendering and forms of schedules relative to contracts agreed to by the architects in Aberdeen and the respective associations connected with the building trade.”

They contained eleven articles. *Inter alia*, they provided (art. 1) that every description of work to be contracted for should be scheduled, and that builders should refuse to offer for any such work, except the same had been scheduled.

(Art. 2) That a uniform system of measuring and scheduling suitable for the respective trades employed should be adopted.

The defenders pleaded ;—(1) The defenders' offer not having been accepted within seven days, as required by said conditions of tendering, or otherwise within a reasonable time, *ipso facto* fell, and consequently no contract was ever entered into.*

No. 166.

June 18, 1897.

Murray v.

Rennie &

Angus.

A proof was led, in which the facts above narrated were admitted or proved. Evidence was led in connection with the "conditions," the knowledge of the parties of their existence, and the custom of builders and others in regard to them, but for the purposes of this report it is unnecessary to refer further to the evidence.

On 4th January 1897 the Sheriff-substitute (Robertson) assoilzied the defenders,† and on 25th February 1897 the Sheriff (Crawford) adhered.‡

(Art. 3) That all details, such as mouldings, &c., should, where practicable, be indicated by marginal sketches.

Appended to the conditions was the following :—"Note.—As many of the terms in the schedules are local on account of this being a granite district, parties to a stamped contract should see that the terms in general conditions, specifications, and schedule agree, and that the contract be fairly balanced as between proprietor and contractor, and generally, that the arbiter named be other than the architect or the engineer on the work."

* By joint minute the parties agreed that the pursuer should be allowed to accept the next highest offer for the work in question. This offer was for £701, 10s., being £11, 10s. in excess of the defenders' offer.

† "NOTE.— . . . The position taken by defenders now is that by general custom of the trade in Aberdeen such offers require to be accepted within seven days; if not, the offerer may consider that his offer is not accepted and that he is free to offer elsewhere. In proof of this they put in a book containing conditions of tendering in such contracts agreed to by the architects and builders in Aberdeen.

"No. 7 of the general conditions relative to contracts stated in this book is to the effect that architects shall within seven days from date of lodging estimates inform the contractors who have tendered as to who has been successful, and that contractors shall be bound by their estimates for that time. The various conditions specified in this book are alleged to govern the building trade in Aberdeen in these matters so far as not altered by special agreement, and it was stated that if altered in essential points builders would refuse to estimate.

"Indisputable evidence of two of the leading architects and two of the leading builders in Aberdeen was led to the effect that the conditions of tendering in this book were always kept in view as between architects and builders and their employers, and specially that the condition in question as to the seven days' limit was universally held as giving the tenderer the option of going on or not if seven days elapsed without his hearing anything of the result of his offer.

"As I have already pointed out, Messrs M'Millan, whose names were on the schedule of quantities on which defenders offered, are architects in Aberdeen, defenders are members of the Master Masons' Association, and in these circumstances it seems to me perfectly clear that defenders in making this offer as they did were entitled to assume that the condition referred to was incorporated in and was an implicit condition of their offer, and that therefore they were within their rights in declining to implement their offer when not accepted within seven days.

"It was sought to be maintained that nothing could be considered here except the simple words of the contract, the offer, and acceptance; but it

‡ "NOTE.—The defence in this action is mainly laid on the usage of trade, and if that is established no better criterion could be found for deciding

No. 166. The pursuer appealed to the First Division.

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The arguments of the parties were to a great extent directed to the evidence and the questions arising thereon, but they sufficiently appear, so far as the questions decided by the Court are concerned, from the opinion of the Lord President.

At advising,—

LORD PRESIDENT.—The offer upon which the present action is founded was to build a house for £690. No time was specified in the offer as limiting the period of its subsistence. It was accepted within eleven days. The Sheriffs have held that the offer was binding for seven days and no longer. The judgments of both Sheriffs are founded on certain printed “conditions,” not expressly referred to in the offer or the acceptance, which they hold to express a usage or custom of the building trade in Aberdeen, to the effect that offers by builders are only binding for seven days. Both Sheriffs hold that the defenders’ offer was made in the knowledge of and in reliance on

seems to me too clear for argument that a usage or rule of trade, such as is here in my opinion proved, may extend, limit, or qualify a contract, so long as the usage is consistent with law, and is reasonable, and is not in contradiction of the terms of the contract, and, farther, must be presumed to be known to and relied upon by both parties.

“I think here that this condition was reasonable—the time was fixed as being reasonable by architects and builders in consultation—it is not contradictory of the terms of the contract, and looking to the evidence led, in my opinion the presumption is that the parties knew the condition and relied upon it. Certainly the defenders relied and acted upon the condition, and if pursuers, or rather their architect, did not they were themselves to blame.”

what is a reasonable interval between an offer and acceptance. The basis, and, so to speak, the text of the evidence in support of the contention that an offer must be accepted within seven days, otherwise the offerer is free, is the printed conditions of tendering agreed to by the architects in Aberdeen and the associations connected with the building trade. The rule on the subject, No. 7, is explicit. The conditions were recently revised in 1890, and this rule was retained, and the decided preponderance of the evidence confirms the presumption that that rule does express the usage of trade in Aberdeen. An effort was made to shew that rules 8 and 9 were less strictly observed, which was partially successful. But these rules refer to matters of detail. Rule 7 must be weighed as evidence of a usage when supported by other evidence, not as binding on the Court in itself, and as evidence its importance is not diminished by the observations on rules 8 and 9. The pursuers, however, further contended that assuming the rule referred to to be binding on the parties who could reasonably be held to have subscribed to it, it was not binding on them. Now, in the first place, the defenders made their offer to Messrs M’Millan, the architects, when no question had arisen, and they were anxious to obtain the contract. I think in the circumstances they were entitled to address themselves to Messrs M’Millan, and could hardly have done otherwise, and that in doing so they were entitled to rely on the usage of trade as embodied in rule 7 being a condition understood on both sides. But, secondly, assuming that the offer was really made to Mrs Murray, and that the rule was not binding upon her, the question arises whether she was not bound to accept within a reasonable time. To decide what was a reasonable time, there can be no evidence better, or so good, as the usage of trade as fixed by rule 7, and I see no reason in law or otherwise for regarding it as too short.”

these conditions, and that they were entitled to assume that the conditions were also in the knowledge of the pursuer or her architects, to whom the offer was sent in. The Sheriff holds, also, that the pursuer was bound to accept within a reasonable time, and that on the question what was a reasonable time, there can be no evidence better, or so good, as the usage of trade as fixed by the conditions. I desire, in passing, to observe that while I do not agree in the conclusion arrived at, the opinions of both the learned Sheriffs shew that care and ability have been applied to the decision of the question at issue; and it is only after full argument that I differ, and I do so on a view of the case which does not seem to have been considered by them.

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The Sheriff has justly remarked that "the basis, and, so to speak, the text of the evidence in support of the contention that an offer must be accepted within seven days, otherwise the offerer is free, is the printed conditions of tendering agreed to by the architects in Aberdeen and the associations connected with the building trade." It is the 7th of these conditions which is said to govern the present case. Now, on the construction of the "conditions," two remarks occur,—one relating to the conditions as a whole and the other relating to the 7th. (1) The conditions do not purport to be, and do not read as if they were intended to be, statements of practice or implied conditions of contracts. Taken as a whole, they are rather rules or maxims for the guidance of architects—statements of what is best to be done in the matters treated of. (2) When the 7th condition is examined it will be found to be wholly inapplicable to the case before us. It postulates a "date of lodging estimates," that is to say, that a date has been fixed and announced as the last day for offers; and then it says that from that date seven days are to run. It therefore assumes that by a certain day all offers must be in, and that accordingly the architect is from that day in a position to consider and compare the offers and make up his mind. The rule has on the face of it no application or applicability to the case where no day is announced for receiving tenders. It gives one and the same period for all offers; it makes that period run, not from the date of each offer, but from the date when, as announced, the architect will take no more offers, but will begin finally to consider his decision.

Now, in the present case, no such date was announced at all. The pursuer was not committed to any date as that at which the time for offering was over. The pursuer, even on the theory of the rule, was entitled to have had offers all in before she began to consider them; she was entitled to assume that they would not come in simultaneously, and, in fact, they came dropping in for several days. To be consistent with the principle of the rule, the defenders ought, in the absence of a stated last day for offers, by way of analogy, to run the seven days from the day on which the last offer in fact came in. But their theory, and the theory of the Sheriffs, is that the seven days run from the offer itself, and that must mean that a separate period of seven days runs for each offer from its own date. For this I can find no warrant whatever in the "conditions," which, as the Sheriff has said, form the basis of the evidence.

The next point to be observed is that the same considerations which shew that the 7th condition does not apply, shew also that it furnishes no evi

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dence at all that the time taken in the present case was unduly or unreasonably long, supposing that to have been the true question for decision. Any bearing which it has is in the other direction. If a punctual architect takes seven days to consider the tenders after they are all in, four days does not seem a very long time to allow for tenders coming in, even supposing (without warrant from the evidence) that the pursuer was committed to simultaneous delivery of the schedules to expected offerers.

Apart from the conditions there is nothing in the evidence to shew that there was any undue or unreasonable delay ; the testimony of the pursuer's husband is that he applied his mind to the offers as soon as he possibly could, and there is no suggestion that he was hindered from doing so by external circumstances.

My opinion, as indicated in these last observations, is that, as matter of fact, it is not proved that there was undue or unreasonable delay in accepting the offer. I must not, however, be understood as asserting that this is the true question in the case. Mr Bell, in his Commentaries (i. 343), has laid it down that " where an offer is made simply, the general rule at common law is that it may be accepted at any time till withdrawn." He goes on to say that " the necessary rapidity of mercantile transaction has introduced an exception in the case of commodities offered to sale, or of an offer to purchase commodities in the ordinary course of trade. For any dealer must know that commodities offered are lying in wait for a market ; that the price is subject to fluctuation ; and that opportunities for disposing of such goods may open and be lost by delay ; or that the person who makes an offer may lose by delay some other opportunity of procuring them. Unreasonable delay in the answer being therefore inconsistent with the spirit of trade, it is an implied condition of a mercantile offer to sell or to purchase that it ought to be instantly accepted, or at least without any undue delay."

Now, it is, to say the least, doubtful whether an offer to build a house falls within the exception stated by Mr Bell, or within the principle of the exception as explained by him ; and if it does not, then what he calls the general rule at common law would seem to apply. The question, in the latter view, would thus be, not whether there had been undue delay in accepting the offer, but whether the offer had been withdrawn. But I mention this view of the case for the purpose of saying that it was not presented to us by the appellant ; and the case was argued on the assumption (presumably based on more recent though uncited authorities) that the true question was, Had there been undue delay ? Holding the opinion which I do as to the failure of the defenders' case, I do not require to consider to what extent Mr Bell's doctrine is a complete statement of the law, or which part of it applies to a builder's offer, and this will be entirely open for future consideration. Only, if I were a building contractor, I should, in the meantime, think it prudent to state in each offer the period for which it is to be binding.

It may be well to add that, as the view which I take of the true construction of the conditions brings down with a run all the evidence based upon them, I have no occasion to consider whether there is here any evidence of usage of trade in the proper sense of the term, or how far the sort

of evidence which we have here could avail to establish, as an implied term of this offer, a limitation of its subsistence. No. 166.

I am for recalling the interlocutors appealed against, and finding, in fact, that the offer was accepted and had not been withdrawn before acceptance, and that it was accepted without unreasonable delay, and, in law, that it was binding. As the pursuer's claim is necessarily for damages, we have to consider how much is proved; and I am unable to find evidence of more loss than the difference between the two contracts. For that sum, which I believe is £11, 10s., the pursuer is entitled to decree.

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LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT recalled the interlocutors of the Sheriff-substitute and Sheriff, and found in fact “(1) that the defenders' offer, dated 10th June 1896, was accepted by the pursuer Mrs Murray, on 21st June 1896; (2) that the said offer had not been in the meantime withdrawn; (3) that the offer was accepted without undue or unreasonable delay; (4) that the defenders failed to do the work specified in the offer; (5) that the pursuers have sustained damage to the amount of £11, 10s.: Find in law that the offer was binding when accepted, and that the defenders are liable for the damage sustained by the pursuers: Therefore decern against the defenders for the said sum of £11, 10s.: Find the defenders liable in expenses in both Courts,” &c.

RONALD & RITCHIE, S.S.C.—PHILIP, LAING, & HARLEY, W.S.—Agents.

WILLIAM DANIEL MACGREGOR, Petitioner (Appellant).—*Cooper—* No. 167.
Munro.

THE MAGISTRATES OF THE BURGH OF LEITH, Respondents.—*Balfour—* June 18, 1897.
Salvesen. Macgregor v.
Magistrates of
Leith.

Burgh—Dean of Guild—Alteration of existing building—Provision for light and ventilation—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), sec. 167.—Under the Burgh Police (Scotland) Act, 1892, the Dean of Guild Court of a burgh were entitled to refuse a warrant “for the erection of any new house or building, or for the alteration of the structure of any existing house or building, until satisfied that the plans provide suitably for stability, light, ventilation, and other sanitary requirements thereof.”

Where the plans for the alteration of a building shewed that the alteration would have the effect of improving the light and ventilation of the premises, *held* that the Dean of Guild Court were not entitled to refuse a warrant on the ground that they were not satisfied that the plans provided suitably for light and ventilation of the building.

WILLIAM DANIEL MACGREGOR, proprietor of tenements, consisting of houses and a boarding-house, on the south side of the court at 112 Kirkgate, Leith, applied to the Magistrates of Leith in their Dean of Guild jurisdiction for warrant to improve the lighting, ventilation, and sanitary arrangements of the premises, by enlarging windows, taking down partitions, erecting new stairs, removing part of wall, and inserting iron beam in same, and executing other minor alterations.*

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Dean of Guild
Court at Leith.

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), sec.

No. 167. The application was served on the Master of Works, who reported that the alterations might improve in a slight degree the light of the respective rooms, but that no alterations, short of entire reconstruction, could ever make the premises thoroughly healthful and suitable for the housing of the working-classes.

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A remit was subsequently made to the medical officer of health and the sanitary inspector for the burgh to say whether, in their opinion, the plans provided suitably for light and ventilation.

They reported that the alterations shewed a slight improvement in the means of lighting the premises, but that more than half the boarding-house was closely surrounded by buildings, and the sunlight was almost entirely shut out on the south; that the alterations might increase the number of lodgers, and that, in their opinion, the plans did not provide suitably for light and ventilation.

On 6th May 1897 the Magistrates, "having visited the premises, and heard the petitioner's agent," found that the plans did not provide suitably for light and ventilation, in terms of clause 167 of the Burgh Police (Scotland) Act, 1892, and therefore declined to grant the warrant craved.

The petitioner appealed, and argued;—Section 167 of the Burgh Police Act was to be reasonably construed, and "suitably" meant suitably looking to the locality and class of property. The petition was for warrant to improve the existing house, and it was not suggested that the ventilation of the house could be provided for in a better way than by the proposed alterations, except by the removal of buildings, which the Dean of Guild had no power to order. The proposed alterations being admittedly an improvement, the Magistrates had no right to refuse the warrant.

Argued for the Magistrates of Leith;—The Magistrates had not exceeded their jurisdiction. They were entitled under section 167 to refuse a warrant for the alteration of a house, if not satisfied that the house as altered would be suitably lighted and ventilated. The proposed alterations would make the house more attractive, and was an alteration of the mode of occupation¹ which would probably lead to an increase in the number of lodgers. That was a legitimate reason for the Magistrates' refusal to grant the warrant craved.

At advising,—

LORD PRESIDENT.—Under the Burgh Police (Scotland) Act, 1892, no one is entitled to alter the structure of an existing house in the burgh without a warrant of the Commissioners. Anyone who proposes to alter the structure of a house has to present a petition to the Commissioners for warrant to do so, and the petition must set forth a description of the alteration, with such relative plans as are necessary to shew the height and mode of structure and arrangement of the intended alteration.

166 provides for the presentation of a petition for warrant to erect new buildings for human habitation, or for the alteration of existing buildings. Sec. 167 enacts,—“The clerk of the Commissioners shall, at their first meeting after receiving such petition, give notice thereof to the Commissioners, who may decline to grant warrant for the erection of any new house or building, or for the alteration of the structure of any existing house or building, until satisfied that the plans provide suitably for stability, light, ventilation, and other sanitary requirements thereof.”

¹ Burgh Police (Scotland) Act, 1892, sections 166 and 169.

The present appellant proposed to alter the structure of his existing No. 167. house, and he accordingly petitioned the Magistrates of Leith, who are the Commissioners of that burgh, for warrant to do so, describing the proposed alteration, and lodging plans in accordance with the statute. The Magistrates have declined to grant the warrant craved, on the ground that they are not satisfied that the plans provide suitably for light and ventilation.

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From the proceedings, however, it appears, and in debate it was admitted, that the objection of the Magistrates is not to the alteration, which alone required their sanction, but to the light and ventilation of the house as it exists, and as it will be after the alteration. It is admitted that the alteration, so far as it affects the light and ventilation of the house, improves them. This being so, it seems to me that the Magistrates were bound to grant the warrant. As this was a lawfully existing house, the question before the Court was the merits of the alteration, and not the merits of the house apart from that alteration. I have called this a lawfully existing house, because *de facto* it existed unchallenged. If its defects in the matters of light and ventilation had exposed it to any hostile action on the part of the Magistrates, it is to be presumed that such action would have been taken. What has been done is to take advantage of the appellant's application to improve his house in order to condemn the house, and this is, in my judgment, a misapplication of section 167.

I am for recalling the interlocutor, and remitting to the Magistrates to grant the warrant craved.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT recalled the interlocutor, and remitted to the Magistrates to grant the warrant craved.

ROBERT D. KER, W.S.—IRONS, ROBERTS, & Co., W.S.—Agents.

MRS MARY HOOD, Pursuer (Reclaimer).—*Gunn*.
CHARLES HOOD, Defender.

No. 168.

June 24, 1897.
Hood v. Hood.

Jurisdiction—Domicile—Husband and Wife—Separation.—In an action of separation and aliment, and for custody and aliment of two children, brought by a wife residing in Scotland against her husband residing in England, the defender deponed that he was 34 years of age, and was born in Scotland, where he served his apprenticeship as an engineer, and that for the last 11 years he had been working in various places in England. He further deponed,—“If I got as good a wage in Scotland as I have been getting in England, I do not doubt but I would go there to work. I only want a living wage. . . . I would go back to Scotland to work if I got a good job. I would not expect to get the same money as I have, but if I got something steady I would be quite willing to go.”

Held (diss. Lord Young, rev. judgment of Lord Pearson) that the defender had never lost his Scottish domicile, and that the Court had jurisdiction.

MRS MARY HOOD, 182 East High Street, Forfar, wife of Charles Hood, engineer, raised this action of separation and aliment against her husband, whom she described as “presently residing at No. 48 Shore Road, Deptford.” She concluded also for the custody of John Hood and Isabella Smart Hood, the children of the marriage, and for

2D DIVISION.
Lord Pearson.

No. 168. aliment for each of them so long as they should be unable to earn a livelihood, and should remain in her custody.

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The Lord Ordinary (Pearson) allowed a proof, at which the defender appeared for himself, although he had not lodged defences.

The following facts were established:—

The defender was born at Inverkeillor, Forfarshire, in 1863, and served his apprenticeship as engineer in Forfar. As a journeyman he worked for a few months in Dundee and Arbroath, and in 1886 went to England where he remained for the next 11 years in the employment of various firms. On 27th December 1889 he was married to the pursuer in Forfar, and after a few days residence in Scotland the parties went to Newcastle, where the defender was then employed. They lived there for eleven months, and then went to London for two months. They removed to Portsmouth, where they lived seven months. In September 1891 they returned to London, and after ten months' residence there they went to Newcastle. In 1893 they returned to London, and lived in various districts until April 1896, when the pursuer left the defender on account of his cruelty to her and returned to her parents in Forfar. The children were born respectively on 1st December 1890, and 18th September 1894, at the house of the pursuer's parents in Forfar.*

On 23d March 1897 the Lord Ordinary pronounced this interlocutor:—"Finds that the defender is domiciled in England, and in respect of no jurisdiction, dismisses the action, and decerns."†

* The defender deponed,— . . . I was born in Inverkeillor. My father died some ten years ago in Forfar, and was buried there. My mother is still living in Forfar. I have three sisters living with my mother. I was working in Arbroath for a short time when I was in Scotland, looking after the case in the Sheriff Court. If I got as good a wage in Scotland as I have been getting in England I do not doubt but I would go there to work. I only want a living wage.

"By the Court.— . . . I would go back to Scotland to work if I got a good job. I would not expect to get the same money as I have, but if I got something steady I would be quite willing to go."

† "OPINION.—A general proof has been led in this case, and if the merits were now to be decided I should have no doubt that the pursuer was entitled to decrea. Her witnesses seem to me entirely straightforward and reliable, with no tendency to exaggeration, and I cannot regard the defender's evidence as of any weight against them.

"But the question of domicile and of jurisdiction is important, and upon the authorities it is narrow enough.

"The pursuer contended that upon the proof the defender's domicile of origin persists; and that, although he has long resided in England, the character of his residence there is such as to preclude the idea that he has acquired an English domicile,—the cases referred to being *Patience*, 1885, 29 Chancery Div. 976; *Steel*, 1888, 15 R. 896; *Low*, 1891, 19 R. 115; *Dombrowitzki*, 1895, 22 R. 906. The law is clear enough. Upon the facts, the first two cases come nearer to the present than the others. But in the case of *Steel* the alleged Burmese domicile was repudiated by the Court in language (see p. 909—'Nobody goes to Burmah to remain') not universally applicable to Scotsmen who go to England; while the alleged English domicile was regarded as incidental to the Burmese business, and as 'not affecting his position as a domiciled Scotchman any more than the establishment of a branch in Burmah.' In the case of Colonel *Patience*, a domiciled Scotsman, he had served in the army in foreign parts for fifty years, after which he retired, and lived a bachelor life for twenty-two years in

The pursuer reclaimed, and argued ;—The Lord Ordinary was wrong in holding that the Court had no jurisdiction. The case started with the fact that the defender's domicile of origin was Scotland, and the *onus* was on him to shew that he had lost it. That *onus* had not been discharged. It was apparent from the proof that he had no intention of giving up his Scots domicile. His residence in England was a mere accident of his employment. He had never really settled there, and he was still willing to live in Scotland. It was a mere question of wages.¹

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No appearance was made for the defender.

LORD JUSTICE-CLERK.—On the cases decided and cited to us my opinion is that the Court has jurisdiction. According to the evidence there has never been any intention on the part of the defender to give up his original Scottish domicile. He never seems to have settled in any place at all. He was and is a jobbing engineer, moving from town to town wherever he can get a job. He himself says that he would return to Scotland if he could get as good wages for his work. My opinion is that he has never lost his Scottish domicile.

LORD YOUNG.—I regard this as a very important case, all the more important that it is quite new. There is no precedent for an action of separation and aliment brought by a wife against a husband resident in England for years, and who is designed in the summons as residing at Shore Road, Deptford, London. I should have thought it clear that the Courts of England had jurisdiction over any man residing in England who is not there as a visitor, or on the occasion of a jubilee, but is residing there and working for his livelihood. In my opinion it is not material that while in England he has moved about from one town to another. I think that for

England in lodgings, hotels, and boarding-houses. The Judge took into account the nature and character of the residence as 'shewing a fluctuating and unsettled mind,' and pronounced for the domicile of origin. The present case differs widely from these in its circumstances. But the pursuer maintains that the principle applies ; that the defender's going to England and staying there was in connection with the prosecution of his trade, and that while so engaged he moved about from place to place in England ; and it is further pointed out that he not only says he would quite willingly return to Scotland if he could get the English rate of wages, but actually wrought at Arbroath for some weeks while he was detained in Scotland in connection with a petition for the custody of his child. After weighing all the circumstances here most carefully, I think it would be going beyond any decided case if I were to hold that the defender had not acquired an English domicile.

"It is indeed the law that the remedies of married persons other than divorce *a vinculo* are not confined to the Courts of the country of the domicile properly so called. It has recently been laid down by high authority (in *Le Mesurier*, 1895, Law Rep. App. Cases, 517) that 'the Courts of the residence are warranted in giving the remedy of judicial separation without reference to the domicile of the parties' (*per* Lord Watson, pages 526-7 and page 531). But that principle has no application in the circumstances of this case, although (assuming a Scottish domicile) it might have supported an application by the wife to an English Court for the remedy of separation and aliment.

"In the circumstances I make no order as to expenses."

¹ *Steel v. Steel*, July 13, 1888, 15 R. 908, *per* Lord President Inglis.

No. 168. all purposes relating to his conduct, whether to his wife or to his children, or in the management of his affairs, the English Courts, and the English Courts only, have jurisdiction. That, I think, is clear upon principle, and if there is any decision to the contrary, one would gladly have heard it, but admittedly there is none. The conclusions of the action are based on alleged cruelty to the wife in England. Decree is asked against his keeping his son with him in England, and ordering him to pay the pursuer money periodically. I should have thought it clear, upon principle and authority, that while the English Courts have jurisdiction, this Court has none. It is admitted that this Court would have no jurisdiction over such a defender in questions of debt, whether ordinary debt or damages for misconduct. What is the distinction here? The defender is said to have misconducted himself to his wife in England so as to subject him to be deprived of her society, and ordered to make payment of money to her periodically. It is said that he was born in Scotland. The domicile of origin may have a great deal to do with a question of succession, but has nothing to do with an action of damages for misconduct similar to the present. I should have thought that a case of this kind, admittedly new and unique, was too serious and important to be determined by a majority of the Court, but might very well have merited further consideration, and possibly a reference to a larger Court than the present. In my opinion the judgment of the Lord Ordinary is right.

LORD TRAYNER.—I do not consider what decree the pursuer may be entitled to under the conclusions of the summons and the proof which she has led, because the only question at present for us to decide is whether the pursuer is entitled to convene the defender before us. The sole question is, whether the defender is subject to the jurisdiction of the Scottish Courts. Upon that question I entertain no doubt. I think the defender is subject to the jurisdiction of the Scottish Courts. The defender is a Scotsman by origin, and has never lost his Scottish domicile. He has never acquired, or shewn any intention of acquiring, an English domicile. I am therefore of opinion that the Lord Ordinary is wrong.

LORD MONCREIFF.—I agree with the majority of your Lordships.

THE COURT recalled the interlocutor of the Lord Ordinary, and remitted to him to dispose of the cause.

JOHN MACKAY, S.S.C.—PARTY—Agents.

No. 169.
June 26, 1897.
Dessau v.
Daish.

MORLAND NICHOLL DESSAU, Pursuer (Reclaimer).—*Clyde.*
ROBERT EVERS DAISH, Defender (Respondent).—*Crabb Watt.*

Process—Mandatory—Foreigner resident in England—Impecuniosity—Judgments Extension Act, 1868 (31 and 32 Vict. cap. 54).—*Held (rev. judgment of Lord Pearson)* that an American pursuer, who was resident in England and had no immediate intention of leaving that country, was not bound to sist a mandatory, in respect that the decree of the Scots Court for expenses could be enforced against him in England under the Judgments Extension Act, 1868.

Lawson's Trustees v. British Linen Co., June 20, 1874, 1 R. 1065, followed.

Mere impecuniosity is not a sufficient ground for ordaining a party to
sist a mandatary. No. 169.

THIS was an action at the instance of Morland Nicholl Dessau, designed in the summons as "sometime of No. 32 Hawlay Street, Boston, United States of America, and at present residing at No. 45 Weymouth Street, Portland Place, London," against Robert Evers Daish, merchant in Edinburgh. The pursuer concluded, *inter alia*, for declarator that the defender had no right to print or sell the calendar known as Dessau's Calendar, except on the conditions specified in an agreement between them, that he had not fulfilled these conditions, and that the pursuer was thus entitled to print and sell the calendar, and for damages.

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Lord Pearson.

The defender, in his answers, stated "that the pursuer is a citizen of the United States of America, and is residing in England for temporary purposes. He has no domicile in this country or in England."

He further founded upon correspondence between him and the pursuer, with the view of shewing that the pursuer was in straits for money, and pressed by creditors.

The defender pleaded;—(1) The pursuer ought, *ante omnia*, to be ordained to sist a mandatary.

Counsel for the pursuer explained at the bar that his client had left the house in Weymouth Street which he occupied at the date when the action was raised, was now in occupation of a house at Ealing under a lease from year to year (September to September), and that he had no immediate intention of leaving England.

On 29th May 1897 the Lord Ordinary (Pearson) appointed the pursuer to sist a mandatary within fourteen days.*

* "OPINION.—This is an action upon a minute of agreement, dated in 1894, in which the pursuer is designed as 'of 32 Hawlay Street, Boston, United States of America, manufacturer.' In the summons, which was raised in December 1895, he describes himself as 'sometime of 32 Hawlay Street, Boston, United States of America, manufacturer, and at present residing at No. 45 Weymouth Street, Portland Place, London,' and he explains in the condescendence that he is lessee of that house at a rent of £235, under a lease which has seventeen and a-half years to run. It was, however, explained at the bar that he has given up that lease, and is residing at Ealing, near London, in a house which he has from year to year. The defender avers that the pursuer is a citizen of the United States, and that he is residing in England for temporary purposes; and, as I read the pursuer's qualified denial at the end of condescendence 1, it does not extend to a denial of these averments. On these statements, and on the further ground that the pursuer's letters produced shew him to have been pressed for money and apprehensive of diligence, the defender moves that he should be ordained to sist a mandatary. I do not proceed on the latter ground. But I hold that the pursuer, being alleged to be domiciled in the United States, and having failed to shew that his residence in England is such as to bring him within the rule laid down in the case of *Lawson's Trustees* (1 R. 1065), ought to sist a mandatary as a condition of being allowed to proceed.

"The only difficulty I have felt in arriving at this conclusion arises from the action being one in which a foreigner is seeking implement of a contract made with a Scotsman, and damages for alleged breach of that contract. But I do not find that this consideration has ever been recognised as a reason for not applying the rule.

"I shall therefore allow the pursuer a reasonable time within which to

No. 169. The pursuer reclaimed, and argued ;—The question whether a party should be ordained to sist a mandatary was one for the discretion of the Court, and was a question not of domicile but of residence. The principle of the rule that a party resident abroad required to sist a mandatary was twofold,—first, that there might be someone within the country answerable to the other party for expenses; and second, that there might be someone answerable to the Court for the proper conduct of the case.¹ In general the first was the material consideration, there being no case in which the second had been held a sufficient ground by itself for requiring a mandatary to be sisted. The effect of the Judgments Extension Act of 1868² was to make residence in England as good in the matter of security for costs as residence in Scotland, and therefore a person resident in England would not be required to sist a mandatary, unless there were some special reasons for requiring him to do so. No such reasons existed in the present case.³

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Argued for the defender ;—Prior to the passing of the Judgments Extension Act, the rule was that all foreigners, without distinction as to their place of residence, required to sist a mandatary.⁴ This rule was not touched by the decision in *Lawson's Trustees*,⁵ or the later case of *D'Ernesti*.⁶ In *Lawson's Trustees*³ the pursuers were Englishmen. They were also of undoubted solvency. In all the cases the question had been treated as a question of circumstances, and here the fact, appearing from the letters, that the pursuer was in great pecuniary straits, was a ground for requiring him to sist a mandatary. It was also to be taken into account that he was only resident in England for temporary purposes, and that the lease of the house he occupied expired in September.

LORD ADAM.—This is a reclaiming note against a judgment of the Lord Ordinary appointing the pursuer to sist a mandatary. The action is by a Mr Dessau, who is designed in the summons as “sometime of No. 32 Hawley Street, Boston, United States of America, manufacturer, and at present residing at No. 45 Weymouth Street, Portland Place, London,” and the ground upon which the Lord Ordinary has proceeded is that “the pursuer, being alleged to be domiciled in the United States, and having failed to shew that his residence in England is such as to bring him within the rule laid down in the case of *Lawson's Trustees*,³ ought to sist a mandatary as a condition of being allowed to proceed.” It appears, therefore, that the Lord Ordinary has not proceeded on the alleged impecuniosity of the pursuer, but upon the fact that he is a foreigner only temporarily resident in the United Kingdom.

It appears to me that the question whether a pursuer should be appointed to sist a mandatary is now, as it has always been, a matter in the discretion

sist a mandatary ; and on this being done, I shall proceed to dispose of the other preliminary questions which were argued.”

¹ *Simla Bank v. Home*, May 21, 1870, 8 Macph. 781, *per* Lord Kinloch, at p. 782 ; *Lawson's Trustees v. British Linen Co.*, June 20, 1874, 1 R. 1065, *per* Lord President Inglis, at p. 1066.

² 31 and 32 Vict. c. 54.

³ *Lawson's Trustees v. British Linen Co.*, June 20, 1874, 1 R. 1065.

⁴ Ersk. iii. 3, 33, note 140 ; *Shand's Practice*, 154.

⁵ *D'Ernesti v. D'Ernesti*, Feb. 11, 1882, 9 R. 655.

of the Court, but in the exercise of our discretion we have rules and decisions to guide us, and one of these decisions is the case of *Lawson's Trustees*,¹ which is referred to by the Lord Ordinary, and was the case most discussed in debate. Prior to the Judgments Extension Act and the case of *Lawson's Trustees*¹ the general rule was—there may perhaps have been some exceptions, but I do not remember any—that every foreigner was bound to sist a mandatory, but then it is to be borne in mind that prior to the Judgments Extension Act “foreigner” meant any person not domiciled in Scotland, and included Englishmen or Irishmen just as much as a citizen of the United States or other foreign country. At least I do not remember that, prior to the Act in question, any distinction was taken between an Englishman and a foreigner. But the effect of the Judgments Extension Act, as explained in the case of *Lawson's Trustees*,¹ was to make a material difference between them, because it was then decided that, although a pursuer was resident in England, he was not on that account alone bound to sist a mandatory, the reason being that the Judgments Extension Act made a decree for expenses pronounced by the Scots Court as enforceable in England and Ireland as in Scotland, and so made it immaterial whether the pursuer was resident in England, Ireland, or Scotland. I do not see that there is any ground for the distinction sought to be taken between an Englishman and a foreigner resident in England, both being subject to the decree of the English Court, and therefore of the Scots Court, under the Judgments Extension Act.

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There were two other grounds upon which the defender maintained that the pursuer should be required to sist a mandatory, (1) that he was only resident in the United Kingdom for a temporary purpose, and (2) that he was alleged to be in a state of impecuniosity.

With regard to the first of these grounds, the facts, as explained at the bar, are, that he is residing in England without any present intention of leaving it. But if he is resident in the United Kingdom with no immediate intention of leaving, we cannot inquire as to the probable duration of his residence. If the defender finds reason to believe, in the course of the proceedings, that the pursuer has quitted the jurisdiction, then he may apply to have him ordained to sist a mandatory, but the mere fact that his residence is temporary and not permanent is not a sufficient reason for pronouncing such an order.

As to the pursuer's alleged impecuniosity, the letters read to us, which are not of very recent date, certainly do shew him to be in an impecunious state, but I never understood that mere poverty was a sufficient ground for shutting the door of the Court to a litigant.

On the whole I am of opinion that the pursuer is not bound *hoc statu* to sist a mandatory, and that the interlocutor of the Lord Ordinary should be recalled.

LORD M'LAREN.—There is no doubt as to the rule of the common law on this subject. The practice was that whenever a pursuer was extraneous—I had rather not use the word “foreigner” as applicable to our fellow-subjects in England and the Colonies—to the jurisdiction of the Court, he was

¹ 1 R. 1065.

No. 169. under the necessity of sisting a mandatary. There are other reasons suggested which may have accounted for the origin of the rule, but in its application in our time I think the matter of being responsible for expenses was the main and determining consideration in all such cases. It was not an absolute rule. The Court always maintained its right to exercise a discretion, and in some cases the necessity for finding a mandatary was dispensed with. Some years after the passing of the Judgments Extension Act, the Court,¹ recognising that the appointment of a mandatary was a matter of discretion, thought fit to alter its practice by laying down explicitly that persons resident in England and Ireland should be treated in all such questions substantially as if they were resident in Scotland: that is to say, that the party was not to find a mandatary unless under circumstances which would justify an application against a Scotchman to find security for expenses. That judgment has been understood to fix the practice, and has been constantly acted upon.

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Now, it seems to me that in developing this equitable principle the Court did not proceed upon the view that a party resident in England or Ireland was to be favoured because of his nationality. If that had been the ground of judgment, the principle would have been extended to India and the Colonies. The decision proceeded upon the purely practical consideration that under the Judgments Extension Act decree could be enforced for expenses, and therefore that as against the party resident in England or Ireland the other party was in as good a position with reference to his power of making a judgment effectual as if his opponent had been resident within the jurisdiction of the Court. That is the ground of judgment expressed in the Lord President's opinion. It is the logical and the only ground that the Court could proceed upon, if they were extending the operation of the Judgments Extension Act, and that ground of judgment plainly covers the case of a foreigner domiciled abroad but resident in London. It could not have been the intention of the Court in laying down this rule to make it necessary to try the question of domicile in order to the application of the rule. Therefore, I am of opinion that Mr Dessau, though neither naturalised nor said to be domiciled in England, is still in the position of a person resident in England, and therefore is not, under ordinary circumstances, to be required to sist a mandatary.

I agree also with what your Lordship in the chair has said on the second ground. The Lord Ordinary has not proceeded upon the ground of poverty, and I agree that poverty is no reason for compelling a person to sist a mandatary. While the Court may not have strictly defined a rule, the usual case of requiring a person to find security for expenses is where he is either bankrupt or has granted a trust-disposition for behoof of creditors, so as to take the administration of his fortune—be it great or small—out of his own hands.

LORD KINNEAR.—I am entirely of the same opinion. The defender's counsel says that it is the rule that a foreigner requires to sist a mandatary. I am not aware that the rule ever obtained that a foreigner, irrespective of his residence, could not sue without a mandatary. The rule was that a pursuer resident abroad required to sist a mandatary, but in applying that

¹ See *Lawson's Trustees v. British Linen Co.*, 1 R. 1065.

rule, which was always a matter for the discretion of the Court, it was never suggested that the Court should inquire into the place of the pursuer's birth, domicile, or allegiance. The only question was as to his residence, and, if it appeared that he was resident abroad, it did not matter whether he was a Scotsman, or an Englishman, or a subject of some other country. The one condition which was indispensable to the operation of the rule was that he should not be resident in Scotland. The rule has been modified in consequence of the Judgments Extension Act, because the decrees of this Court may now be enforced in other parts of the United Kingdom; and for the purpose of this question residence in some other part of the United Kingdom is thus practically equivalent to residence in Scotland.

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With regard to the pursuer's alleged impecuniosity, I confess I am not inclined to draw any inference from the letters. All that they shew is that the pursuer was pressing the defender for money on the ground apparently that he had some claim against him. That may or may not be the case, but it appears to me that demands of that kind, and the urgency with which they are pressed, afford no safe ground for any conclusion as to the pecuniary condition of a letter writer who has not been examined as a witness, or given an opportunity of explaining the circumstances in which his letters were written. If it were safe to draw any such conclusion I agree that mere impecuniosity is no reason whatever for requiring a party to find security for expenses or to sist a mandatory.

The LORD PRESIDENT was absent.

THE COURT recalled the interlocutor of the Lord Ordinary.

HOPE, TODD, & KIRK, W.S.—JAMES GIBSON, S.S.C.—Agents.

PETER MACKINNON AND OTHERS (Sir William Mackinnon's Trustees), No. 170.

First Parties.—*C. J. Guthrie—C. K. Mackenzie.*

MRS MACNEILL (MacNeill's Administratrix), Second Party.—

Johnston—W. C. Smith.

MRS MACNEILL, Third Party.—*Johnston—W. C. Smith.*

ANDREW DUNCAN MACNEILL, Fourth Party.—*Johnston—W. C. Smith.*

ALMA LOUISA MACNEILL AND OTHERS, Fifth Parties.—

C. J. Guthrie—C. K. Mackenzie.

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Mackinnon's
Trustees v.
MacNeill.

Succession—Vesting—Direction to pay on attainment of majority.—A testator directed his trustees to make payment to his nephew, D. M., of a legacy of £60,000, "and that in liferent for his liferent use only, and on his death I direct the said sum of £60,000 to be paid to and among his children equally among them, share and share alike, on their respectively attaining the age of twenty-one, payable as such children, after their father's death, respectively attain majority, the interest or annual produce being, however, in the meantime, available for their maintenance and education, the issue of any of the said children who may have predeceased taking their parent's share."

D. M. predeceased the testator.

Held that the fee of the £60,000 vested equally in all D. M.'s children at the testator's death, irrespective of their attainment of majority.

Adam's Trustees v. Carrick, 23 R. 828, distinguished.

No. 170. *Process—Special Case—Questions not argued.*—The Court will not answer questions in a special case which are not argued.

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1ST DIVISION.

SIR WILLIAM MACKINNON died on 22d June 1893, leaving a trust-disposition and settlement, whereby he disposed and assigned his whole estate to trustees.

The tenth purpose of the settlement was in the following terms:—
“I direct and appoint my said trustees to make payment to my nephew, the said Duncan MacNeill, of another sum of £60,000, and that in liferent for his liferent use only, and on his death I direct the said sum of £60,000 to be paid to and among his children, equally among them, share and share alike, on their respectively attaining the age of twenty-one, payable as such children, after their father's death, respectively attain majority, the interest or annual produce being, however, in the meantime, available for their maintenance and education, the issue of any of the said children who may have predeceased taking the parent's share.”

The testator made a number of other bequests to different nephews and nieces and grandnephews and grandnieces in liferent, and to their issue in fee. In regard to some of these legacies he provided that if the liferenters should die without issue the sums bequeathed should revert to his trustees, and form part of his trust-estate.

Duncan MacNeill predeceased the testator. He was survived by a widow and seven children. One of the children, Janet Mackinnon MacNeill, died on 1st October 1894, aged six years.

After Janet's death a question arose as to whether a share in the legacy of £60,000 had vested in her, and a special case was presented by (1) Sir William Mackinnon's trustees; (2) Mrs MacNeill, mother of Janet MacNeill, as administratrix of Janet's moveable estate, under letters of administration from the High Court of Justice in England; (3) Mrs MacNeill, as an individual*; (4) Andrew Duncan MacNeill, Janet's eldest brother, as representing her in heritage; and (5) the other children of Duncan MacNeill.

The opinion of the Court was craved on the following question:—
“(1) Whether one seventh share of the said legacy of £60,000 had vested in the said Janet Mackinnon MacNeill at the date of her death?”

A question was also put to the Court as to whether one-seventh of a share of the residue of Sir William Mackinnon's estate destined to Duncan MacNeill and his issue had vested in Janet, but at the discussion counsel for the fifth parties stated that he did not see his way to offer any argument against the vesting of the residue, but that the trustees were desirous of having the question answered by the Court.

Argued for the fifth parties;—There being nothing but a direction to pay to each child upon the occurrence of the uncertain event of the child attaining majority, vesting was postponed in the case of each child until majority.¹ In this case there was a destination over just as much as there was in *Adam's Trustees*,² the issue of the children being conditionally instituted. In *Alves' Trustees v. Grant*,² and *Waters' Trustees v. Waters*,³ there was a direction to hold apart from

* Janet having died domiciled in England, her mother was entitled to one-half of her moveable estate.

¹ *Adam's Trustees v. Carrick*, June 18, 1896, 23 R. 828.

² *Alves' Trustees v. Grant*, June 3, 1874, 1 R. 969.

³ *Waters' Trustees v. Waters*, Dec. 6, 1884, 12 R. 253.

the direction to pay. In *Wilson's Trustees v. Quick*¹ the trustees were empowered to advance the capital of the shares. *Fox*² had been differed from,³ and *Harrison*⁴ could not be accepted as authoritative in Scotland, for vesting was there held to have taken place prior to the period of distribution, although the settlement contained a survivorship clause. A provision that the whole of the interest of a legacy not yet payable should be paid to or applied for the legatee did not necessarily imply vesting.⁵ Here the provision was not so strong, as it consisted merely of a declaration that the income should be available for behoof of the legatees.

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Argued for the second, third, and fourth parties;—There was no survivorship clause or destination over, and the interest was to be applied for the children's benefit prior to majority. The conclusion to be drawn from the terms of the clause was that the condition as to the attainment of majority was not adjoined to the gift, but only to its payment.⁶ The opposite conclusion would involve seven different periods of vesting, and was at variance with the direction as to equal distribution, for that presupposed that the number of legatees would be ascertained before payment fell to be made to the eldest. The view that vesting was not postponed was supported by the fact that in regard to other legacies the testator had provided for the event of the possible failure of the legatees, but here he evidently had not contemplated the possibility of this legacy falling into intestacy.

LORD ADAM.—The only question argued, and therefore the only question which we have to answer, is, whether a share of the legacy of £60,000 was vested in Janet Mackinnon MacNeill at the date of her death. The other questions in the case not having been argued, we can give no opinion upon them. The question argued to us arises on the tenth purpose of the settlement of Sir William Mackinnon. By that purpose Sir William directed his trustees to make payment to his nephew Duncan MacNeill of a "sum of £60,000, and that in liferent for his liferent use only, and on his death" he directed "the said sum of £60,000 to be paid to and among his [Duncan MacNeill's] children, equally among them, share and share alike, on their respectively attaining the age of twenty-one, payable as such children, after their father's death, respectively attain majority, the interest or annual produce being in the meantime available for their maintenance and education, the issue of any of the said children who may have predeceased taking the parent's share."

¹ *Wilson's Trustees v. Quick*, Feb. 28, 1878, 5 R. 697.

² *Fox v. Fox*, 1875, L. R., 19 Eq. 286.

³ *Tucker v. Wintle*, L. R. [1896], 2 Ch. 711.

⁴ *Harrison v. Grimwood*, 1849, 12 Beavan, 192.

⁵ *Bogle's Trustees v. Cochrane*, Nov. 29, 1892, 20 R. 108, esp. *per* Lord Justice-Clerk, at p. 111; *Adam's Trustees v. Carrick*, June 18, 1896, 23 R. 828.

⁶ *Alves' Trustees v. Grant*, June 3, 1874, 1 R. 969, *per* Lord Justice-Clerk Moncreiff, at p. 972; *Waters' Trustees v. Waters*, Dec. 6, 1884, 12 R. 253; *Wilson's Trustees v. Quick*, Feb. 28, 1878, 5 R. 697; *Harrison v. Grimwood*, 1849, 12 Beavan, 192; *Wood v. Burnet's Trustees*, 1813, Hume, 271; *Kennedy v. Crawford*, July 20, 1841, 3 D. 1266; *Ralston v. Ralston*, July 8, 1842, 4 D. 1496; *Fox v. Fox*, 1875, L. R., 19 Eq. 286, *per* M. R. Jessel, at p. 290.

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The facts which give rise to the question are that Duncan MacNeill predeceased the testator leaving a daughter Janet, who survived the testator, but died unmarried before attaining majority, and the parties whose interests are in conflict are Janet's mother, who is entitled, as the child was domiciled in England, to one-half of whatever vested in her, and Janet's brothers and sisters, who claim to take under the settlement on the footing that no share vested in Janet.

In construing the tenth purpose the first thing which occurs to one is that there is clearly no benefit of survivorship given to the children *inter se*.
/ There is a gift to a class—to those children, not more or less, in existence at the date of vesting, whatever that may be, but there is certainly no survivorship clause. The next material point is, that there is no destination over. No doubt there is a substitution of the issue of any of the children
2 who may have predeceased to their parent's share, but that is not a proper destination over, and has never been so treated, because it merely expresses what the law itself would imply, namely, the *conditio si institutus sine liberis decesserit*.

Taking the question as one of general intention, I think the testator meant to give the life interest of this sum of £60,000 to his nephew, and the fee to his children at once. I think the words of the clause point in that direction, and I find nothing in the clause inconsistent with that view. It will be observed that, as Mr Johnston pointed out, the direction is, that on the death of the nephew, the life renter, the said sum is to be paid to and among his children, equally among them, share and share alike. Now, if one were to stop there, as was suggested, there could be very little doubt that a bequest in these terms vested *a morte*, the direction being to pay to the children on the death of the life renter, and there being no destination over. But then we have these words, "on their respectively attaining the age of twenty-one"; and the question is, whether we are to read that as merely an administrative direction. It appears to me that it is not a condition of the gift, but a direction as to payment. The direction is repeated in these words, "payable as such children after their father's death respectively attain majority." It was contended that these words have no other meaning than to direct the trustees to pay to the children on their attaining majority, and neither they have, but I think the form of expression in this latter clause goes to support the view that the words do not import a condition of the gift but a mere direction as to when the share is to be payable. The conclusion I arrive at is, therefore, that a share of the legacy vested in Janet *a morte testatoris*.

The case of *Carrick*¹ was pressed on us as ruling this case, but it appears to me to do nothing of the kind. Of course all these cases have to be considered with reference to the terms of the settlement, which is the subject of construction, and the case of *Carrick*¹ is quite distinct from the present, in respect that, in that case, there was a very clear direction to pay on the youngest of the children attaining the age of twenty-one years. That was, if I remember aright, the only period pointed at in the deed at which payment was to be made. Here the direction is to pay as

¹ 23 R. 828.

each of the children respectively attains majority, and that direction, it appears to me, if construed as attaching a condition to the gift, would be quite inconsistent with the other direction in the deed, namely, that each child is to get an equal share of the £60,000. The direction, as I read it, means that each child, when it reaches the period of payment—that is, attains majority—is entitled to get its share and go away with it, and has no further claim on the estate. In my opinion, therefore, the question should be answered in the affirmative.

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LORD M'LAREN.—The only question which your Lordships propose to answer is the question put to the effect of determining whether Miss Janet MacNeill took a vested interest under the tenth purpose of Sir William Mackinnon's will, whereby a legacy of £60,000 is given to be enjoyed in liferent by Mr MacNeill, and to be shared by his family in the manner there pointed out in fee.

The gift is in the form of a direction to trustees, and the direction seems to be qualified by three conditions :—First, that the sum is to be paid after the death of Duncan MacNeill ; second, that it is to be paid only on the respective majorities of each member of his family ; and third, that in case of the death of any child leaving issue payment shall be made to the issue in place of the parent to the extent of that parent's original share. Now as was pointed out by Lord Moncreiff in the case of *Alves' Trustees*,¹ which has been cited, these questions of conditional vesting generally resolve into this inquiry, whether the conditions only have relation to the time and mode of payment, or whether they are intended to condition the right of the legatee. In the former case the condition is consistent with the existence of a vested right in the person of the legatee, in the latter case of course it is not ; for to say that a gift is affected by a condition is just another way of expressing that no right is given until the condition is purified.

With regard to the first of these conditions—the survivance by the children of their father—it is enough to say that Duncan MacNeill died in the testator's lifetime, and therefore no question arises with reference to the survivance of him. I cannot see that if the father had survived the testator there is anything in the terms of this deed which would make that a material consideration or suggest a different construction. But then Duncan MacNeill did not in fact survive the testator, and therefore it was possible to ascertain the class of his children as at the date of the testator's death—I mean that the class could not be increased by the birth of objects after the testator's death.

Coming to the next condition—the condition of payment at majority—there are cases where a fund is directed to be divided, once for all, when the youngest member of the family shall attain a certain age, and where it may be a reasonable consideration that the class could not be ascertained until that event occurred. But it is a clear point in the construction of the clause before us that the class of objects must be fixed before any part of the fund is paid away, because each child, as he or she attains majority, is to be paid out his share, his aliquot share, of £60,000. Now, this direction to pay the child his share would, in the absence of anything repugnant to the con

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dition, imply that, as soon as the eldest child had attained majority, the trustees were in a position to pay, because they must know into how many shares the fund is to be divided. This is to my mind conclusive of the question that the attainment of majority was not intended in this case to be a condition of the gift, because the class being defined and ascertained before the younger children respectively attain majority, it follows that the attainment of majority is not a condition of the gift in their favour.

Then in regard to the condition arising out of the words substituting children to parents, I concur with what your Lordship in the chair has said, that there is a body of decisions of the House of Lords and of this Court to the effect that such words are fully satisfied by the supposition that they were inserted only to prevent a lapse by the death of an object during the testator's lifetime. In that view the words of substitution express nothing more than the condition which we have borrowed from the Roman law *si sine liberis decesserit*. In any case I should not myself be disposed to hold that a clause in general terms substituting children in place of parents, even in a case in which the *conditio si sine liberis* would not apply, was to be read as importing a condition or having the effect of postponing vesting.

The result is that the conditions which have been introduced into this very carefully guarded and carefully drawn will appear to me to have reference only to payment, and are not inconsistent with the general intention that the right to the fee of the sum of £60,000 should vest in the class. I am therefore of opinion that the share in question vested in Janet MacNeill.

LORD KINNEAR.—I am of the same opinion, and agree with your Lordships that this child's interest in her share of the legacy of £60,000 vested at the death of the testator, notwithstanding that she had not attained majority, but died in pupillarity. I have come to that conclusion for the same reasons that your Lordships have already explained, and therefore I shall only add that I think the material considerations are three in number.

In the first place, I think the testator has very clearly directed that the fee of this legacy on the death of the liferenter shall be divided equally among a class of persons, the members of which are to be ascertained at a period which may be long anterior to this particular child's majority, and in point of fact has turned out to be anterior to the period at which she would have attained twenty-one years of age had she lived. I think this is clear from the direction that upon the death of the liferenter—on the father's death—the sum is to be divided among his children, equally among them, share and share alike, and paid to each child on his or her attaining majority. The eldest child who first attains majority is to take an equal share with all the other children of the sum of £60,000, and that must be paid over to him and his claim paid off and discharged on his attaining majority irrespective altogether of the ages of his brothers and sisters. The division therefore must be made at a certain point of time and once for all, although the period of payment of the younger children's shares may not have arrived; and it appears to me to follow that the extent of the interest of each child cannot be dependent upon the arrival of their postponed period of payment. The number of children must be ascertained once for

all when the first payment comes to be made, and therefore the vesting cannot be postponed until any later date. No. 170.

The second point which I think material is that there is no gift to survivors of the children themselves; and the third is that there is no destination over, because I entirely agree with what has been said by your Lordships, that a gift to issue, which is really equivalent to the implication of law in favour of children, does not operate as a destination over.

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The result of these three considerations seems to me to be that the testator has clearly directed that this sum of money is to be divided among the members of a certain class who are to be ascertained irrespective of the period of majority of the younger children, and that he has not intended that anybody else shall take any interest in that particular sum. The postponement of payment therefore is, in the first place, necessary merely for the payment of the liferent to their father, and secondly, till the time shall arrive when the child shall attain majority, and be able to take payment of his own money and discharge the trustees. On general considerations, therefore, I should not consider the question one of very great difficulty when once one has come to see what is the precise effect of the direction which the testator has given in reference to payment.

But in addition to these main grounds, Mr Johnston brought forward two other considerations to which I think some weight is to be attached, although he said he used them rather as confirming his argument, as what he called make-weights, than as having very great substance and force in themselves. The first is that although the principal of a child's share is not to be paid over until it attains majority, the interest or annual produce is in the meantime to be available for that child's maintenance and education; and so far as that goes, it is a consideration in favour of the view that the child had already taken a vested interest in the sum, out of the income of which it was to be supported during minority and pupillarity.

The second confirmatory point on which he founded was this, that whereas in the case of many of the other legacies in this will, the testator has taken care to provide that if all the persons whom he has called *nominatim* to benefit from these legacies shall die without issue, the sum bequeathed shall revert to the trustees and form part of the trust-estate, there is no similar provision as to this particular sum, and the inference Mr Johnston draws—and I think fairly enough—from that is, that the testator did not contemplate the probability of this sum falling into residue at all, but thought he had provided sufficiently for it by leaving it to the children of his nephew Duncan MacNeill who were alive at the time that his will came into operation by his death. Therefore it is said—I think with some force—that he cannot be supposed to have contemplated that there should in any case be intestacy with reference to this particular legacy.

These last two considerations are not, I think, without force; but at the same time I agree with your Lordships that the main ground of judgment ought to be what you have already stated in the opinions, with which I concur.

I agree also that it is quite impossible for us to answer questions which the parties do not choose to argue. It is not the purpose of special cases to obtain an opinion of the Court on questions which are not brought before it in such a way as to enable the Court not only to express an opinion but

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to give a decisive judgment on them. It is said that trustees ought to be advised as to what course they should take in particular circumstances; and that is quite true, provided the questions have arisen in such a way as to give rise to a litigation upon which a judgment *inter partes* may be given. If that cannot be done—if there is no room for a judgment *inter partes*—then the opinion of the Court is not binding upon the parties interested, and gives no protection to the trustees. What protects trustees is a judgment and decision of the Court; and we are not in the practice of deciding questions which are not disputed, or which counsel for the respective parties have declined to argue.

The LORD PRESIDENT was absent.

THE COURT answered the first question in the affirmative, and refused to answer the second question.

MURRAY, BEITH, & MURRAY, W.S., Agents.

No. 171.

WILLIAM CLARK AND OTHERS (W. Maclean's Trustees), First Parties.

—*Craigie.*

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OLIVIA RACHEL NORA MACLEAN AND OTHERS, Second Parties.—

W. C. Smith—Constable.

MRS ADA MARRINER ATKINS OR MACLEAN (C. Maclean's Executrix),
Third Party.—*W. C. Smith—Constable.*

WILLIAM CLARK AND OTHERS (C. Maclean's Trustees), Fourth Parties.
—*C. K. Mackenzie—Younger.*

Succession—Vesting—Power to trustees to postpone division or to make interim divisions—Survivorship.—A testator, after directing his trustees to pay certain alimentary annuities, directed that "after the foregoing purposes are served" his trustees should divide the residue of his estate equally, share and share alike, among his surviving children *nominatim*, and the children of a deceased daughter, "such children coming in the place of their mother and receiving equally among them the share that would have fallen to her if she had survived me, and formed one of my residuary legatees, and to the survivors of my said five children and grandchildren; declaring that, in the event of any of my children before named, or grandchildren before referred to, dying prior to the division of said residue, leaving lawful issue, such issue shall succeed equally, share and share alike, to that portion of my said means and estate which would have devolved on their parent under the destination above written, and as if such parent had survived said period of division." The testator empowered his trustees to sell all or any portion of his estates at such times as they might consider advantageous, and to set aside sufficient investments for payment of the annuities, if they thought proper. He further empowered them to postpone the division of the residue until the whole had been realised, or to make interim divisions as the realisation proceeded.

Held that the whole residue vested in the children and grandchildren of the testator at the date of his death.

1ST DIVISION.

WILLIAM M'LEAN of Plantation died on 22d February 1867, leaving a trust-disposition and settlement, whereby he conveyed his whole estate, heritable and moveable, to trustees.

After directing his trustees to pay a free liferent annuity of £500 to his widow, a like annuity of £100 to his son Colin, and one of £30 to his sister Agnes, the truster provided as follows:—

"(Lastly) After the foregoing purposes are served, my said trustees

shall divide the residue and remainder of my said means and estate No. 171.
 equally, share and share alike, among my remaining children, William
 M'Lean, Joseph M'Lean, Mary M'Lean or Niven, Charles M'Lean, June 29, 1897.
 and Rachel M'Lean, and the children of my deceased daughter Jane Maclean's
 M'Lean or Clark, such children coming in the place of their mother, Trustees v. Maclean.
 and receiving equally among them the share that would have fallen
 to her if she had survived me, and formed one of my residuary
 legatees; and to the survivors of my said five children and grand-
 children: Declaring that, in the event of any of my children before
 named, or grandchildren before referred to, dying prior to the division
 of said residue leaving lawful issue, such issue shall succeed equally,
 share and share alike, to that portion of my said means and estate
 which would have devolved on their parent under the destination
 above written, and as if such parent had survived said period of divi-
 sion. But all such portions of my said means and estate as may
 become due and payable to any of my grandchildren under the
 destinations before written shall be retained by my said trustees until
 said grandchildren attain respectively the age of twenty-one years
 complete, or are married; and in the meantime they shall invest the
 same in such securities as they may think proper in their own names,
 in trust for behoof of said grandchildren, and apply the annual pro-
 ceeds, or so much thereof as may be necessary, in the maintenance
 and education of said grandchildren respectively. . . . Declaring
 also that, in the event of any of my sons who are already married or
 may yet marry predeceasing me leaving a widow, but without leav-
 ing lawful issue, or in the event of such issue, if any, also predeceas-
 ing me, then, and in either of these events, I provide and declare that
 the surviving wife or wives of such of my said sons who may so pre-
 decease me without leaving lawful issue that shall survive me shall
 have no right to, nor interest in, any bequest or share or portion of
 my estate that would have devolved on or fallen to such son or sons
 so predeceasing, except in so far as such son or sons by marriage-con-
 tract, deed of settlement, or will, may have appointed or devised in
 favour of their said wives: And to enable my said trustees and their
 foresaids to carry these presents into effect, I authorise and empower
 them to sell, by private bargain or public roup, all or any portion of
 my said means and estate before conveyed, and that at such times as
 they may consider advantageous, and to invest if they think proper,
 in such securities as they may approve of, sums sufficient for the pay-
 ment of the annuities before provided, or to purchase said annuities
 or to allow them to remain burdens on any portion of the heritable
 property left by me, the said annuities being hereby declared by me
 to be real liens and burdens on said heritable property until such
 investiture or purchase; and farther, with power either to postpone
 the division of the residue of my means and estate until the whole
 has been realised, or to make interim divisions, one or more, as the
 realisation proceeds; and in general, to manage and dispose of the
 means and estate hereby conveyed, as fully, freely, and effectually as
 I could have done myself before executing these presents. But I
 recommend to my said trustees, first, to be cautious in selling or feuing
 any portions of the lands of Plantation for some years after my death,
 my conviction being that the value of these lands is increasing every
 year, but at the same time, if an offer which they consider eligible be
 made for the whole or any portion of said lands, it is not my wish
 that they should reject or lose sight of such offer, but, on the con-

No. 171. trary, that they should use their own discretion and sound judgment in the circumstances."

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William M'Lean was survived by his widow, his son Colin, his sister Agnes, and by the children and grandchildren named or described in the residuary clause of the settlement. He left moveable estate amounting to £117,838, and he was also proprietor at the date of his death of the estate of Plantation, near Glasgow, part of which had been feued prior to his death. After his death his trustees gradually realised his estate, and after paying the annuities provided by the settlement and other expenses, they from time to time, between 1867 and 1895, divided the balance of the proceeds in their hands as directed.

On 25th October 1896 Charles M'Lean died survived by a widow, Mrs Ada Marriner M'Lean, and two daughters, Olivia Rachel Nora M'Lean and Elfrida Mary Hamilton M'Lean. In 1882 Charles M'Lean had assigned his interest as residuary legatee under his father's settlement to trustees. He left a will by which he appointed his wife his sole executrix, and to be guardian of his children during their minorities.

After the death of Charles M'Lean, a question arose as to the manner in which one-sixth of the residue of William M'Lean's estate, still in the hands of the trustees, was to be dealt with, and a special case was presented by (1) the trustees under William M'Lean's settlement; (2) Charles M'Lean's daughters and their mother as their guardian; (3) Mrs Ada Marriner M'Lean as sole executrix under Charles M'Lean's will; and (4) the trustees under the assignation granted by Charles M'Lean, in order to obtain the opinion of the Court on the following questions:—“(1) Was the one-sixth of the residue of the estate of the truster, the said William M'Lean, still in the possession of the first parties, vested in the deceased Charles M'Lean at the date of his death; and if so, was said one-sixth validly assigned by said assignation granted by him? or (2) In the event of the preceding question being answered in the negative, did said one-sixth of said residue vest in the said Olivia Rachel Nora M'Lean and Elfrida Mary Hamilton M'Lean on the death of their father, so far as the same is still in the possession of the first parties as trustees? or otherwise, is vesting thereof postponed until the first parties have realised and divided said part of said residue?”

The fourth parties maintained that one-sixth of said residue was vested in Charles M'Lean at the date of said assignation, or at least prior to the date of his death, and that said one-sixth share was effectually carried by said assignation, and fell to be paid to the fourth parties. The second parties, on the other hand, maintained that the one-sixth of the residue still remaining unrealised in the hands of the first parties was not vested in Charles M'Lean at or prior to the date of his death, and that it, if vested at all in him, was vested in him subject to defeasance in the event of his dying prior to the realisation thereof leaving lawful issue, and therefore did not fall to be paid to the fourth parties, but that said share vested in the two daughters of the said Charles M'Lean on his death, or otherwise, that it would vest in them when the first parties had realised and paid over the remaining residue of the truster's estate, and would fall to be paid to them, or retained by the first parties for their behoof until majority or marriage.

Argued for the fourth parties;—The residue vested at the period of

division. That was a single period, and occurred at the testator's death, or as soon thereafter as the "foregoing provisions" had been provided for, or a reasonable time allowed for that purpose. The declaration that, in the event of the legatees dying before the division of the residue, their issue should take was not a proper destination, and did not postpone vesting.¹ The postponement of payment was merely for purposes of convenient realisation, and the case was a contrast to *White's Trustees*,² where a discretion was given to the trustees to withhold payment of the shares of residue in whole or in part, with an express provision that, in the event of any legatee dying before receiving payment of the whole of his share, so much as should remain in the hands of the trustees should pass to his issue.

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Argued for the second parties;—The gift consisted in a direction to divide "after the foregoing purposes are served," and there could be no vesting at death, there being a postponement of payment and a destination over to the issue of those primarily called.³ The true view was that there were successive periods of vesting when the portions of residue in fact were paid or became divisible. The testator had expressed no preference for any particular period of vesting, but had made vesting dependent on division, and had left it to the trustees to fix the periods of division. The result was that vesting was postponed until the actual periods of division fixed by the trustees.⁴

LORD M'LAREN.—The question raised in this case is one which it was very proper to bring under the consideration of the Court in this form, because there are cases where the distribution or division of the estate upon which vesting depends may in certain circumstances be affected by the acts of trustees. In a case like the present, where the truster evidently contemplated a trust of long duration, and gave the trustees power to realise the heritage at successive times, it is quite possible that he might have intended that the right to the estates successively realised should belong to his sons and daughters surviving at these times. A slight variation in the language used might possibly have led to this result. In such cases it is safe to begin with the proposition that it is not to be presumed that the period of vesting is referred to the discretion of the trustees, though I am far from saying that this is impossible, or that if the truster says so in plain terms, his expressed intention is not to receive effect. If we hold vesting to be postponed, our decision must proceed on some definite expression of intention on the part of the testator. Now, I find nothing in the clauses under consideration except directions in regard to the administration and distribution of the estate. The direction is that the residue is to be divided among children named, and the issue of a deceased daughter and the survivors, and then follows a general substitution of issue to their parents in terms which I do not need to read. It was argued that, in the great majority of cases, when the Court has had to construe clauses directing estate to be divided among persons named and the survivors, it has been

¹ *Richard's Trustees v. Roland*, Dec. 7, 1894, 22 R. 140.

² *White's Trustees v. White*, June 20, 1896, 23 R. 836.

³ *Adams' Trustees v. Carrick*, June 18, 1896, 23 R. 828.

⁴ *Chambers' Trustees v. Smiths*, April 15, 1878, 5 R. (H. L.) 151; *White's Trustees v. White*, June 20, 1896, 23 R. 836.

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held that the survivorship is referable to a period subsequent to the death of the testator. If that is so, I think the reason is not difficult to divine. It is that, where there is no postponement of the division, no one would think of coming to the Court, because, if the direction is to divide a residue amongst the members of a class and the survivors, and there is no postponement of the distribution, survivors can only mean survivors at the testator's death. Now, when we come to consider the period to which survivorship is referable in this case, the terms of the clause point only to the period of the testator's death, because the division is to be made "after the foregoing purposes are served." There might have been purposes so conceived as to make it impossible to proceed to a division of the estate, but the purposes referred to are merely the provision of certain annuities, and annuities which the truster himself has said may be provided for by the purchase of securities. I think that in directing the residue to be divided the testator means only what remains after this has been done, the word "after," while primarily referable to time, referring here not to time but to the amount remaining when the annuities have been provided for.

When we come to the discretionary part of the will, where the trustees are directed to sell with the view of obtaining as large a sum as possible, I find no expressions referring back to the previous part of the will so as to affect the vesting under the residuary clause. It therefore appears to me to be clear that a division of the estate is to be made at the testator's death for the purpose of ascertaining the persons entitled to succeed, though it may be that the sale and payment of the proceeds would not take place until long after, and only upon the realisation of successive portions of the estate.

In my opinion Charles M'Lean took a vested interest, and was entitled to grant an assignation which was effectual to carry his share of what had been divided, as well as what remained to be divided.

LORD KINNEAR.—I am of the same opinion, and for the same reasons.

LORD ADAM concurred.

The LORD PRESIDENT was absent.

THE COURT answered the first question in the affirmative.

MILLAR, ROBSON, & M'LEAN, W.S.—J. A. CAMPBELL & LAMOND, C.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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June 30, 1897.
 M'Laughlin v.
 Glasgow
 Tramway and
 Omnibus Co.,
 Limited.

JOHN T. M'LAUGHLIN, Pursuer.—*Jameson.*

THE GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED, Defenders.
 —*Constable.*

Expenses—Tender—Delay in accepting.—In an action of damages for personal injury, the pursuer was found liable in part of the expenses incurred between the date on which a tender was made and the date of acceptance in respect of undue delay in accepting the tender.

1ST DIVISION.

THIS was an action of damages for personal injury at the instance of John T. M'Laughlin against the Glasgow Tramway and Omnibus Company, Limited.

The case, which had been postponed from the Spring Sittings of the No. 172.
First Division, was ultimately put down for trial before a Judge of
that Division on Monday, 28th June.

During the month of May three successive tenders were made of
£30, £100, and £200.

On Saturday 19th June intimation was given to the pursuer's
agents that the defenders were to make a tender of £250, and a
minute formally making a tender of that amount was duly lodged on
Monday, 21st June. This tender was accepted on Saturday, 26th June.

Upon the pursuer moving for decree in terms of the minute of
tender with expenses to the date of acceptance, the defenders sub-
mitted that there had been undue delay in accepting the tender,¹ and
moved for expenses from Monday 21st June on which date they
argued the tender should have been accepted.

The pursuer submitted that there had been no undue delay in
accepting the tender. The minute had only been lodged on Monday
the 21st, and on that day there was a consultation of doctors in Glas-
gow to consider the extent of the pursuer's injuries. Until the result
of that consultation was known nothing could be done, and Tuesday
and Wednesday were Court holidays.*

THE COURT found the pursuer entitled to the expenses incurred
by him down to and including June 24th, and found the de-
fenders entitled to expenses after that date.

MACPHERSON & MACKAY, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

COUNTESS OF LEITRIM AND OTHERS (Earl of Leitrim's Trustees, Owners No. 173.
of the "Rossgull"), Pursuers (Respondents).—*Sol.-Gen. Dickson*
—*Younger*.

G. & J. BURNS (Owners of the "Spaniel"), Defenders (Appellants).—
Salvesen—Burns.

Et e contra.

*Ship—Collision—Regulations for Preventing Collision at sea under Order
of Council, 11th August 1884, arts. 13 and 18.*—The Regulations for Pre-
venting Collisions at sea under Order of Council, 11th August 1884, provide,
inter alia,—Article 13.—"Every ship, whether a sailing ship, or steam-
ship, shall, in a fog, mist, or falling snow, go at a moderate speed." Article
18.—"Every steamship, when approaching another ship so as to involve
risk of collision, shall slacken her speed, or stop and reverse if necessary."

Early on the morning of 2d January the s.s. "Spaniel" entered a very
thick fog off the island of Arran and slowed down to "dead slow"—about
3½ knots an hour. Shortly afterwards she heard whistles right ahead, or a
little on her port bow, and her helm was ported, but she continued to
advance dead slow, and was almost immediately afterwards struck by the
s.s. "Rossgull," which proved to be the vessel from which the whistles had
proceeded.

In cross actions of damages, the "Rossgull," which had been proceeding
at full speed, ultimately admitted that she was in fault.

Held that the "Spaniel" was also in fault in respect that she had violated
art. 18 by not stopping and reversing when she heard the whistles right
ahead, or a little on her port bow.

¹ *Shaw v. Edinburgh and Glasgow Railway Co.*, Nov. 28, 1863, 2 Macph.
142, 36 Scot. Jur. 73.

* Tuesday, 22d June, and Wednesday, 23d, were held as Court holidays
in celebration of Her Majesty's Diamond Jubilee.

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No. 173. IN April and May 1896 the testamentary trustees of Robert Birmingham, Earl of Leitrim, owners of the steamship "Rossgull" of Londonderry, and G. & J. Burns, owners of the steamship "Spaniel" of Glasgow, raised cross actions of damages in the Sheriff Court at Glasgow, on account of a collision between these two vessels, which took place early in the morning of 2d January 1896, in a thick bank of fog off the island of Arran. The actions were conjoined. Upon record each party maintained that the collision was due solely to the fault of the other.*

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"Spaniel."
2D DIVISION.
Sheriff of
Lanarkshire.

The following epitome of the result of a proof is taken from the Sheriff-substitute's note:—"The s.s. 'Rossgull,' 90 tons register, 130 feet long, belonging to the parties Leitrim and others, was, during the night and early morning of 2d January last, on a voyage from Greenock to Portrush. The captain went below about 11.25 p.m., off Wemyss Bay. At that time the night was dark but clear. The 'Rossgull' was left by him in charge of the mate, Archibald Campbell, a certificated master. No other person remained with the mate on deck except the steersman, John M'Connell, A.B. It began to be a little hazy near the Cumbræes, and the 'Rossgull's' whistle was blown occasionally. From the Cumbræes her course had been S.W. by S. $\frac{1}{4}$ S. Catching a glimpse of Holy Island as they passed the north end of Lamlash Bay, the mate altered his course a $\frac{1}{4}$ of a point to S.W. by S. $\frac{1}{2}$ S. Immediately thereafter she ran into a bank of very thick fog at the back of Holy Island. This was about ten minutes or a quarter of an hour before the collision. Several steam whistles in different directions were heard by the mate or the steersman, more especially two whistles were heard pretty nearly ahead, which must have been from the 'Spaniel.' But the 'Rossgull' continued to go at her full speed, which is about 10 knots, for the purpose, apparently, of picking up the light at the south end of Holy Island at her correct time.

"Meantime the s.s. 'Spaniel,' 250 feet long, belonging to the parties G. & J. Burns, on a voyage from Belfast to Glasgow, and under the command of Captain Horner, entered the same bank of fog, also about a quarter of an hour before the collision. From Dippen Point, in Arran, her course had been N.E. by N. magnetic. When she entered the fog, the captain had the engines slowed from full speed to dead slow, so that, in Captain Horner's opinion, she was going $3\frac{1}{2}$ to 4 knots an hour at the time of the collision. Several whistles were heard from the 'Spaniel,' notably two right ahead, or a little on the port bow, which must have been from the 'Rossgull.' To avoid the vessel thus whistling, the 'Spaniel's' course was altered to east by south, which she was steering at the time of the collision.†

* The following articles of the Regulations for Preventing Collisions at Sea, under Order of Council, 11th August 1884, were referred to:—

Article 13.—"Every ship, whether a sailing ship or steamship, shall, in a fog, mist, or falling snow, go at a moderate speed."

Article 18.—"Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary."

† William Horner, the master of the "Spaniel," deponed,—“When we got into the fog I slowed the engines to ‘dead slow,’ and from that time onwards we were going ‘dead slow.’ I kept the whistle going regularly, in the usual way, at short intervals, with a man standing by the whistle. The fog was dense. Sometime after entering the fog I heard a whistle right

"About two o'clock those in the 'Rossgull' first noticed the red port light of the 'Spaniel,' within 200 feet off. The helm of the 'Rossgull' was immediately put hard to port, and the engines immediately stopped and reversed, but it is clear that the way was not all off her at the time of the collision. The 'Spaniel,' about the same instant, or soon thereafter, noticed the mast-head of the 'Rossgull'; no change was made on her course or engines. The 'Rossgull' struck the 'Spaniel' at an acute angle. She got entangled with the 'Spaniel,' and being much lighter, was pulled round by the 'Spaniel' as she surged forward. Both vessels were injured by the collision."

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"Spaniel."

On 2d December 1896 the Sheriff-substitute (Erskine Murray) pronounced this interlocutor:—"Finds (1) that the s.s. 'Rossgull,' belonging to the parties Leitrim and others, on 2d January last, at 2 a.m., in a dense fog, collided off Holy Island with the s.s. 'Spaniel,' belonging to the parties Burns & Company, and both vessels were injured, and actions of damages have been raised by both parties, which have been conjoined: Finds (2), for the reasons assigned in the note annexed hereto, that the said collision occurred through faults on the part of those in charge of both vessels, and that therefore the rule as to the allocation of the loss in such cases comes into play, and in the meantime reserves to pronounce further."*

ahead, a little on the port bow if anything. Upon that I gave an order to port, and after that to steady, and then I ported a little more—still keeping the other whistle on the port bow. The whistle did not seem to become much broader on my port bow as the result of the porting; it was still on the port bow, and I steadied. I heard a whistle broad off on our starboard beam, and another on the starboard quarter; they were two different whistles on the starboard side. (Q.) But these were not the whistles of the vessel that ultimately came into you, were they? (A.) Not at all. I had in view that there were obviously several ships about me; I heard the whistles. The first I saw of the approaching ship was the mast-head light; just immediately abaft the fore-rigging. She looked about 50 feet away, I should say, when I first saw the light. I thought I was going to get past. I thought she was going parallel, but immediately after I saw the hull of the ship, and then she came crash into the 'Spaniel' instantly. I account for the 'Rossgull' striking us by her starboarding her helm."

Alexander Carmichael, look-out on the "Spaniel," deposed,—“After getting into the fog, I reported a whistle sharp on the port bow; that is a true account of where I heard it coming from. I heard it several times. It was coming more aft on the port bow, but nearer to us all the time. I did not see anything then, but afterwards I saw a bright light; I saw the mast-head light and the hull of the vessel all at once and she was into us. I saw the light and the hull just as she was coming into us. She came in about our fore-rigging, about four or five points off the port bow. The collision happened immediately after that.”

* “NOTE.—(After the narrative given above)—Which vessel was in fault, or were both? It is clear, in the first place, that the 'Rossgull' was in fault. She had no business to be going at full speed through a dense fog, which a number of whistles shewed concealed a number of vessels; in breach, clearly, of articles 13 and 18 of the Regulations for Preventing Collisions at Sea; especially as from the whistles she knew she was approaching another ship, and this fault contributed to the collision.

“The case of the 'Spaniel' is not quite so clear. She had no business to alter her course in the fog so seriously as to run E. by S. She might thereby have well deceived, as to her position, any vessel that had heard her previous whistles. Rule 15 does not apply, except in cases where vessels

No. 173. Thereafter the Sheriff-substitute, on 18th March 1897, in terms of a joint minute, found that the damage sustained by the "Rossgull" amounted to £840, and that sustained by the "Spaniel" to £548; and on 30th March, in the action at the instance of the owners of the "Rossgull," decerned against the owners of the "Spaniel" for £146, and in the action at the instance of the owners of the "Spaniel" assolizied the owners of the "Rossgull."

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"Spaniel."

The owners of the "Spaniel" appealed; the owners of the "Rossgull" acquiesced in the judgment of the Sheriff-substitute.

Argued for the owners of the "Spaniel";—The "Rossgull" had now admitted that she was in fault; she was going at full speed through a dense fog, and so was violating article 13, and also article 18, if, as she maintained against the "Spaniel," there was a risk of collision. That being so, the *onus* was on the "Rossgull" to shew that the "Spaniel" was also in fault. Now she was going "dead slow" against the tide, and she was therefore obeying article 13. The

or their lights are seen. Still, the Sheriff-substitute is not convinced that the error of the 'Spaniel' was one of the causes of the collision.

"But rules 13 and 18 apply in the case of the 'Spaniel' as well as in the case of the 'Rossgull,' though in a minor degree. Rule 13, that in a fog a vessel must go at moderate speed, applies whether or not there is reason to believe that another vessel is being approached. Had there been no such reason, however, it might fairly well be said that $3\frac{1}{2}$ to 4 knots was only 'a moderate speed.' But from the 'Rossgull's' whistles the 'Spaniel' must have known that she was approaching another ship, so as to involve risk of collision.

"In these circumstances, in such a dense fog, so dense that clearly the whole length of the 'Spaniel' could hardly be visible from her own deck, even $3\frac{1}{2}$ to 4 knots was too great a speed. This also contributed to the collision.

"The Sheriff-substitute is therefore of opinion that the collision was caused by the faults of those in charge of both vessels. The rule as to allocation of damages in such cases must therefore apply. Both parties have agreed in deferring the questions of the amount of damage till the decision of the question of liability. It will therefore be for the parties either to come to some arrangement as to the amount of damage, or to have another diet of proof fixed for the determination of these questions.

"A number of cases have been referred to on both sides,—specially those of the '*Nerano*,' 22 R. 237, and the English cases of the '*Kirby Hall*,' 1883, L. R., 8 Prob. Div. 71; the '*Zadok*' and the '*John Macintyre*,' L. R., 9 Prob. Div. pp. 114 and 135 respectively; the '*Ceto*,' 1889, L. R., 14 App. Cases, 670; the '*Dordogne*,' 1884, 10 Prob. Div. 6; the '*Lancashire*,' L. R. [1894], A. C. 1; the '*Resolution*,' 1888, 6 Aspinal, 362; '*Vindomora*,' 1889, L. R., 14 Prob. Div. 172, and [1891], A. C. 1, may be referred to as bearing more or less on the present case.

"The case of the '*Zadok*' was referred to by the parties Burns as shewing that a vessel, under article 13, has only to reduce her speed so far as she can consistently with keeping steerage-way.

"The '*Zadok*,' a sailing vessel, was going about 5 knots, which was held in the circumstances to be too fast. But the point raised was simply under rule 13, as rule 18, about stopping and reversing, only applies to steamers. The rule about stopping and reversing must necessarily, to some extent, interfere with steerage-way in certain circumstances.

"The '*John Macintyre*' was the case of a steamer in similar circumstances, and it was held that her duty was to stop and reverse; and the '*Kirby Hall*' was another of a very similar nature. Really, in a fog, the question is more one of common sense and reasonable care than of law."

only question consequently was, whether she had violated article 18, No. 173. and so far as the first part of article 18 was concerned she had obeyed that in obeying article 13, for she had already slackened her speed. Thus the case against her turned upon whether she ought also to have stopped and reversed. This part of article 18 was not imperative. Stopping and reversing was to take place only if necessary. It must be shewn that in the whole circumstances of the particular case there was a reasonably apparent risk of collision if the vessel did not stop and reverse.¹ To construe article 18 as laying down a hard and fast rule that the master of a vessel must always stop and reverse whenever he heard the whistle of another vessel would be productive of more danger than safety in a crowded locality such as the evidence shewed this to have been, for of course what applied to one vessel applied to all. Article 18, which was, not like article 13, confined to cases of fog and snow, contemplated that the master should have reasonable grounds for concluding that stopping and reversing was the proper course to pursue. In the present case the master of the "Spaniel" had not such grounds. He did not know, and could not assume, that the "Rossgull" was flagrantly violating the regulations by going at full speed through a fog.² Besides, it was apparently the Sheriff-substitute's opinion—and that opinion was supported by the evidence—that the sole cause of the collision was the fault of the "Rossgull"—that the collision would have occurred whether the "Spaniel" had reversed or not.

Argued for the owners of the "Rossgull";—The "Rossgull" did not now dispute that she had been in fault, but she maintained that the "Spaniel" was also in fault in this sense, that the "Spaniel" had violated one or more of the regulations which were applicable to the particular case. Assuming that the "Spaniel" had sufficiently complied with article 13, there remained article 18, and this the "Spaniel" had violated. It was clear on the evidence that the master of the "Spaniel" knew, or ought as a competent nautical man to have known, that a vessel was approaching him in such a way as to make a collision almost certain if both vessels continued on their course, and therefore article 18 applied and required the "Spaniel" to stop and reverse. It was nothing to the point that the "Rossgull" ought equally to have stopped and reversed. Nor was it to the point to urge that the "Rossgull's" fault was flagrant, and the "Spaniel's" venial. It might even be that the "Spaniel's" fault in no way contributed to the collision—that the collision would have taken place whatever the "Spaniel" had done. Such considerations had no relevancy to questions like the present. Fault here did not mean negligence causing, or contributing to, the damage; it meant the violation of a regulation applicable to the particular circumstances. It was a relevant answer to say, that the regulation, even if violated, had no application to the circumstances; but it was not a relevant answer, that the violation of the regulation admitted or proved to be applicable did not in fact cause any damage.³

¹ The "Vindomora" L. R. [1891], A. C. 1; The "Lancashire," L. R. [1894], A. C. 1; The "Nerano" v. The "Dromedary," Jan. 10, 1895, 22 R. 237.

² The "Thorsa," June 23, 1893, 20 R. 876, *per* the Lord Justice-Clerk at p. 884.

³ The "Kirby Hall," 1883, L. R. 8 P. D. 71; The "Ebor," 1886, L. R. 11 P. D. 25; The "Duke of Buccleuch," L. R. [1891] A. C. 310.

No. 173. At advising,—

June 30, 1897.
Owners of the
"Rossgull" v.
Owners of the
"Spaniel."

LORD JUSTICE-CLERK.—This case turns on the question whether one of two vessels which came into collision in the Firth of Clyde was at fault, the other being admittedly at fault. The "Rossgull" entered the fog and proceeded on her course at full speed, which was quite contrary to the regulations. Accordingly, it is not disputed that the "Rossgull" is to blame. The question is whether the "Spaniel," which was coming in the opposite direction, was also to blame. The conduct of those in command of the "Spaniel" was this, that, hearing the whistle of another vessel almost directly ahead, they continued on their course at the same speed as they were then running at, viz., dead slow, and on hearing the whistle repeated, they still continued at dead slow, and at the same time altered the course of their vessel to a small extent. In the circumstances, I think that the "Spaniel" ought to have stopped and reversed, when it was known that a vessel was approaching and was nearly directly ahead, and in any case should have stopped and reversed when after an interval it was ascertained that she was still nearly directly ahead. This was not done until the other vessel was seen through the fog, and it was then too late to avoid collision. The conclusion that I have come to is, that the "Spaniel" is also to blame.

LORD YOUNG.—I concur in thinking that both vessels were in fault, and must be held responsible for the collision.

LORD TRAYNER.—These conjoined actions arise out of a collision which occurred between the "Rossgull" and the "Spaniel" in the Firth of Clyde in January 1896. Both vessels were damaged, and each blames the other as being the sole cause of the collision. The Sheriff-substitute has found that both vessels were in fault, and has dealt with the joint damages according to the usual rule. The owners of the "Rossgull" admit the fault alleged against their vessel, and acquiesce in the judgment of the Sheriff-substitute, but the owners of the "Spaniel" maintain that their vessel was not in fault and claim absolutor. After a careful consideration of the case and the proof adduced, I have come to be of opinion that the Sheriff-substitute is right. I think it quite clear that the "Spaniel" was not so much to blame for what happened as the "Rossgull," but more or less fault does not affect the result in cases of this class. The facts which appear to me to establish fault on the part of the "Spaniel" are to be found in the evidence of the master of that vessel and the seaman who was on the look out when the collision occurred.

The vessels were both in a dense fog, and the "Spaniel" was proceeding as I think at a moderate rate of speed as required by article 13. But the master says that he "heard a whistle right ahead, a little on the port bow, if anything," that to give the vessel whistling a wider berth he ported a little, and that, notwithstanding this, the whistle did not "become much broader" on the port bow. The man on the look out gives evidence to the same effect. He heard and reported a whistle "sharp on the port bow," heard the whistle several times, coming more aft on the port bow, but "nearer to us all the time." This whistle ahead, "coming nearer all the time," gave the master of the "Spaniel" warning that there was a vessel

ahead of him coming in his direction, and being "sharp on the port bow," No. 173. involved a risk of collision undoubtedly. In these circumstances, it was the duty of the "Spaniel" to stop and reverse, according to article 18, as it has been interpreted and applied in many cases, of which the case of the "Rossgull" v. Owners of the "Ceto"¹ may be taken as an example. Not having complied with the provisions of that rule, the "Spaniel" must be deemed to have been in fault, and therefore jointly liable with the "Rossgull" for the damage done. I think, therefore, that this appeal should be dismissed.

LORD MONCREIFF.—On full consideration of the evidence and the authorities cited, I am satisfied that the Sheriff-substitute's judgment is right, and for the reasons which he gives. In his note he says,—“But rules 13 and 18 apply in the case of the ‘Spaniel’ as well as in the case of the ‘Rossgull,’ though in a minor degree. Rule 13, that in a fog a vessel must go at moderate speed, applies whether or not there is reason to believe that another vessel is being approached. Had there been no such reason, however, it might fairly well be said that $3\frac{1}{2}$ to 4 knots was only ‘a moderate speed.’ But from the ‘Rossgull’s’ whistles the ‘Spaniel’ must have known that she was approaching another ship, so as to involve risk of collision. In these circumstances, in such a dense fog, so dense that clearly the whole length of the ‘Spaniel’ could hardly be visible from her own deck, even $3\frac{1}{2}$ to 4 knots was too great a speed. This also contributed to the collision.”

This passage states concisely and accurately the import of the evidence and the conclusions to be drawn from it. What at first gave some colour to the appellants' argument was, that while the "Rossgull" was proved to be flagrantly in fault, going at a speed of 10 knots an hour in a dense fog, the "Spaniel" was going dead slow. But as it is proved that those in charge of the "Spaniel" must have known, from repeated whistles on the port bow, that a vessel was approaching nearly right ahead, and as the fog was so dense that a vessel could not be seen beyond 50 feet, I think the "Spaniel" was bound to stop and reverse.

THE COURT dismissed the appeal, found in fact in terms of the findings in fact in the interlocutor of 2d December 1896, and affirmed the interlocutor of 30th March 1897.

WEBSTER, WILL, & RITCHIE, S.S.C.—J. & J. ROSS, W.S.—Agents.

ALEXANDER MACASKILL, Applicant.—*J. H. Millar.*
NORMAN MAGNUS M'LEOD, Objector.—*C. K. Mackenzie.*

No. 174.

Poor's-roll—Circumstances warranting admission.—Held that a workman earning 31s. 6d. a week, with a wife and two children dependent on him, who had been found to have a *probabilis causa litigandi*, was not entitled to the benefit of the poor's-roll. June 30, 1897.
Macaskill v. M'Leod.

ALEXANDER MACASKILL, joiner, Fort-William, applied for admission to the poor's-roll, in order to raise an action against M'Leod of M'Leod and John Macaskill, Kilmuir, Skye, the applicant's brother,

¹ L. R., 14 App. Cas. 670.

No. 174. for reduction of a lease, dated 31st June 1885, granted by M'Leod of M'Leod in favour of the applicant's father, Ewen Macaskill, and for declarator that the applicant was tenant of the subjects leased, for decree of removing against John Macaskill, for an accounting against him, and for damages.

June 30, 1897.
Macaskill v.
M'Leod.

On 14th May the application was remitted to the reporters on *probabilis causa litigandi*, who, on 4th June, reported that counsel for the parties admitted that the applicant was earning 31s. 6d. a week, and that on this wage he supported his wife and two children, and paid £16 of rent for his house; that his only property was his household furniture; and that, on the merits, in their opinion the applicant had a *probabilis causa litigandi*.

Counsel for the applicant moved for admission.

Counsel for the objector argued;—No applicant with such a wage and so small a family had ever been admitted. In the strongest case for Macaskill,¹ the applicant had four children dependent on him, and he sought to raise an action of damages for personal injury. This was a reduction of a lease which had existed since 1885. Even in the case of *Paterson*,¹ Lord Rutherford Clark dissented. In ordinary circumstances, a man earning 23s. a week was not entitled to admission.² In the case of a net income of £53 per annum doubt had been expressed of the applicant's eligibility.³

Argued for the applicant;—It was admitted that a wage of 27s. a week was the highest limit at which an applicant had ever been admitted, but the proper test was whether a litigant could pay for counsel and agent in the Court of Session,⁴ and it was clear that this was impossible on 31s. 6d. a week. In *Anderson*⁴ the applicant only earned 15s. a week, but his son, who lived with him, earned £1 a week. An applicant with 30s. a week was refused,⁵ but on the ground that the action should have been brought in the Small-Debt Court.

LORD JUSTICE-CLERK.—If this application had come before us as a new thing, for my own part I should consider it absolutely necessary to give it the most careful consideration, and consider whether such an application should be refused, because I think that not only the nature of the case but the circumstances and time require to be taken into consideration. But I do not myself feel at liberty to go against what has been apparently an established rule of the Court for some time, and what has been practically acted upon in recent times, and therefore I am for refusing this application.

LORD YOUNG.—It is perhaps altogether superfluous for me to repeat what I have had an opportunity of saying, and have said on former occasions, but I may take the liberty of saying now that I consider this matter had better be considered and put upon a right footing—that is, a reasonable footing—either by statute or by Act of Sederunt. The sense and reason for admission to the poor's-roll is to aid poor people who are not in worldly

¹ *Paterson v. Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826.

² *Robertson*, July 8, 1880, 7 R. 1092, *per* Lord President Inglis.

³ *Stevens v. Stevens*, Jan. 23, 1885, 12 R. 548.

⁴ *Stevens v. Stevens*, *supra*, *per* Lord Young, p. 549; *Anderson v. Blackwood*, July 11, 1885, 12 R. 1263, *per* Lord Young, p. 1264.

⁵ *Wright v. Kerr*, Feb. 27, 1890, 17 R. 516.

circumstances to enable them to carry on a litigation in this Court, if they have a *probabilis causa litigandi*. There is no other reason or sense in it. I think that will be admitted by everybody. The professional bodies have with great generosity appointed members of their own professions, both law-agents and counsel, to conduct such cases, and they also appoint members of their own profession to consider the circumstances of individual cases—whether it is fitting that they should give their professional services upon these exceptional terms—without pay—in the individual cases. Every case in which such an application is made upon a report of *probabilis causa litigandi* made by the professional bodies, who give their services gratuitously in cases in which they are satisfied, is of that character. Well, as I have said before, when a party is really in poverty, which a man with a family and 25s. or 30s. a week really is, and the professional bodies—both counsel and agents—are ready and willing to give their services in the individual case, having looked into it, we can hardly say (it is not reasonable or sensible)—“Oh! but he has plenty of money to pay.” It is nonsense in the estimation of anybody who is acquainted with the practice of this Court and the expense of litigation in this Court, to say that a man with 30s. a week has money sufficient to pay his way. Well, then, the poor’s-roll is just to aid people who have not money to pay their way. If there is an Act of Parliament, which can only be altered by the Legislature, declaring that anybody with 25s. a week has money to pay his way in a litigation in the Court of Session, we must bow to that, whatever the good sense of it may be; and if there is an Act of Sederunt, which cannot be altered at least without a majority of the Court, and the majority decline, being of opinion that 25s. a week is quite sufficient for anybody to support a wife and family and to carry on litigation, we must bow to that too, and if that is the position in which this matter stands I bow respectfully; but at the same time I take the liberty of repeating what I began with—that I think it would be better if this matter were put on a satisfactory footing, quite distinctly decided, and that in putting it on that footing the good sense and reason of the thing should be taken account of.

LORD TRAYNER.—Following the authorities as they at present stand, I am of opinion that we have no alternative but to refuse this application.

LORD MONCREIFF.—I am of the same opinion.

THE COURT refused the application.

JAMES M’WILLIAM, S.S.C.—BLAIR & FINLAY, W.S.—Agents.

JAMES WILKINSON, Pursuer (Appellant).—*Watt—A. S. D. Thomson.* No. 175.
THE KINNEIL CANNEL AND COKING COAL COMPANY, LIMITED, Defenders
(Respondents).—*Balfour—Salvesen.*

July 1, 1897.
Wilkinson v
Kinneil
Cannel and
Coking Coal
Co., Limited.

Reparation—Volenti non fit injuria—Risk voluntarily incurred to save another’s life—Master and Servant.—The father of a boy, thirteen years and four months old, raised an action against a coal company for damages under the Employers Liability Act, 1880, on account of injuries sustained by the boy when in the defenders’ employment. The pursuer averred that while the boy and another employee of the defenders were

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standing on a coal waggon at the pithead of the defenders' pit trimming coal, an uncontrolled waggon was allowed (through the fault of a person entrusted with the superintendence of the shunting operations at the pithead) to approach the waggon on which the boy and his companion were standing at great speed on a down incline on the same line of rails; that the boy's companion, from his position on the stationary waggon, could not see the approaching waggon, but that the boy, "upon suddenly observing the near approach of the waggon running with great speed and force, in a moment of hurry and confusion, incident to his surroundings, and the extreme danger to himself and the said" companion, "jumped from the buffer of the stationary waggon, and seizing a wooden pit prop, about 5 or 6 feet in length, he 'snibbled' or stopped the waggon by inserting the prop between the spokes of one of the wheels and the body of the waggon. In doing so the momentum of the waggon caused one end of the prop to twist round with a sudden jerk, and, striking him on the stomach, threw him on his back, and his left arm falling on the rail, one of the waggon wheels passed over it from near the shoulder to the wrist. The waggon was stopped within 3 or 4 feet of the stationary waggon, and but for the piece of wood inserted in the wheel as aforesaid, . . . the two waggons would have come into violent collision, and been attended with great danger to the said" companion, "who was standing on the top of the coal in the stationary waggon, and also the said" boy.

The defenders pleaded that the pursuer's averments were irrelevant.

Held (by a majority of a Court of seven Judges) that the pursuer was entitled to an issue, *per* Lord Young, on the ground that the boy was, or on the evidence might be shewn to have been, under such a duty to attempt to save the life or limbs of his companion as to disentitle the defenders to a verdict on the plea that the boy's injuries were due to a risk voluntarily incurred by him; and *per* Lord M'Laren, Lord Kinneil, and Lord Moncreiff, on the ground that where two persons are exposed to a common danger through the fault of a third person, and one of the two persons, who might have saved himself, is injured in consequence of having, on the impulse of the moment, interposed to save his companion, it is a jury question whether these injuries are not fairly attributable to the fault of the person which gave rise to the common peril; *diss.* Lord Justice-Clerk, Lord Adam, and Lord Trayner, on the ground that on the pursuer's averments the boy's injuries were due to a risk voluntarily incurred by him, outside the scope of his employment, and after he had put himself out of danger from the approaching waggon.

Expenses—Dominus Litis—Parent and Child.—An action of damages on account of personal injuries to a pupil boy was raised by the father of the boy "as tutor and administrator-in-law of" the boy. During the dependence of the action the boy became a minor, and thereafter an interlocutor was pronounced sisting him, "with consent and concurrence of" his father, "as his curator and administrator-in-law, as pursuer in room and in place of the said" father.

The defenders having obtained a verdict, the Lord Ordinary (Kyllachy), on their motion, *granted* decree for expenses against the father up to the date of sisting the boy as pursuer, and against the father and the boy conjunctly and severally subsequent to that date.

2D DIVISION,
 with three con-
 sulted Judges.
 Sheriff of
 Lanarkshire.

In June 1896, James Wilkinson senior, miner, Airdrie, as tutor and administrator-in-law of his pupil son, James Wilkinson junior, raised an action in the Sheriff Court at Glasgow against the Kinneil Cannel and Coking Coal Company, Limited, for £54, 13s., as damages due by the defenders under the Employers Liability Act, 1880, on account of injuries sustained by James Wilkinson junior when in the employment of the defenders.

The pursuer averred that his son, a boy at the date of the action

thirteen years and four months old, was on 29th January 1896, employed by the defenders at the pithead of a pit belonging to them, near Bo'ness; that on that day a railway waggon loaded with rubbish was pushed up a steep incline at the pithead by means of an engine belonging to the defenders in charge of David Grant, engine-driver in their employment, "who was a person entrusted with superintendence in shunting and removing waggons and material from one place to another, in the yard or grounds surrounding the pit"; that after reaching the top of the incline the waggon was unloaded and uncoupled from the engine; that Grant then "without having previously blown the whistle of the engine, or given any warning whatever, started his engine at the top of the incline, and running down the same, a distance of about 90 yards or thereby, at a high rate of speed and a considerable distance in advance of the waggon, drove his engine into a lye branching off to the right of the points, and allowed the waggon uncontrolled, and also at a high rate of speed, to run a straight course into the lye leading to the 'screes,' by which the coal from the pit hutches was passed into railway waggons. (Cond. 6) "At the time the waggon was so allowed to run into the lye leading to the 'screes,' a waggon, which was stationary, was in course of being loaded with coal. On the top of the coal in this stationary waggon there was a person in the employment of the defenders named Alexander Steel, whose duty it was to build and trim the coal in the waggons intended for transit by rail. The pursuer's son, the said James Wilkinson junior, was also engaged at this waggon picking stones and dirt from the coal as it was passed over the 'screes,' and assisting in trimming the coal. To enable him to do this work he was standing upon one of the buffers at the east end of the waggon, which was the usual and customary place for persons engaged at this work to stand. The said Alexander Steel, from his position on the waggon, and the construction of a wooden shed erected immediately over the 'screes,' could not see when a waggon was run into the lye. When the waggon was allowed to run down the lye in the manner before described, the said James Wilkinson junior was the only person engaged at the 'screes' who had an opportunity of seeing the waggon coming down, and upon suddenly observing the near approach of the waggon running with great speed and force, in a moment of hurry and confusion, incident to his surroundings, and the extreme danger to himself and the said Alexander Steel, jumped from the buffer of the stationary waggon, and seizing a wooden pit prop about five or six feet in length, he 'snibbled' or stopped the waggon by inserting the prop between the spokes of one of the wheels and the body of the waggon. In doing so the momentum of the waggon caused one end of the prop to twist round with a sudden jerk, and, striking him on the stomach, threw him on his back, and, his left arm falling on the rail, one of the waggon wheels passed over it from near the shoulder to the wrist. The waggon was stopped within three or four feet of the stationary waggon, and but for the piece of wood inserted in the wheel as aforesaid by the said James Wilkinson junior, the two waggons would have come into violent collision, and been attended with great danger to the said Alexander Steel, who was standing on the top of the coal in the stationary waggon, and also the said James Wilkinson junior."

The defenders pleaded, *inter alia*;—(1) The pursuer's statements are irrelevant.

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 Co., Limited.

On 29th July 1896 the Sheriff-substitute (Spens) allowed a proof before answer.

The pursuer appealed for jury trial.

When the case came up in the Second Division for adjustment of issues, parties were heard on the question of relevancy.

Thereafter on 1st December the cause was appointed to be heard before the Judges of the Division with the assistance of Lord Adam, Lord M'Laren, and Lord Kinnear.

The arguments sufficiently appear from the opinions.¹

At advising, on 11th March 1897,—

LORD JUSTICE-CLERK.—The case of the pursuer, as stated in the condescendence, is that while he was employed under the defenders in cleaning coal in a waggon, a waggon was, by the fault of an engine-driver, sent at a high speed down the lye on which the waggon he was working at was standing; that observing the waggon coming on, he jumped off, and seizing a wooden prop he tried to stop the waggon “by inserting it between the spokes of one of the wheels and the body of the waggon.” His averment is that he did this in a moment of hurry and confusion incident to his surroundings, and the extreme danger to himself and another workman who was on the waggon. In doing this he alleges he suffered certain injuries from the prop twisting round and striking him.

These averments come to this, that the pursuer having got on to the ground clear of the approaching waggon, took means to endeavour to prevent it running on and striking the waggon from which he had got down, and succeeded in stopping the waggon. That was conduct which may have been quite natural, and indeed laudable in the view of the fact that there was a fellow-workman on the waggon which was in the way of the moving waggon. But, contrary I believe to the opinion of the majority of your Lordships, I have been unable to come to the conclusion that they constitute a relevant case. What the pursuer did was the direct cause of the accident. At the time he did it he was not himself in the way of or liable to be injured by the moving waggon. In doing what he did he must have gone upwards on the lye to meet the waggon, as his averment is, that although it was going at a great speed, what he did had the effect of stopping the waggon before it reached the stationary one. I recognise it as an established rule that a person injured by an accident is not debarred from recovering damages because he did not, when he saw the danger, take the most wise course, or even if he did, in the agitation of the moment, take an unwise course in endeavouring to escape from it. But I have been unable to come to the conclusion that, where the pursuer's case discloses that after having taken himself out of danger, he did an act which it is not averred he had any duty or obligation to do, and which he therefore did voluntarily, and in consequence of his action received injuries, he can recover damages as for an injury caused by the fault of others.

My opinion is that the pursuer, upon the averments he has made, is not

¹ *Authorities cited*.—Sutherland v. Monkland Railway Co., July 15, 1857, 19 D. 1004, 29 Scot. Jur. 475; Woods v. Caledonian Railway Co., July 9, 1886, 13 R. 1118; Memberry v. Great Western Railway Co., 1889, L. R., 14 App. Cas. 179; Beven on Negligence, vol. i. p. 179.

entitled to have an issue allowed, but that the action should be dismissed as irrelevant. I am aware that in one or two cases views have been expressed tending in the direction of holding that a person trying to save others in case of accident, although not in danger himself, may have a claim for damages if injured, but I am unable to assent to that view.

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LORD YOUNG.—This at first appeared to me to be a clear case, but that opinion was of course modified when I found some of my brethren differing from the view which I had taken, and accordingly I cannot now regard it as a clear matter, although it at first appeared to me to be so.

There is here admittedly a relevant averment of fault on the part of the defenders. That is not disputed, and certainly the case would not have been sent to be argued before seven Judges upon any question as to the relevancy of the allegation of fault on their part. That fault lies in the fact that a waggon was run upon the lye specified at dangerous speed, and in a manner to expose to danger the truck in which the pursuer was engaged along with a fellow-workman. The pursuer was only a lad, and his companion was an elderly man, and the two of them were upon the truck which was exposed to danger. I assume, upon the question of relevancy, that the pursuer may prove at the trial the passage in the condescendence to which your Lordship in the chair has referred. The question is, whether, if that is proved, there is a good claim against the persons whose fault exposed those upon the waggon to danger; or rather, whether there is any objection to the relevancy of the pursuer's claim against them for the consequences to him of their fault. I have heard no objection to the relevancy except this, that when the pursuer's son jumped off and got to the ground he was in perfect safety, and that there was, as your Lordship expressed it, no duty or obligation upon him to interpose, after he was in safety, for the protection of his companion. I cannot assent to that view. I may be taken to agree that there was no such duty or obligation upon him as could have been legally enforced. I think the pursuer's son would not have been liable in damages as for a breach of legal obligation if he had not done what he did. But I must say that, in my opinion, there was a duty all the same. It was according to his duty, or may have been according to his duty, to interpose to save the life or limbs of his companion. I do not speak about interposing to save property, although that might raise a question worthy of consideration, but to save life or limb I think there was such a duty as the law will take account of, and I hold that if he performed such a duty it cannot be pleaded against him that he voluntarily exposed himself to danger in turning back on the spur of the moment to save his companion, and that instead of doing so he ought to have allowed his companion to take his chance of being killed. I cannot assent to that view. I am of opinion that the case ought to go to trial, and if it is proved that there was fault on the part of the defenders in having that waggon sent along that lye at a dangerous rate of speed, and that the pursuer's son interposed, although not in pursuance of a legal duty, but only as doing what was right and reasonable in the circumstances, and thereby met with an accident, he is not precluded from claiming damages because he was in safety and put himself out of safety in order to save another.

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LORD ADAM.—Wilkinson, the boy injured, was in the employment of the defenders, and part of his duty was the loading and trimming of waggons with coal from the pit. On the morning of the day on which the accident happened he was engaged in the duty of trimming coal on a waggon at the foot of an incline leading from the pithead. The fault alleged against the company is that an engine-driver allowed a waggon uncontrolled to run down the incline at a high rate of speed towards the waggon on which the boy and his fellow-workman were at work. No doubt if the waggons had come into collision the defenders would have been responsible for any damage done, because the damage would have been the natural and direct consequence of the fault alleged against the defenders' engine-driver, but it appears to me to be clear that the accident was not the natural and direct result of the waggon being allowed to run down the incline. Wilkinson, we are told, had jumped to the ground and was in perfect safety, and the accident was the direct and natural result of his endeavouring to stop or snibble the waggon. That might be a most meritorious act, but in doing it he was not discharging any duty to his master, whom it is now sought to make responsible. It was an act not within the scope of his employment, and therefore it appears to me that the master is not responsible in law for the consequence of that act of his servant. After the boy had jumped to the ground it seems to me that he was in the same position as if he had never been in the waggon at all. He voluntarily placed himself in a position of danger, and I do not see how any liability for the accident can be imposed upon the master.

LORD M'LAREN.—The facts of this case are not so clearly outside controversy that we can safely deal with the case as a question of relevancy. On the contrary, it is a case which ought to be sent to a jury in order that the law may be applied to the true facts of the case. But as observations have been made upon the law applicable to the facts as stated by the pursuer, I may say that it appears to me that there is no difference in principle between the views which have been expressed by the majority and those taken by the minority of the Court. I agree with your Lordship in the chair that if a person who is exposed to imminent danger through the fault of another takes reasonable means to save himself, he will not lose his claim for reparation because he has not taken the best possible means, or because he may have lost time in endeavouring to save a fellow-creature, and thereby be unable to avoid being hurt. On the other hand, if a person standing, say, by the way-side, and having no contract and no duty whatever in connection with either the stationary waggon or the one that is approaching, interferes to save life, I am unable to see how his act, meritorious as it might be, will give rise to any claim of compensation against the owner of the waggon. I think the present case may possibly fall within the first of the two categories I have referred to, because if the young man in endeavouring to save himself, quite laudably and properly considered whether he could not take his fellow-workman along with him, and did on the spur of the moment something which was not directly necessary for his own safety, I am not prepared to say that under all circumstances that will bar his claim to redress. A good deal must depend upon how the facts

come out at the trial. Further, it is not to be overlooked that this young man had a duty to take care of his employers' waggon, and what he did in stopping the approaching waggon was calculated to avoid damage to the waggon on which he was working. If there was any duty of that kind, of course it would not be the less a duty to save his master's property because in doing so he also saved a fellow-workman from death or injury.

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LORD KINNEAR.—I concur with Lord Young and Lord M'Laren in thinking that this case ought to go to trial. According to the pursuer's statement, it is clear enough that his son was placed in a position of great danger by the negligence of the defenders, with the result, either immediate or remote, that the boy was very seriously injured. Now, if the mischief which happened was the direct and natural consequence of the defenders' negligence, the pursuer is entitled to recover. If the boy might have avoided the mischief by exercising ordinary care and diligence, then the injury must be held to be proximately due to his own want of care or his voluntary action, and not to the defenders' negligence. It is said against the pursuer, on his own statement on record, that the boy is in this latter position, because he, having jumped off the waggon, was in perfect safety, and would have escaped altogether if he had not voluntarily incurred a new danger by attempting to stop the waggon. That does not appear to me to be quite a fair construction of the pursuer's statement, because his averment is that, if the waggon had not been stopped, it would have come into violent collision with the other, and that this violent collision would have been attended with danger not only to Steele, but to the pursuer's son himself. But however this may be, I am not prepared to hold as matter of law that if one is exposed to danger by the fault of another, he has failed to exercise reasonable care and prudence for his own safety merely because he has paid regard to the safety of another as well as to his own, and so brought himself into further peril which he might have escaped if he had thought of nobody but himself, and has therefore no claim against the wrongdoer. Nor am I prepared to say, as matter of law, that his exposing himself to further risk in order to save a life which was in peril was not the natural or probable consequence of a fault which put both lives in danger. These are questions of fact which cannot be safely decided without consideration of all the circumstances of the case.

LORD TRAYNER.—The pursuer in this case claims damages from the defenders for injuries sustained by his son while in the defenders' employment. The statement of the grounds of action set forth in the condescendence is clear and explicit. The injured lad, while engaged in the work which he had been employed to do, saw a waggon approaching him and another workman uncontrolled, and at a speed which threatened injury to them both. He left his work and went towards the approaching waggon, he "snibbled" or stopped the waggon before it had reached the point where it could have done the damage which its advance threatened, and in doing so he received the injuries complained of. This is, in effect, the pursuer's statement. I assume, in dealing with the question of relevancy, that the waggon was running uncontrolled at an improper and dangerous speed, and that this is a fault for which the defenders are responsible. But

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assuming this, I am of opinion that no relevant case has been averred against the defenders inferring liability for what happened. The direct and immediate cause of the injuries to the pursuer's son was his own act. It was no part of his duty or employment to stop such a waggon—no one asked or ordered him to do it; and it is at least doubtful whether the defenders or anyone representing them could lawfully have ordered him to do so. The action of the pursuer's son was, in the strictest sense, voluntary, and *volenti non fit injuria*. Nor was this action necessary for the lad's own safety or the safety of his neighbour workman. The pursuer's son saw the approaching danger sufficiently early to provide for his own safety and for the safety of the other workman, if warning had then been given. As the pursuer's son got out of the way of danger in time, so could the workman, had the pursuer's son given warning. But the pursuer's son deliberately adopted a different course, and did that, as I have said, voluntarily, which resulted in his injury.

The pursuer's son, no doubt, did what he thought best for everybody, his employers included. His proceedings were well intentioned, and the defenders might very well make him some recompense. But I am unable to affirm their liability at law for the claim now made.

LORD MONCRIEFF.—I agree with those of your Lordships who hold that this case should be sent to trial. Difficulties may arise on the evidence, but in my opinion the pursuer's averments are relevant. Stated shortly, they are to the effect that his son James Wilkinson junior, and a fellow-workman Alexander Steele, were suddenly exposed to extreme danger owing to the fault of the defenders or those for whom they are responsible; that the boy saw the approaching waggon, but Steele could not, owing to the position in which he was standing; and that, "in a moment of hurry and confusion, incident to his surroundings, and the extreme danger to himself and the said Alexander Steele," the boy jumped from the buffer of the stationary waggon, and succeeded in stopping the approaching waggon, and preventing injury to Steele and the stationary waggon, but in doing so received the injuries complained of.

It is not disputed that if the pursuer's son had been content with trying to save himself, and been injured in doing so, he would, assuming fault on the part of the defenders, have been entitled to recover damages. But it is said that he is not entitled to recover because the boy could have saved himself, and indeed, it is said, had done so, and that in attempting to save Steele he acted ultroneously.

I think it is well settled that if a man is placed in a position of danger through the fault of another his actions in endeavouring to avoid injury to himself are not to be judged by the same standard as those of one who has time to act calmly in the knowledge of all the facts and the alternatives open to him. And if in the hurry of the moment he does not adopt the best means of securing his own safety, the wrongdoer will not thereby be freed from liability. I am of opinion that the same rule applies where two persons are exposed to a common danger, and one of them, who could, I assume, save himself, had he time to think and chose to do so, acts upon the natural and unselfish impulse of the moment, saves his companion, but

is himself injured. I think it is a proper and legitimate jury question, No. 175. whether the actings of a person placed in such a position, and the consequent injuries sustained by him, are not fairly attributable to the fault of the person who placed him in peril.

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In the present case, if it appears that the boy acted officiously and unnecessarily, the defenders will be assoilzied. But as on the pursuer's averments I see nothing to indicate that he acted as a volunteer, I think the case must go to trial.

The defenders having lodged a minute setting forth that James Wilkinson had attained minority, and having moved that he should be sisted as pursuer, the Court, on 16th March, pronounced this interlocutor:—

"In conformity with the opinion of the majority of the consulted Judges, sustain the appeal: Recall the interlocutor appealed against: Repel the first plea in law for the defenders: Approve of the issue No. 11 of process . . . to be the issue for the trial of the cause: Further, sist James Wilkinson junior, with consent and concurrence of James Wilkinson senior, as his curator and administrator-in-law, as pursuer in room and place of the said James Wilkinson senior, in terms of the minute No. 13 of process; and remit the cause to Lord Kyllachy to proceed therein as accords, with power to him to dispose of the expenses of this appeal as expenses in the cause."

The cause was tried before Lord Kyllachy and a jury on 16th and 17th June. The jury returned a unanimous verdict for the defenders.

On 1st July *Salvesen* for the defenders moved the Lord Ordinary to apply the verdict, and also moved for decree against Wilkinson senior for expenses incurred down to the date on which Wilkinson junior was sisted as pursuer, and for decree against both *quoad ultra*. On the question of expenses he (in answer to the Lord Ordinary) cited the undernoted authorities.¹

The pursuers, to whom the motion had been intimated, did not appear.

The Lord Ordinary pronounced this interlocutor:—"Applies the verdict found by the jury in this cause, and in respect thereof assoilzies the defenders from the conclusions of the action, and decerns: Finds the original pursuer, James Wilkinson senior, liable in expenses up to the date of sisting the present pursuer; and finds both original and present pursuers liable conjunctly and severally in expenses subsequent to that date: Allows an account," &c.

HUTTON & JACK, Solicitors—GILL & PRINGLE, W.S.—Agents.

ALEXANDER RUSSELL, Pursuer (Respondent).—*John Wilson—Wilton.* No. 176.

BANKNOCK COAL COMPANY, LIMITED, Defenders (Appellants).—

Johnston—C. K. Mackenzie.

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Bill of Exchange—Blank Acceptance—Authority to fill in name of third party as drawer—Accommodation Bill—Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), secs. 20 and 29.—Russell, for the accommodation of Knox, handed to Knox a bill stamp with his (Russell's) acceptance written

¹ *Fraser v. Cameron*, March 8, 1892, 19 R. 564; *White v. Steel*, March 10, 1894, 21 R. 649.

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across the face of it, but otherwise blank. It was understood between the parties that a bill on Russell for £189, 13s. at four months should be completed on the acceptance, but there was no agreement that Knox himself should necessarily be the drawer. Knox, for facility of discount, procured the bill to be drawn for the agreed on sum and at the agreed on usance, by the Banknock Company, of which he was managing director, and to whom he was indebted. The company discounted the bill with a bank, and applied the proceeds in reducing a debt due by Knox to them. Knox having become bankrupt, and having failed to retire the bill, it was retired by Russell, who brought an action of relief against the Banknock Company.

Held that the pursuer had no right of recourse against the defenders.

2D DIVISION.
 Sheriff of
 Lanarkshire.

IN November 1896 Alexander Russell, iron and machinery merchant, Coatbridge, brought an action in the Sheriff Court at Glasgow against the Banknock Coal Company, Limited, for payment of £189, 17s., with interest from 29th October 1896.

The action arose out of a bill of exchange for £189, 13s., drawn by the defenders and bearing the pursuer's acceptance, which had been discounted by the Clydesdale Bank and retired by the pursuer on 29th October 1896, four days after maturity. The pursuer in the present action sought relief of payment of the contents of the bill, together with 4s. as the expense of noting it.

The circumstances, as appearing from the record and a proof, were as follow:—On 23d June 1896 the pursuer and John Knox, coal merchant in Glasgow, and at that date managing director of the defenders' company, agreed to accommodate each other by granting cross bills for £189, 13s. at four months' date. In pursuance of this arrangement they each handed the other a bill stamp sufficient to cover £189, 13s., with the giver's acceptance written across the face of it, but otherwise blank. Knox, instead of completing the bill handed to him by the pursuer by drawing it in his own name, procured the signature of the defenders as drawers, their signature being adhibited by himself as a director of the defenders' company and by Howell the secretary. The parties to the action were at issue as to whether in thus completing the bill otherwise than by drawing it himself, Knox was acting in terms of the arrangement between himself and the pursuer. On this point the pursuer averred;—(Cond. 3) "The pursuer signed the said blank bill stamp on the footing that the bill to be written thereon would be made out as an accommodation bill for the said John Knox, who should sign as drawer, and that the drawer should retire the same at maturity." (Cond. 4) "In direct contravention of said arrangement, and without the knowledge or authority of the pursuer, the said blank stamp was" drawn by the defenders. The evidence of the pursuer and of Knox on this point is given below.*

* Knox deponed,—“I stipulated that I should draw on pursuer for my accommodation, and he should accept that. The arrangement was that I was to retire the bill drawn by me on pursuer, and that he was to retire the bill drawn by him on me. . . . The bills were signed in a tea-room in St Vincent Street. It was merely the acceptors' names that were signed on the bills, otherwise they were left blank. I did not tell pursuer when he handed me the bill stamp signed by him as acceptor that it was my intention to hand the bill stamp blank to the defenders. Pursuer did not authorise me to fill in the defenders as drawers of the bill. (Q.) I think you handed this bill to the defenders blank as regards the drawer's name? (A.) I wanted to get it done in my own bank but could not, and I pre-

The pursuer further averred that the defenders received the proceeds of the bill (less discount). "The defenders gave no value to the said John Knox for the said bill stamp." The defenders in answer averred that the proceeds of the bill were handed by their secretary to Knox, and that Knox thus got the entire benefit of the accommodation. It was proved that Knox at the date of the bill was largely in debt to the defenders, and that the amount of the bill (less discount) was put to his credit with the defenders. Knox became bankrupt and called a meeting of his creditors on 28th October 1896.*

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The pursuer pleaded;—(1) The said bill having been accepted by the pursuer for the accommodation of the drawers, the defenders as drawers thereof are bound to relieve the pursuer of all liability thereunder. (2) The defenders having, without the authority of the pursuer, filled up and signed the bill as drawers, and having thereafter negotiated the same, are liable to relieve the pursuer of liability therefor. (3) The pursuer having paid the said bill to the Clydesdale Bank Limited, the holders thereof, is entitled to reimbursement from the defenders. (4) The defenders not being indorsers of said bill are subject to all objections pleadable against the same in a question with Knox.

vailed upon the secretary of the defenders' company to pass it through the defenders' company. Being managing director of the defenders' company, I signed it as such, so as to get it passed through the bank. . . . The transaction between pursuer and me was a private transaction. I did not do this as the Banknock Coal Company; it had no connection whatever with the company."

The pursuer deponed,—“It was clearly understood that Mr Knox himself was to draw the blank bill accepted by me . . . and that I was to do the same as regards the bill stamp he had signed and handed to me. It was simply for convenience that they were not filled up, because we were in a public place. I never authorised Mr Knox to fill up the bill with any other party as drawer but himself. I would not have done so. He never suggested to me that he proposed to hand away the bill to a third party.”

* The Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61) enacts as follows:—Section 20 (1) “Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.

“(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

“Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given.”

Section 29 (1).—“A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely,

“(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact:

“(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.”

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The defenders pleaded, *inter alia*;—(4) Defenders being in the position, as regards pursuer, of holders for value, are not bound to relieve pursuer of liability for said bill, and should be assoilzied, with expenses. (5) Pursuer not having accepted said bill for the accommodation of defenders, they should be assoilzied, with expenses.

On 26th March 1897 the Sheriff-substitute (Erskine Murray) pronounced an interlocutor whereby he, *inter alia*, found in fact—“(5) That on 23d June 1896, Mr Knox having met the pursuer Russell, it was agreed between them that they should grant each other accommodation to the extent of £189, 13s., by each accepting a bill to that amount, which could be discounted; which was accordingly done, the names of the drawers being left blank; but it was understood between them, if not expressed, that each was to fill up his own name as drawer in the bill which the other accepted,” and then found “on the whole case, and in law (1) that in the circumstances defenders, before they could resist the pursuer’s demand, would have to prove that in inserting their name as drawers they did so under authority from him; (2) that they have failed to prove that they had such authority; (3) that the action is relevant; (4) that in the circumstances pursuer is not barred from insisting on his demand: Repels the pleas in law stated for defenders, and finds defenders liable to pursuer in the sum of £189, 17s., as craved, with interest,” &c.*

* “OPINION.—The points of law at issue in this case are very nice and somewhat doubtful, although there is little variance between parties as to the facts. The law applying to the subject may first be dealt with.

“Before the passing of the Bills of Exchange Act, 1882, the leading authority on the point at issue appears to have been the English case of *Schultz v. Astley*, 1836, 2 Bingham’s New Cases, 544. In that case, which came up in the Court of Common Pleas before Lord Chief-Justice Tindal and the other Judges, it was stated in the judgment,—‘Nor can we see any distinction in principle, when the bill has passed into the hands of third parties, between holding the acceptor liable to a given amount, when the bill is afterwards drawn in the name of the party who has obtained the acceptance, and when it is drawn by a stranger who becomes the drawer at the instance of the party to whom the acceptance was given. The blank acceptance of the bill is an acceptance of the bill which is afterwards put upon it; and it seems to follow from the doctrine of Lord Mansfield in *Russell and Langstaffe* that it does not lie in the mouth of the acceptor to say that the drawing or indorsing of the bill is irregular. As all that he (the acceptor) desired was to raise the money, it could make no difference to him, either as to the extent of his liability or in any other respect, whether the bill was drawn in the name of one person or another.’ If therefore the present case fell to be decided by the broad rule laid down in *Schultz*, it is obvious that the pursuer must fail in his action. It must be noted, however, in view of subsequent law that the pursuer *Schultz* was not the drawer but an indorsee, who would, in the terms of the recent Bills of Exchange Act, have been held to be a ‘holder in due course,’ and would therefore, had the case occurred even under the recent Act, have been entitled to succeed.

“The pursuer has called attention to two cases that occurred before the Act. The first, *Awde v. Dixon*, 6 Exch. 869, was the case of a bill delivered over when incomplete in the sum, and on the condition that a third party, Robinson, was to be a joint surety along with the acceptor, and Robinson refused to join. Baron Parke laid down that a party who took such an incomplete instrument could not recover on it unless the person from whom he received it had a real authority to deal with it, or the

The defenders appealed, and argued;—(1) *Ante omnia*, it was to be borne in mind that this was not an action to enforce a bill of exchange, and consequently the Bills of Exchange Act, sec. 20, which related only to the enforcement of bills of exchange, had no application. The bill had been retired by the acceptor—the pursuer—and the acceptor on a bill, who had retired the bill, had, in virtue of the bill merely, no right of relief against the drawer, since, in retiring the bill, the acceptor had done no more than fulfil the obligation which, *ex facie* of the bill, he had undertaken to the drawer. The pursuer's case accordingly was not founded on the bill, but on the fact, which was admitted, that the pursuer's acceptance was an accommodation acceptance. Where, however, a bill was retired by the acceptor, the mere fact that the acceptance was an accommodation acceptance was not sufficient to entitle the acceptor to relief against the drawer, since the drawer was not necessarily the person accommodated; and the question whether in any given case the drawer was or was not the person accommodated depended on the real nature of the transaction,

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party granting the note conducted himself in such a manner as to lead the plaintiff to believe that there was authority.

"In the case of *Hogarth v. Latham*, 1878, L. R., 3 Q. B. D. 643, the pursuer Hogarth received from his partner Cotton two bills with the drawer's name blank accepted in the partnership name of the defenders Latham & Company, of which the partners were Forster and Latham. It afterwards appeared that Forster had accepted them without Latham's authority, which he was not entitled to do. When the plaintiff got the bills he believed that they had been lawfully accepted, but after his suspicions were aroused that there was something wrong, he yet filled in the name of his firm as drawers. The Court assailed. Lord Bramwell held that even 'supposing the plaintiff was entitled to assume that value had passed as between Cotton and defender's firm, yet as the acceptance was in the handwriting of one partner only, the pursuer had not, as against the other partner, and as a matter of right, the power of putting in his name as the drawer, he not being the creditor, and as he did so, he must shew that the partner whose name was not on the bill authorised the other partner to put the document in circulation, and gave authority to any holder to put in his name as drawer. It is one thing to authorise a creditor to put his name to a bill, and another thing to authorise him to insert the name of a third person.'

"Brett, L.J., held that 'the person who takes an acceptance with the drawer's name in blank has no right to say that he may assume that that acceptance entitles any holder to put in any name which he may think fit.' As the drawer 'knew in effect that the defendant had given no authority to draw' at the time when he inserted his name as drawer, his action failed.

"Before the Act of 1882, therefore, it appears, taking the authorities together, that while in the case of a person who would now be termed a 'holder in due course,' a bill in which the drawer's name had thus been subsequently filled up, with or without authority, must prevail—on the other hand, in the hands of one who himself fills in his name as drawer, the document not being a negotiable instrument when he got it, he can only prevail if he can shew that the acceptor, in the words of Lord Bramwell, must be taken to have given authority to anyone into whose hands it might come to fill up the blank. Brett, L. J., says he cannot assume this.

"What, then, is done in this matter by the Bills of Exchange Act of 1882? The 20th section gives power to the possessor of a signature on a bill stamp as a bill, to fill it up as a bill, but that it may be enforceable

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as disclosed by the whole evidence. Now, here it was not suggested by the pursuer that he intended to accommodate the defenders—his case was that he intended to accommodate Knox and nobody else—but if it had been proved that in fact the defenders were the persons accommodated—if they had retained the proceeds of the bill as their own—it would have been difficult for them to resist the pursuer's demand. The evidence, however, clearly shewed that Knox got the accommodation which the pursuer intended he should get. It was true that the defenders drew the bill and discounted it, so that the proceeds in the first instance came into their hands, but it was Knox who got the ultimate benefit. The defenders, in short, had simply given the accommodation of their name to Knox, who thought he could not discount the bill unless it had another name on it than his own, but that was nothing to the point on the question whether the defenders had themselves been accommodated by the pursuer. It was also true that Knox did not put the proceeds of the bill into his own pocket, but applied them *pro tanto* in diminishing his debt to the defenders. That was no doubt an advantage to the defenders, but it was not accommodation. It was just as if the pursuer had lent Knox so much money, and he had used it to diminish his debt to the defenders. In such a case could it have been

against a prior party by him it must be filled up 'strictly in accordance with the authority given,' while, if such an instrument after completion is negotiated to a holder in due course, he may enforce it as if it had been filled up strictly in accordance with the authority given. Practically the Act recognises the doctrine of both *Schultz* and *Hogarth*. It gives effect to the right of such a holder as *Schultz*, whom it denominates a 'holder in due course,' but it imposes on a party who has inserted his own name as drawer in an incomplete instrument the *onus* of proving authority as in the case of *Hogarth*.

"Now, in the present case the Clydesdale Bank, who cashed the bill when complete, were holders in due course, and therefore could enforce payment from the pursuer as acceptor. But the defenders, to whom the Clydesdale Bank cashed it, and who had filled in their own name as drawers, must prove authority to do so. This they have failed to do. Neither Knox nor pursuer say that there was any agreement that a third party's name might be inserted as drawer. Each was to draw the bill of which the other was acceptor.

"The defenders contend that the pursuer has lost nothing by the substitution of their name as drawers, that Knox got the money as pursuer intended him to get it, and that in subsequently paying it to them he did no more than he was entitled to do. But then it must be remembered that the Clydesdale Bank paid the money to defenders, not to Knox; it only got to Knox by being handed by them to him, which they did for the purpose of enabling him to pay them a debt which he owed them. They therefore are in the position of the drawers of an inchoate bill, which they themselves completed for their own purposes, and as to which they have failed to prove authority to do so. It is clear, therefore, that they would not have been able to establish liability against the pursuer as acceptor had the question arisen in that form. As it is, the acceptor has paid to a holder in due course, but as the bill was admittedly an accommodation bill, he can recover the amount from the party who got the money from that holder.

"It may seem that it is hard on defenders that they should be found liable when, had Knox filled in his own name as drawer, and indorsed it to the defenders, they would have been safe. This is true. But unfortunately for them the wording of the Bills of Exchange Act is too definite."

suggested that the pursuer had an action for repayment of the loan against the defenders? Therefore, viewing the action in its proper light, as an action for relief on the plea of accommodation, the pursuer's case failed. But (2) even if the question had arisen in an action on the bill, the result would have been the same. Suppose that the defenders had themselves taken up the bill from the bank, and had then brought an action on the bill against the pursuer as acceptor, would it have been an effectual defence to such an action that the acceptance was for accommodation? It certainly would not have been effectual if the defenders—the pursuers of the supposed action—had been *bona fide* onerous indorsees after completion of the bill, for their position would then have been identical with that of the bank, to whose claim the pursuer admittedly had no answer. It was said, however, that as the defenders had taken a blank acceptance and not a completed bill, any action by them on the bill would be open to the same pleas that were good against Knox. Now, no doubt under the Bills of Exchange Act, 1882, sec. 20, and probably also under the prior law, looking to the authorities founded on by the pursuer,¹ a person getting an acceptance on a bill stamp otherwise blank and completing the bill in his own name as drawer, took the risk of the bill not being completed in accordance with the authority given by the acceptor to the person to whom the acceptance was originally delivered; but the general rule was, both under the Act and at common law,² that a person lawfully in possession of such an acceptance had *prima facie* authority to draw the bill himself. On this question of authority the proof came to no more than this, that the pursuer and Knox may have assumed in a general sense that each would himself draw on the other's acceptance, but not even the pursuer spoke to this having been an express condition of the agreement. In short, the proof left the question to be determined by the general presumption of law. The bill having thus been well drawn by the defenders, what had the fact that the bill as between the pursuer and Knox was intended for the accommodation of Knox to do with the rights of the defenders as drawers, they having given value for the acceptance and Knox having got the accommodation which the pursuer intended him to get? Their position was exactly that of onerous indorsees after completion of the bill.

Argued for the pursuer;—The defenders had drawn a bill upon an acceptance which they knew to be an accommodation acceptance; they had discounted the bill, and had thus received the accommodation. If they chose to give Knox the benefit of the accommodation, that was their affair; the pursuer having retired the bill was not bound to go beyond the drawers, who had discounted it, for relief. But looking to the substance of the whole transaction it was clear that the defenders had been themselves accommodated. They had in effect borrowed the amount of the bill from the pursuer, and they now declined to repay the loan. It did not alter the substance of the

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¹ Hood v. Darling, Nov. 25, 1808, Hume's Dec. 59; Awde v. Dixon, 1851, 6 Excheq. 869; Hogarth v. Latham & Co., 1878, L. R., 3 Q. B. D. 643.

² Disher v. Kidd, Nov. 16, 1810, Hume's Dec. 64; Grassick v. Farquharson, July 8, 1846, 8 D. 1073, 18 Scot. Jur. 533; Schulz v. Astley, 1836, 2 Bing. N. C. 544.

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transaction that the defenders and Knox had agreed that his debt to them should be extinguished *pro tanto*. That merely shewed that the defenders proposed to get payment of part of what Knox owed to them by keeping what the pursuer had lent to them. It was true that Knox might himself have drawn the bill and indorsed it to the defenders in consideration of a discharge of his debt *pro tanto*. In that case it might be that the defenders, as in a question with the pursuer, would have been in the position of *bona fide* indorsees for value. As matter of fact, however, the defenders were not indorsees but drawers of the bill, and they must take the consequences of that position. If they had retired the bill they could not have succeeded in an action against the pursuer as acceptor, in the first place, because a person who filled up blanks in a negotiable instrument in his own favour was subject to the same pleas—in this case the plea of accommodation—as the person from whom he received the instrument;¹ and secondly, because the pursuer had never authorised the defenders to draw on him, and had no money or other property of theirs in his possession against which they might be entitled to draw. It was said that by delivering an acceptance blank in the name of the drawer the pursuer had impliedly authorised anyone in lawful possession of the paper to draw on him. The authorities prior to the Bills of Exchange Act were adverse to that view,² and under the Act, section 20, the drawer of a bill could enforce it only if the bill had been drawn up “strictly in accordance with the authority given.” Upon the question whether the pursuer had authorised anyone other than Knox to draw the bill, the Sheriff-substitute had come to the right conclusion on the evidence—that the pursuer had not. In short, as between the pursuer and the defenders there was no bill at all, and the pursuer, therefore, who had been obliged to recognise and retire the bill as in a question with the bank, was entitled to relief from the defenders, through whose unauthorised act the bill had been put into the circle.

LORD JUSTICE-CLERK.—I do not think it is necessary to call for any further argument. The original transaction here was of a very simple and common kind. It was arranged between Russell and Knox that Russell should give his acceptance to Knox for his accommodation. He did that by handing to Knox a signature upon a blank bill stamp. That was an authority to Knox to get it filled up as a bill for any amount which the stamp would cover. That has been distinctly decided in the cases which were cited to us, about which there is no dispute, and it is in accordance with practice, and also in accordance with the Bills of Exchange Act, 1882. Now, what was done with the bill stamp? Knox did not fill in his own name as drawer. Having doubts as to whether the bank would give him the money for the bill, he went to the Banknock Coal Company and asked them to give their name as drawer of the bill. The company consented, and having so consented, they obtained the money and gave Knox credit for it in account with them.

¹ *France v. Clark*, 1884, L. R., 26 Ch. Div. 257, *per* Lord Chancellor Selborne, at p. 262.

² *Hood v. Darling*, Nov. 25, 1808, Hume's Dec. 59; *Awde v. Dixon*, 1851, 6 Excheq. 869; *Hogarth v. Latham & Co.*, 1878, L. R., 3 Q. B. D. 643; *Hanbury v. Lovett*, 1868, 18 L. T. R. (N. S.) 366.

They therefore got the bill for value. The result has been that Russell has had to retire the bill. He desires now to make the Banknock Coal Company pay him back what he has had to pay to the bank to meet his acceptance. The grounds on which he makes that claim is that the bill was filled up in a way contrary to the arrangement between him and Knox. That made no difference to him. Being acceptor of the bill, he was bound to pay the amount of the bill in discharge of his acceptance. He has suffered no prejudice. Suppose Knox had drawn the bill himself and then indorsed it to the Banknock Coal Company, who had then discounted it with the bank, the result would have been exactly the same, and Russell would have had to pay just the same. He would have been exactly in the same position as he is now. I am unable to see how, apart from some specialty in the case—and there is no specialty here—the acceptor could have any claim against the drawer in such circumstances as we have in this case.

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I should like to guard myself from being supposed to say anything as to what would be the result if there were evidence that the acceptor had made it a condition that the name of the person to whom he was giving accommodation, and the name of no one else, should appear as the drawer of the bill. In that case the result might be different. But in this case there is no evidence to satisfy me that the pursuer made any such stipulation when he gave his signature. It may have been understood by him that Knox would be the drawer of the bill, but that there was any binding arrangement which should prevent him from getting someone else to give his name as drawer appears to me not to be proved in this case.

I do not think the case of *Hood*¹ has any bearing on the present. It is clear from the rubric that there was a specialty in that case which was the ground of the decision. Baron Hume, who was very careful about such matters, would not have used the words "perverted to a wrong purpose" unless there had been some specialty in the case of the kind indicated by these words. That this specialty was the true ground of the decision in that case also appears from the opinion of the Lord Justice-Clerk in the subsequent case of *Grassick*.² The case of *Grassick*² is really the same as the present, and I know of no reason why we should not follow it.

LORD YOUNG.—I am of the same opinion, and have very little to say. The transaction here was a very plain and simple one. The pursuer signed a piece of paper with a bill stamp for 2s. on it. That piece of paper was therefore capable of being converted into a bill of exchange for any amount which the stamp would cover. He did this for the accommodation of Mr John Knox, Mr John Knox having accommodated him with a similar acceptance. It appears that the sum filled in was £189, 13s., and as to the amount there is no controversy between the parties. The bill was discounted with the Clydesdale Bank, and Knox got the money for it, not directly from the bank, but I take it on the evidence he got it through the Banknock Coal Company. When the bill became due the bank got payment of it from Russell the acceptor. That demand was irresistible, and was not resisted. This action is now brought by him against the Banknock

¹ Hume's Dec. 59.

² 8 D. 1073.

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LORD TRAYNER.—I agree. I have not heard any ground stated which would entitle the pursuer, in my opinion, to our judgment. If the present defenders had been suing the pursuer upon the bill in question, I could have understood the argument—I do not say I could have assented to it—that he was not liable in respect of the alleged irregularity in the constitution of the bill. But that is not the case or kind of case we have before us.

The pursuer is suing the defenders for repetition of a sum which he paid in respect of his own obligation to his own creditor. The pursuer was the primary obligant on the bill; he was the acceptor. He accepted the bill for the purpose of enabling his friend to raise money on his, the pursuer's, obligation by discounting the bill. The bill was in the hands of the bank, who discounted it, and the pursuer paid the bank as he was bound to do when the bill matured. In doing so he was, I repeat, paying his own debt to his own creditor. Why should the defenders be called upon to reimburse him? I think the claim for repetition out of the question. If the pursuer could have shewn that the interposition of the Banknock Company as drawers instead of Knox had prejudiced him, perhaps a claim of damages might have arisen. But the pursuer has plainly suffered no prejudice. He has not been called upon to do anything more than fulfil the obligation which he voluntarily undertook on behalf of Knox.

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LORD MONCREIFF.—I am of the same opinion. *Prima facie* delivery to Knox of the bill stamp, signed by the pursuer as acceptor, authorised Knox to get the bill filled up with any name he chose as drawer. This is in accordance with the cases of *Disher*¹ and *Grassick*,² and also with the Bills of Exchange Act, 1882. It is not necessary to consider what would have been the result if there had been an express stipulation that Knox should fill up the bill with his own name as drawer, because in my opinion such a stipulation is not proved. It is not enough to prove that authority was not expressly given by Russell to Knox to get the bill filled up with someone else's name as drawer. It was necessary to shew that when Russell gave his acceptance it was made a condition, express or necessarily implied, that Knox alone should sign as drawer. Now, the proof does not come up to this. The Sheriff-substitute's judgment is based upon a finding that it was understood between them (that is, Russell and Knox), if not expressed, that each was to fill up his own name as drawer on the bills. In one sense this may be true, but the understanding, such as it was, is not shewn to have amounted to a condition. I think the interlocutor is erroneous, and should be recalled.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against: Find in fact (1) that on 23d June 1896 John Knox, coal-merchant, Glasgow, met the pursuer in Glasgow, when it was agreed between them that they should grant each other accommodation by way of cross bills; (2) that accordingly each handed to the other a blank acceptance to be filled up for the sum of £189, 13s. at four months' date; (3) that though it was in the contemplation of the parties that each should become drawer of the bill to be accepted by the other, there is no evidence that there was any agreement come to which precluded the bill, so handed to the said John Knox, being filled up with another name as drawer than his own; (4) that accordingly the pursuer wrote across a paper bearing a stamp, which would cover the sum of £189, 13s., his acceptance payable at

¹ Hume's Dec. 64.

² 8 D. 1073.

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the Bank of Scotland, Hope Street branch, Glasgow, and handed it to the said John Knox; (5) that the said John Knox, for facility in discount, procured the bill, accepted by pursuer and handed to him, to be filled in with the agreed on sum, and at the agreed on usance, but with the name of the defenders' company as drawers, the drawers' subscription being adhibited by himself as a director and by Jonathan Howell, the secretary of the defenders' company; (6) that the bill so completed and indorsed was discounted by the defenders with the Clydesdale Bank, and the proceeds, less discount, applied to the uses of the said John Knox; (7) that the said John Knox having become bankrupt failed to retire the bill when it fell due on 26th October 1896, and called a meeting of his creditors on 29th October 1896, on which day the pursuer retired the bill: Find in law that the pursuer has in these circumstances no claim to recover from the defenders the sum which he has paid to the Clydesdale Bank as onerous indorsees of the bill: Therefore assoilzie the defenders from the conclusions of the action, and find them entitled to expenses in this and in the inferior Court, and remit," &c.

GRAY & HANDYSIDE, S.S.C.—R. AINSLIE BROWN, S.S.C.—Agents.

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Chalmers v.
Paterson.

DAVID CHALMERS, Pursuer (Appellant).—*Salvesen—W. Brown.*
PETER R. PATERSON, Defender (Respondent).—*Sol.-Gen. Dickson—*
Abel.

Sale—Sale of moveables—Right of inspection before taking delivery.—Certain barrels of herrings were, after an inspection by the buyer, bought for shipment abroad, it being part of the contract that delivery should not take place until the buyer had arranged for a ship, and that the seller should until delivery attend regularly to the condition of the herrings, in order to ascertain whether any of the barrels had lost their "pickle" by leakage, and should supply fresh pickle in that event. About a month afterwards, the buyer intimated that he had a ship ready, but refused to take delivery of the herrings except at a reduced price, on the ground that they were not of the quality represented in the contract. The seller having declined to agree to this, the buyer made a formal demand to inspect the herrings as to "quality and cure." The seller refused this demand, and the buyer thereupon refused to take delivery.

In an action by the seller for the price, *held* that, while the defender, having inspected the herrings before purchasing, would not have been entitled to a second inspection with the view of ascertaining whether they were of the quality specified in the contract, his right to inspect them before taking delivery for the purpose of identifying them as in fact the herrings purchased by him and for the purpose of ascertaining whether their pickling had been properly attended to, was absolute; that the pursuer was not entitled to refuse the defender's demand for an inspection on the ground that the defender intended to use the inspection for an illegitimate purpose; that the pursuer therefore was in breach of contract; and that the defender fell to be assoilzied.

2D DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

ON 19th September 1895 David Chalmers, fish-curer, Findochty, sold to Peter R. Paterson, coal-merchant and fish-curer, Fraserburgh, several lots of herrings, including 244 barrels of unbranded matties, at 17s. a barrel.

The contract note bore,—“To be delivered in good condition, clean No. 177. and well pickled, f.o.b. on buyer's order.”

Paterson purchased the herrings through his buyer, George Forbes, ^{July 2, 1897.} who had been told before purchasing to satisfy himself as to the ^{Chalmers v. Paterson.} quality of the herrings, and had done so.

The herrings were purchased for export to Riga, and under the contract between Chalmers and Paterson delivery was not to be taken immediately, but only when Paterson could arrange for a steamer in which to export them. In the meantime, until delivery, the herrings remained in Chalmers' premises in Aberdeen, and under the contract it was his duty, until delivery, to see that the herrings were regularly attended to in order to ascertain that none of the barrels lost their pickle through leakage or otherwise.

Barrels of herring are apt to lose their pickle, and when this occurred it was necessary that the barrel should at once be filled up with fresh pickle, otherwise the herrings in it would become dry and what was known as “rusty,” and would not be in good condition. An expert merely by tapping a barrel could ascertain whether it was at the moment properly supplied with pickle, but without opening the barrel and inspecting the herrings themselves he could not ascertain whether it had always been kept properly supplied.

On 26th October Forbes, Paterson's buyer, on Paterson's instructions, came to Aberdeen to arrange for the shipment of the herrings, and on that day made an examination of certain of the barrels of herrings, which were lying outside in the yard of Chalmers' premises. As the result of this examination Forbes sent this telegram to Paterson (the portions here omitted referred to another parcel of herrings):—

“Have examined . . . Chalmers' herrings . . . fair pars, but good many smalles herrings in them . . . must reduce . . . 1s. 6d.”

In consequence of this telegram Paterson, on the same day, sent the following telegram to Chalmers:—“My shipper, inspecting your selected matties, finds great many only smalls; refuse take delivery unless reduction 2s. brl.; wire instantly, vessel ready Monday.”

Chalmers, in reply, on 28th October, telegraphed to Paterson,—“Only received your Saturday telegram about shipment herrings now. The matties were inspected already, and are perfectly up to sample. Will be Aberdeen one o'clock.”

Chalmers came to Aberdeen on 30th October, and there met Paterson, who demanded to be allowed to inspect the herrings. Chalmers refused on the ground that Paterson had already, through his buyer Forbes, made an inspection, and was not entitled to a second inspection. Paterson thereupon wrote the following letter, and handed it to Chalmers:—“Dear Sir,—With reference to my call at your fish-curing premises to-day for the purpose of inspecting before shipment the unbranded matties bought by me from you, and your refusal to allow me to so inspect, I hereby give you notice that I will wait at your yard for permission to inspect. Failing your granting me permission by 4 P.M. to-night of ascertaining by inspection whether the goods are of the requisite quality and cure, I will hold you refuse to implement the sale, and hold you responsible for freight and other loss. You are at liberty to appoint a party to represent you at the inspection.”

Chalmers having returned no answer to this letter, Paterson refused to take delivery of the herrings.

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Chalmers then brought an action for the price in the Sheriff Court at Peterhead.

The parties were at issue upon the question whether, by custom of trade, the defender, notwithstanding his inspection through his buyer Forbes at the time of purchase, was entitled, before taking delivery, to a second inspection with the view of satisfying himself as to whether the herrings were in every respect conform to the description in the contract, and of rejecting them if, upon any ground, they were not; but the case ultimately came to turn upon the following issue, which proceeded on the assumption that the defender had no such general right of inspection and rejection:—The pursuer, while not seriously disputing that he would have been bound to allow the defender to inspect before taking delivery if he had asked for the inspection for the purpose of identifying the herrings as those bought by him, or for the purpose of ascertaining whether the pursuer had fulfilled his obligation to keep the herrings properly pickled, maintained that he was not bound to allow the inspection actually demanded, seeing that it was plain from the correspondence that the defender asked for the inspection in order that he might reject the herrings if they were in any respect disconform to the description in the contract. The defender, on the other hand, maintained that his right to inspect before delivery for identification and as to pickling was absolute, whatever his other motives might have been, and that the pursuer, by refusing to allow him to inspect, was in breach of contract.

A proof was allowed. The evidence, in the opinion of the Court, established the facts narrated above in so far as they had been in dispute.

On 6th February 1897 the Sheriff-substitute (Robertson) pronounced this interlocutor (after findings in fact in conformity with the foregoing narrative):—"Finds in law (1) that the herrings having been inspected at the time of purchase defender was not entitled to a second inspection for the purpose of ascertaining their quality; but (2) that the herrings not having been taken delivery of at the time of purchase, defender was in terms of his contract entitled to ascertain by inspection if necessary whether the herrings were in good condition, clean, and well pickled at the time of delivery; and (3) . . . that pursuer having refused to allow defender to inspect the herrings when permission was requested to do so on 30th October, defender was not bound to take delivery; therefore assoilzies defender from the conclusions of the action, and decerns," &c.

On appeal the Sheriff (Crawford), on 27th March, adhered.

The pursuer appealed, and argued;—It was plain from the telegrams of 26th October and the defender's letter of 30th October that his object, and his only object, in asking for an inspection on 30th October was that he might reject the herrings if they did not in any respect conform to the description in the contract. It might be conceded that he was entitled to inspect before delivery for the purpose of identifying the herrings as being in fact the herrings that he had purchased, or for the purpose of seeing whether they had been kept properly pickled, and if he had simply asked to be allowed to inspect without saying why, the pursuer would probably have put himself in the wrong if he had refused. But the pursuer knew what the defender's object was, and if, with that knowledge, he had allowed the inspection, it might well have been held that he was barred from afterwards

objecting to the defender rejecting the herrings as disconform to contract. In short the pursuer would not have been entitled to refuse an inspection if he had been appealed to as custodier of the herrings, but he was entitled to refuse as he had been appealed to as seller. No. 177.

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Argued for the defender;—It was clear that the defender was entitled to inspect the herrings with the view of seeing whether they were the herrings he had bought. A buyer was not bound to take anything the seller chose to tender as in implement of the contract.¹ The defender was also entitled to inspect the herrings for the purpose of seeing whether the pursuer had attended properly to their pickling. This was *a fortiori* in the case of goods intended to be shipped abroad immediately on delivery, for it would be too late to reject on either of these grounds after the goods had gone abroad,² and it was unreasonable to suppose that the defender should open the barrels and inspect the herrings at the ship's side, or anywhere else than in the pursuer's premises. But the pursuer had in effect conceded the defender's right to inspect for either of the purposes mentioned. His case really was that he was entitled to refuse the inspection because the defender's declared object in asking for it was to raise the whole question of conformity or disconformity to contract. Now, in the first place, it was not clear that the defender did declare this to be his object—at least his sole object. In his formal letter of demand of 30th October he asked for an inspection as to "quality and cure"—language which might well include, if it was not confined exclusively to, the pickling of the herrings. But even if the defender had unequivocally demanded an inspection for the purpose of raising the general question of conformity to contract, that did not entitle the pursuer to refuse the inspection. His proper course would have been to reply, "Inspect as much as you like, only you are not entitled to reject unless the herrings are not in fact the herrings you bought, or unless their pickling has not been attended to properly." Had he taken that course he would have been in perfect safety as regarded any plea of personal bar. In refusing the demand for an inspection the pursuer had violated an essential condition of the contract, which entitled the defender to rescind.³

Junior counsel were heard on the question whether under the Sale of Goods Act, 1893, the property in the herrings had passed before delivery, but senior counsel stated that they did not consider that the question between the parties turned in any way on that point.

At advising,—

LORD TRAYNER.—I think the Sheriffs are right. The defender purchased the herrings in question after inspection by his buyer. He could not thereafter object to the quality of what he had bought, or claim any deduction from the contract price, on the ground that they were not unbranded matties, or not so good as he or his buyer had thought they were. But the matties so bought were packed in barrels, which were in no way marked or

¹ Isherwood v. Whitmore, 1843, 11 M. and W. 347; Benjamin on Sale (4th ed.), p. 704; Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), sec. 34 (2).

² Morton & Co. v. Abercromby, Jan. 7, 1858, 20 D. 362, 30 Scot. Jur. 193; Cowdenbeath Coal Co., Limited, v. Clydesdale Bank, Limited, June 15, 1895, 22 R. 682; Pini & Co. v. Smith & Co., June 19, 1895, 22 R. 699.

³ Turnbull v. Maclean & Co., March 5, 1874, 1 R. 730.

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Paterson.

identified; they were to be kept by the pursuer until the defender gave orders for their delivery, and the pursuer contracted to deliver them then in good order. In the meantime they were to be cared for by the pursuer, especially in the matter of seeing as to their being preserved in good and sufficient pickle. In these circumstances the defender was entitled, before taking delivery, to inspect the matties, first, to satisfy himself that the matties tendered to him in fulfilment of the contract were the matties he had bought, and second, to see that the pursuer had kept them as he was bound to do, and was delivering them in good order, clean and well pickled in terms of his contract. Such an inspection could not be made at the ship's side, and the defender's demand to inspect the matties in the pursuer's yard was not only within his right, but was most reasonable in itself. I am of opinion that the defender was not bound to take, without inspection, whatever the pursuer pleased to represent as the defender's matties; and that the pursuer's refusal to allow the matties to be inspected entitled the defender to act as he did.

In the course of the discussion, a reference was made to the Sale of Goods Act, but as senior counsel for both parties concurred in stating that the provisions of that Act did not affect the question here raised, I have not taken the Sale of Goods Act into consideration in disposing of the case.

LORD LOW.—I agree in the judgment which has just been delivered, that the interlocutor of the Sheriff should be affirmed, and I concur in the grounds of judgment which Lord Trayner has stated.

At the same time I think that the dispute has probably arisen out of the position which at one time the defender took up. The telegrams of 26th October passing between Forbes and the defender, and the defender and the pursuer, shew that at that date the defender took up the position that the matties were not of the quality which they had been represented to be, and that he refused to take delivery unless a substantial reduction was made in the price. As the matties had been bought after inspection by the defender's buyer, that was clearly a position which he was not entitled to take up.

Now, it may be that the pursuer believed, and had reason to believe, that the inspection which the defender asked in his letter of 30th October, was for the purpose of ascertaining whether there were not, as reported to him by Forbes, a number of small herrings in the barrels, with the intention, if that turned out to be the case, of refusing to take delivery except at a reduced price, and I think that it is not improbable that that was the defender's intention. But I think that the defender's right to an inspection for the purposes stated by Lord Trayner was absolute, and the suspicion that the defender intended to use the inspection for an illegitimate purpose did not justify the pursuer in insisting that he should take delivery without any inspection. Therefore, although I cannot free the defender from blame, I think that the pursuer has in the end put himself entirely in the wrong, and that judgment must go against him.

LORD JUSTICE-CLERK.—I concur with both your Lordships. I think there is a great deal in what Lord Low has said with regard to the defender's conduct. But his right to inspect the herrings before shipment, first, for the purpose of seeing that the herrings proposed to be delivered were the herrings which he

had bought; and second, for the purpose of seeing that they were in good condition, and had been kept well pickled, was absolute, and the pursuer was not entitled to refuse him an opportunity of exercising it. No. 177.

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LORD YOUNG and LORD MONCREIFF were absent.

THE COURT pronounced this interlocutor:—"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and law in the interlocutors appealed against: Assoilzie the defenders, and decern," &c.

ALEXANDER ROSS, S.S.C.—WM. CROFT GRAY, Solicitor—Agents.

MRS SARAH THOMSON, Pursuer (Appellant).—*Guy—Findlay.*
LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY, Defenders
(Respondents).—*Sol.-Gen. Dickson—Malcolm.*

No. 178.

July 3, 1897.
Thomson v.
Lanarkshire
and Dumbartonshire Rail-
way Co.

Reparation—Precautions for safety of the public—Safety of children—Wall separating public place from railway.—In an action against a railway company for damages on account of the death of a son, the pursuer averred that the defenders' line of railway, in passing through a town, was separated from a public court by a wall belonging to the defenders about five feet high on the side facing the court, with a drop about twenty-five feet in depth on the railway side; that this wall was flat on the top, and about fourteen inches wide; that the pursuer's son, who was a boy ten years of age, was playing in the court, and, following the example of his companions, got on to the top of the wall by means of a heap of rubbish, two feet high, which had been left by the defenders against the wall in the court; that the boy, while walking along the top of the wall, stumbled and fell down on to the railway and was killed; and that the accident was due to the negligence of the defenders in not having a fence or other obstruction to prevent children from getting on to the top of the wall, and also in placing the heap of rubbish against the wall. *Held* that the action was irrelevant.

IN January 1897 Mrs Sarah Boyd or Thomson, widow, residing at 28 Kelvin Street, Partick, brought an action in the Sheriff Court at Glasgow against the Lanarkshire and Dumbartonshire Railway Company for £500 as damages on account of the death of her son, Thomas Thomson. 2ND DIVISION.
Sheriff of
Lanarkshire.

The pursuer averred;—(Cond. 2) The defenders' railway, as it passed through Partick, below the level of the street, was "bounded by a wall belonging to the defenders, which runs alongside of and separates from the railway the public court of" a tenement of houses. "The said wall on the side facing the public court is about 4 feet 11 inches in height, and on the railway side is about 25 feet in depth. The said wall is flat on the top, and about 14 inches wide." (Cond. 4) That in this court "there was at the date of the accident after mentioned, a heap of dirt of about 2 feet or thereby high, which had been left there by the defenders or their workmen. Easy access to the top of the railway wall could be had by this heap." (Cond. 5) "The said railway wall was, on account of its broad flat top and the easy access to it, and the great depth on the railway side, dangerous to children. Explained that the defenders intended to protect the wall by a railing on the top, but they negligently left the wall in an incomplete and unsafe condition by failure on their part to place a railing or other obstruction along the top thereof. This was or ought to have been known to the defenders; but they failed to put a railing or other preventive obstruction on the top of it. The defenders failed to take

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ordinary and reasonable precautions to prevent young children from getting on to the top of the wall." (Cond. 6) "On 9th August 1896 the pursuer's son, Thomas Thomson, ten years of age, was playing in the said public court, and, following the example of his playmates, he got on to the flat top of said railway wall by the said heap of rubbish, and while walking along it stumbled and fell on to the railway, a depth of 25 feet, and was killed." (Cond. 8) "The said accident was due to the negligence of the defenders in leaving said railway wall in an incomplete and unsafe condition, and in not having a railing or some other obstruction on the top of said wall, so as to prevent children from getting on to the top of same, and also through the negligence of defenders in having placed the heap of rubbish as aforesaid."

The pursuer pleaded, *inter alia*;—(1) The pursuer's child having been killed through the fault and negligence of the defenders, as condescended on, the pursuer is entitled to reparation from them.

The defenders pleaded, *inter alia*;—(1) The pursuer's statements are irrelevant, and insufficient to support the conclusions of her action.

On 6th February 1897 the Sheriff-substitute (Balfour) allowed a proof before answer.

On appeal, the Sheriff (Berry), on 15th April 1897, recalled his Substitute's interlocutor, sustained the defenders' plea of irrelevancy, and dismissed the action.

The pursuer appealed, and argued;—She had stated a case entitling her to go to a jury on the question whether the defenders were in fault in not fencing this dangerous place in a populous locality, and further, in adding to the danger by permitting this heap of rubbish to remain.¹

The defenders were not called upon.

LORD JUSTICE-CLERK.—In my opinion there is no relevant case set forth on this record. It is said that this wall fenced off a public place from the defenders' line of railway, and that it was about five feet in height. It is also averred that there was a pile of rubbish two feet high placed against the wall by the defenders, but that left three feet of wall above the pile of rubbish. A boy ten years of age must have known perfectly that a wall like this was an obstruction which he had no business to pass, and in this case he was not going to pass it. He was not going there for any legitimate purpose; he went on to the wall in order to amuse himself by walking on the top of it, and it was while walking along the top of it that he lost his balance and fell over. It seems to me that this is a case which cannot be held relevant.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

THE COURT dismissed the appeal, and affirmed the Sheriff's interlocutor.

HENRY ROBERTSON, S.S.C.—CLARK & MACDONALD, S.S.C.—Agents.

No. 179.

July 3, 1897.
Murray v.
Rennie &
Angus.

MRS ELLEN CARR OR MURRAY, Pursuer (Appellant).—*Abel*.

RENNIE & ANGUS, Defenders (Respondents).—*Salvesen*.

Expenses—*Sheriff*—*Action ad factum præstandum and for damages*—*Conclusion ad factum præstandum dropped*—*Act of Sederunt, 4th December 1878*—*General Regulations 1, 3, and 4*.—Section 1 of the General

¹ Findlay v. Angus, Jan. 14, 1887, 14 R. 312.

Regulations annexed to the Act of Sederunt of 4th December 1878 provides that "in the ordinary Sheriff Court there shall be two scales of taxation, viz.,—First, for causes where the amount of principal and past interest concluded for does not exceed £25; second, for causes of higher amount." No. 179.
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Subsection 3 of section 3 provides that "in damage cases the scale for taxation of the account between party and party shall for the pursuer's agent be regulated by the amount decerned for, unless the Sheriff shall otherwise direct."

In an action raised in a Sheriff Court for implement of a contract and for damages, the Sheriff-substitute, on the joint application of the parties before the record was closed, authorised the pursuer to accept another tender for the contract. The pursuer ultimately obtained decree in the Court of Session for payment of £11, 10s. of damages, with expenses.

Held that the action having at the outset been converted into a mere action for damages, the Auditor was bound to tax the pursuer's expenses in the Sheriff Court on the lower scale, no direction having been given to the contrary.

Opinions that, if it was desired to have the higher scale applied, a motion to that effect should have been made when judgment in the case was given.

(SUPRA, p. 965.)

Mrs Ellen Murray raised an action in the Sheriff Court at Aberdeen against Rennie & Angus, masons, to have them ordained to execute certain mason work according to a contract which they had made with the pursuer, and to pay a sum of £25, and, failing their immediately commencing the work and completing it within such period as the Court might appoint, to pay £50 as damages.

1st Division.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

Before the closing of the record the parties presented a joint minute in which they concurred in craving the Court to authorise the pursuer to accept the next offer to that made by the defenders, or to take new offers, and the Sheriff-substitute (Robertson) interposed authority to this minute, and authorised the pursuer as craved.

On 4th January 1897 the Sheriff-substitute assoilzied the defenders, and on appeal the Sheriff (Crawford) affirmed his interlocutor.

The pursuer having appealed to the First Division, the Court, on 18th June (*vide supra*, p. 971), recalled the interlocutors appealed against, and granted decree in favour of the pursuer for the sum of £11, 10s., with expenses in both Courts.

Upon the Auditor's report coming up for approval, the defenders objected thereto on the ground that the Auditor should have taxed the expenses in the Sheriff Court upon the lower instead of the higher scale as he had done. They founded upon the General Regulations made by the Act of Sederunt of 4th December 1878,* and in parti-

* By the Act of Sederunt of 4th December 1878, the Lords of Council and Session enacted that the Regulations and Table of Fees annexed thereto should, after 31st December 1878, regulate the fees of agents practising before the Sheriff Courts until the same should be altered by the Court. Annexed to the Act are, *inter alia*, the following General Regulations:—I. "In the ordinary Sheriff Court there shall be two scales of taxation, viz.,—First, for causes when the amount of principal and past interest concluded for does not exceed £25; second, for causes of higher amount. In executory proceedings there shall be one scale of taxation only. . . .

"III. (1) The scale for taxation shall in the ordinary case be determined by the amount concluded for, but in all cases it shall be competent to the Sheriff to direct that the expenses shall be taxed according to the scale applicable to the amount decerned for. (2) In cases where the sum concluded for does not exceed £25, it shall be competent to the Sheriff to direct

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cular subsection (3) of section 3 thereof, and argued;—By the interlocutor of the Sheriff-substitute interponing authority to the joint minute of parties the action had been converted into a mere action for damages before the record was closed. Section 4 had therefore no application, and the account should have been taxed on the lower scale, the amount decerned for being under £25, and the Court having made no direction to the contrary. If the pursuer desired the higher scale to apply it was for him to move the Court to that effect.

Argued for the pursuer;—The action was one *ad factum præstandum*, and section 4 applied. In the absence of direction from the Court, the Auditor was entitled to tax on the higher scale. If the defenders wished the lower scale to apply, they should have made a motion to that effect when the case was decided.

LORD PRESIDENT.—I think Mr Salvesen is right. The summons did contain a conclusion for implement, but at the very outset, as appears from the joint minute of parties and the interlocutor of the Sheriff, the action was converted into an action of damages pure and simple, and so the section of the Act of Sederunt founded on by Mr Salvesen appears to be applicable, no motion having been made in the Sheriff Court, or here, to have the higher scale applied.

LORD ADAM.—I agree. I think that, if it was desired to have the higher scale applied, the matter should been brought up at the time the action was disposed of. It is not a question of taxation.

LORD M'LAREN.—I am of the same opinion. If there had been a real question argued under the conclusions for implement, I should have held that the higher scale ought to be applied. But there was no such question argued here.

LORD KINNEAR.—I quite agree, and I entirely concur with what Lord Adam has said, that this is a question which ought to be raised at the time when judgment is given, because it is not a question of pure taxation, but a question for the Court as to the construction of the Act of Sederunt and its application to this particular case. But that being so, the question comes to be, under which section of the Act of Sederunt the case falls. And I agree with your Lordship that this is to all intents and purposes an action of damages.

THE COURT sustained the objection, and remitted the account back to the Auditor to tax the same according to Scale I. of the Sheriff Court Table of Fees, and to report.

RONALD & BITCHIE, S.S.C.—PHILIP, LAING, & HARLEY, W.S.—Agents.

taxation on the higher scale, if he shall be of opinion that the amount sued for does not truly indicate the nature and importance of the cause. (3) In damage cases, the scale of taxation of the account between party and party shall, for the pursuer's agent, be regulated by the sum decerned for, unless the Sheriff shall otherwise direct. . . .

"IV. . . . In actions *ad factum præstandum*, for exoneration, interdict, and others, where the pecuniary amount or value of the question in dispute cannot be ascertained from the process, the Sheriff, when deciding the case, shall determine according to which scale the amount shall be taxed."

DAME FLORENCE WINIFRED BERENS OR ROSS, Pursuer (Respondent).— No. 180.
W. Campbell.

SIR CHARLES HENRY AUGUSTUS FREDERICK LOCKHART ROSS, Defender July 3, 1897.
ROSS v. ROSS.
 (Reclaiming).—*Sol.-Gen. Dickson—Pitman.*

Process—Reclaiming Note—Competency—Action of Divorce.—Held that it was competent for the defender in an action of divorce for adultery, who had appeared by counsel, but had not lodged defences or contested the case on the merits, to reclaim against the interlocutor of the Lord Ordinary granting decree of divorce.

Opinion by Lord McLaren and Lord Kinnear, that it is competent for the defender in an action of divorce to reclaim against the interlocutor of the Lord Ordinary granting decree of divorce, although he has made no appearance in the Outer-House.

IN October 1896 Lady Ross, wife of Sir Charles Ross of Balnakeil, 1st Division, gown, raised an action of divorce on the ground of adultery against her husband.

No defences were lodged, and on 31st October the Lord Ordinary (Kyllachy) found the libel relevant, and appointed proof to be led on 11th December.

On 8th December Sir Charles Ross raised a counter action of divorce against his wife, and on 9th December the Lord Ordinary, in respect of the service of this counter action, discharged the diet of proof fixed for 11th December.

On 17th March 1897 proof was led in the action by Lady Ross. Sir Charles was represented by counsel at the proof, but they did not cross-examine the pursuer's witnesses, or contest the case on the merits. At the close of the proof they moved the Lord Ordinary to postpone granting decree until proof had been led in the counter action. The Lord Ordinary pronounced an interlocutor finding the defender guilty of adultery, but, *quoad ultra*, in respect of the dependence of the counter action, superseded further consideration of the cause until the counter action was ripe for judgment.

On 12th June, after proof had been led in the counter action, the Lord Ordinary pronounced decree of divorce against Sir Charles Ross, and in the counter action assoilzied Lady Ross.

Sir Charles reclaimed in both actions.

Lady Ross objected to the competency of the reclaiming notes, and argued;—(1) The reclaiming note in the first action was incompetent, because Sir Charles had lodged no defences, and had not opposed decree being granted. The decree was therefore a decree in absence, and the defender's proper remedy would have been to apply for its recall within ten days.¹ As he had not done so the decree had become final. (2) Assuming the decree to have been pronounced *in foro* the defender could not reclaim against it, as he had not resisted its being granted, and indeed it was admitted that the reclaiming note was not presented for the purpose of opening up the case on the merits. (3) If the reclaiming note in the first action was incompetent and the Lord Ordinary's decree final the counter action fell to the ground, the parties being no longer man and wife.

Argued for the reclaiming;—Every decree in an action for divorce was a decree *in foro*, and the defender could appear at any stage of

¹ Section 23 of Court of Session Act, 1868 (31 and 32 Vict. c. 100).

No. 180. the case.¹ Section 23 of the Act of 1868 accordingly did not apply. Further, the defender had appeared at critical periods of the case.

July 3, 1897.
Ross v. Ross.

LORD PRESIDENT.—I think there is no doubt that this reclaiming note is competent. Upon the proceedings it appears that Sir Charles Ross was represented by counsel at what I may call the two most critical stages of the case. And accordingly I have heard nothing to shew that he is not entitled to follow the action forward by carrying on the appeal here.

I by no means imply, by my reference to the proceedings in the Outer-House, that the reclaiming note would have been incompetent if Sir Charles had stayed away.

LORD ADAM.—I am entirely of the same opinion.

LORD M'LAREN.—I concur. I agree in the observation made by your Lordship in the course of the argument, that if the defender in a consistorial case appears by counsel at any stage that is an appearance for all purposes, and that the mere circumstance that he has not thought it consistent with the requirements of the case to contest it on the merits does not prevent the appearance being an appearance on the merits. If it were necessary to consider the point my leaning would be to go further, and hold that, although the defender had not appeared by counsel or in person in the Outer-House, he was not thereby barred from presenting a reclaiming note against the Lord Ordinary's judgment, because he may change his mind, and the decision is not final until the expiry of the reclaiming days.

LORD KINNEAR.—I have no doubt as to the competency of the reclaiming note. I think a defender in an action of divorce may appear at any time, though he has not put in defences.

THE COURT sent the reclaiming notes to the roll.

TODS, MURRAY, & JAMIESON, W.S.—J. & F. ANDERSON, W.S.—Agents.

No. 181.

July 3, 1897.
Paolo v.
Parias.

PASQUALE DI PAOLO, Pursuer (Appellant).—*Wilson*.
PHILIP PARIAS, Defender (Respondent).—*Forsyth*.

Expenses—Decree in name of Agent-disburser—Compensation.—A, having been found liable to B in the expenses of an appeal to the Court of Session in an action which he had raised in the Sheriff Court against B, objected to decree going out in the name of the agent-disburser, on the ground that in a prior action with B, relating to the same matter, and tried in the same Sheriff Court, which was pending when the second action was brought, he had obtained decree for expenses against B which had not been paid, and which he maintained should be set off against the expenses in which he had been found liable. The decree in the prior action had been granted and extracted before the appeal in the second action came into Court.

Held that the agent-disburser in the appeal was entitled to decree for expenses in his own name, in respect that at the date of the appeal the prior action was no longer pending.

Portobello Pier Co. v. Clift, 4 R. 685, distinguished.

¹ Paterson v. Paterson, June 8, 1848, 20 Scot. Jur. 459; Cumming, March 16, 1875, *vide* Coldstream on the Practice of the Court of Session, p. 152.

PHILIP PARIAS raised an action against Pasquale di Paolo in the Sheriff Court at Clackmannan for payment of £30, as the balance due of the price of an ice-cream business belonging to the pursuer which it was alleged the defender had agreed to purchase. No. 181.

July 3, 1897.
Paolo v.
Parias.

In defence it was alleged that the pursuer had failed to implement a material part of the contract between the parties, and that the defender was therefore entitled to refuse to implement the obligation which the contract imposed upon him.

1ST DIVISION.
Sheriff of
Stirling, Dum-
barton, and
Clackmannan.

On 17th January 1896 the Sheriff-substitute (Johnstone) assolized the defender, and his judgment was acquiesced in.

On 1st April decree for expenses was pronounced against Parias. On 20th April this decree was extracted, and on 24th April Parias was charged thereon. The expenses were not paid.

In March 1896 Paolo raised an action in the same Court against Parias for interdict against his carrying on the business of an ice-cream merchant within a radius of ten miles of Alva.

The pursuer founded upon the agreement which he had repudiated as defender in the previous action.

On 20th April 1896 the Sheriff-substitute (Liddell) found that the contract founded on by the pursuer had been discharged in virtue of the judgment in the prior action, and refused interdict.

On 2d June 1896, after certain procedure, the Sheriff (Lees) affirmed the Sheriff-substitute's interlocutor, and on 8th July the Sheriff-substitute (Johnstone) approved of the auditor's report upon the defender's account of expenses, and allowed decree for said expenses to go out and to be extracted in name of a solicitor at Alva as agent-disburser.

The pursuer subsequently appealed to the First Division, and on 15th January 1897 the Court pronounced this interlocutor:—"Refuse the appeal; affirm the interlocutors of the Sheriff-substitute and of the Sheriff, dated 20th April and 2d June 1896 respectively, and decern: Find the pursuer (appellant) liable to the defender in the expenses of the appeal, and remit the account to the Auditor to tax and report."

Upon the Auditor's report on the defender's account of expenses coming up for approval, counsel moved for decree in name of the agent-disburser.

The pursuer objected, and maintained that the expenses to which he had been found entitled in the prior action should be set off against the expenses of the appeal in the second action in which he had been found liable. He argued that as the two actions were between the same parties and relative to the same matter of dispute, and as the first was still pending when the second was raised, the principle of compensation was applicable.¹

The defender argued that, as the second action had not been raised until after judgment had been given in the first, the two actions could not be treated as concurrent, and could not have been conjoined, and that the principle of the *Portobello Pier Company's*¹ case did not apply.

LORD PRESIDENT.—I must own that I have some sympathy with the proposal to refuse to allow decree to go out in the agent's name, but at the same time this is a matter of right, and we can only assent to Mr Wilson's proposal if it falls within some recognised rule of practice. Now, it seems to me that the fatal defect of the argument is that the decree in the other action in the Sheriff Court was granted, and had been extracted, before this

¹ *Portobello Pier Company v. Clift*, March 16, 1877, 4 R. 685.

No. 181. appeal ever came into Court. It had therefore passed into the region of a judgment debt, historically no doubt arising out of a dispute on the same subject-matter, but not out of a living proceeding.

July 8, 1897.
Paolo v.
Parias.

I am of opinion, therefore, that the case of *Clift*¹ does not apply, and that we cannot refuse the motion.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT approved the Auditor's report on the defender's account of expenses, and decerned against the pursuer for the sum of £15, 4s. 4d., the taxed amount thereof, and allowed decree therefor to go out and be extracted in name of William Ritchie Rodger, S.S.C., the agent-disburser thereof.

J. B. DOUGLAS & MITCHELL, W.S.—W. RITCHIE RODGER, S.S.C.—Agents.

No. 182. JOHN TURNBULL SMITH AND OTHERS (Whitehead's Trustees),
First Parties.—*A. S. D. Thomson.*

July 6, 1897.
Whitehead's
Trustees v.
Whitehead.

MISS M. M. WHITEHEAD AND ANOTHER, Second Parties.—*J. H. Millar.*
WILLIAM MACLEOD AND ANOTHER (Wright's Trustees),
Third Parties.—*Horne.*

Succession—Liferent or Fee—Residue—Direction to trustees to invest for behoof of A and pay interest—Right to renounce liferent.—In his trust-disposition and settlement executed in 1858 a testator who had three daughters, one married and two unmarried, directed his trustees, previous to their dividing the residue of his estate, "to set apart and invest" in their own names £1600 in two sums of £800 each "for behoof of" his two unmarried daughters M and W, "the interest thereof to be paid to them respectively so long as they remain unmarried," declaring that in the event of either of them contracting marriage or dying, the interest on the sum "effeiring to such daughter" should be paid to the other so long as she remained unmarried. The testator further authorised his trustees to pay to each daughter on her marriage a sum not exceeding £200 "out of the said sum of £1600" for outfit, and then directed his trustees after payment of his debts, and "after investing the said sum of £1600," to make over the residue of his estate to his three daughters, share and share alike, "but deducting from the shares of my said children . . . any sum . . . that may have been paid by my said trustees to any of my said daughters for outfit in the event of the marriage of either of them." In the event of any of the children dying before the period of division, her share was to accrue to the survivors.

The testator was survived by his three daughters.

Held (1) that the provision in the residuary clause that the sums paid by the trustees for marriage outfit from the £1600 should be deducted from M and W's shares of residue shewed the testator's intention that the fee of the £1600 should form part of the residue, and that it fell to be disposed of accordingly, and (2) that the unmarried daughters were entitled to renounce their liferents of the £1600, and to obtain immediate payment of their shares of the capital thereof as residue.

1ST DIVISION. WILLIAM WHITEHEAD died on 24th June 1866, leaving a trust-disposition and settlement executed in 1858 whereby he conveyed his whole estate to trustees.

The first purpose of the deed was for payment of the truster's debts, &c., and by the second purpose provision was made for conveying the deceased's business to his only son, Josiah Whitehead.

The deed then proceeded,—"(Thirdly) I hereby direct and appoint

my said trustees, previous to their dividing the residue of my said estate as after mentioned, to set apart and invest on such good security as they may approve of the sum of £1600, in two sums of £800 each, for behoof of my two unmarried daughters, Marion Mason Whitehead and Wilhelmina Whitehead, said sums to be so invested in the names of my said trustees for their behoof, and the interest thereof to be paid to them respectively so long as they remain unmarried, and that at two terms in the year, Whitsunday and Martinmas, by equal portions; and I also authorise my said trustees to allow my said two unmarried daughters the use and enjoyment of all my household furniture, bed and table linen, silver plate, books, paintings, &c., so long as they remain unmarried; and declaring that, in the event of either of my two daughters contracting marriage or dying, then and in either of these events the interest on the said sum effeiring to such daughter shall be paid by my said trustees to my other unmarried daughter so long as she remains unmarried, and the furniture and other effects above specified shall be enjoyed by such unmarried daughter so long as she remains unmarried: (Fourthly) In the event of the marriage of either or both of my said two daughters Marion Mason Whitehead and Wilhelmina Whitehead, I hereby authorise my said trustees to pay to each of them on her marriage a sum not exceeding £200 out of the said sum of £1600 to be set apart as aforesaid, and that for their outfit: (Fifthly) After payment of all my debts and expense of mournings, and the expenses of realising and recovering my said estate, and after investing the said sum of £1600, I direct and appoint my said trustees to assign, dispoine, convey, and make over the residue of my said estate and effects, heritable and moveable, to and among my three daughters, Euphans Murray Whitehead, spouse of the said John Wallace Wright, and the saids Marion Mason Whitehead and Wilhelmina Whitehead, and that equally among them, share and share alike, but deducting from the shares of my said children any sum or sums of money that may appear to their debit in my business or private ledger at the time of my decease, or any sum or sums that may have been paid by my said trustees to any of my said daughters for outfit in the event of the marriage of either of them: And declaring that in case any of my said children shall die before the division of my said estate, then the share or shares of the child or children so dying shall accresce to the survivors or survivor of my said children, and be equally divided among them, share and share alike: Providing nevertheless that in case the child or children so dying shall have left lawful issue, such issue shall be entitled to the share or shares of the said residue which their deceased parent or parents would have been entitled to if alive."

The truster was survived by his son (who discharged all claims competent to him against his father's estate), and by his three daughters Mrs Wright, Marion, and Wilhelmina.

In 1897 the two unmarried daughters, who had been receiving the income of the sum of £1600, which had been duly invested by the trustees, intimated to Mr Whitehead's trustees that they were advised that the fee of the £1600 had vested in them, and that they desired the trustees to pay over the capital to them. On the other hand, the trustees of Mr Wright (who had come to be in right of any share of residue and intestate succession of her father's estate which fell to Mrs Wright) maintained that the fee of the £1600 had not been disposed of by the trust-settlement, or otherwise that it fell into residue.

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No. 181. appeal ever came into Court. It had therefore passed into the region of a judgment debt, historically no doubt arising out of a dispute on the same subject-matter, but not out of a living proceeding.

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I am of opinion, therefore, that the case of *Clift*¹ does not apply, and that we cannot refuse the motion.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT approved the Auditor's report on the defender's account of expenses, and decerned against the pursuer for the sum of £15, 4s. 4d., the taxed amount thereof, and allowed decree therefor to go out and be extracted in name of William Ritchie Rodger, S.S.C., the agent-disburser thereof.

J. B. DOUGLAS & MITCHELL, W.S.—W. RITCHIE RODGER, S.S.C.—Agents.

No. 182. JOHN TURNBULL SMITH AND OTHERS (Whitehead's Trustees),
First Parties.—*A. S. D. Thomson*.
MISS M. M. WHITEHEAD AND ANOTHER, Second Parties.—*J. H. Millar*.
WILLIAM MACLEOD AND ANOTHER (Wright's Trustees),
Third Parties.—*Horne*.

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Succession—Liferent or Fee—Residue—Direction to trustees to invest for behoof of A and pay interest—Right to renounce liferent.—In his trust-disposition and settlement executed in 1858 a testator who had three daughters, one married and two unmarried, directed his trustees, previous to their dividing the residue of his estate, "to set apart and invest" in their own names £1600 in two sums of £800 each "for behoof of" his two unmarried daughters M and W, "the interest thereof to be paid to them respectively so long as they remain unmarried," declaring that in the event of either of them contracting marriage or dying, the interest on the sum "effeiring to such daughter" should be paid to the other so long as she remained unmarried. The testator further authorised his trustees to pay to each daughter on her marriage a sum not exceeding £200 "out of the said sum of £1600" for outfit, and then directed his trustees after payment of his debts, and "after investing the said sum of £1600," to make over the residue of his estate to his three daughters, share and share alike, "but deducting from the shares of my said children . . . any sum . . . that may have been paid by my said trustees to any of my said daughters for outfit in the event of the marriage of either of them." In the event of any of the children dying before the period of division, her share was to accrue to the survivors. The testator was survived by his three daughters.

Held (1) that the provision in the residuary clause that the sums paid by the trustees for marriage outfit from the £1600 should be deducted from M and W's shares of residue shewed the testator's intention that the fee of the £1600 should form part of the residue, and that it fell to be disposed of accordingly, and (2) that the unmarried daughters were entitled to renounce their liferents of the £1600, and to obtain immediate payment of their shares of the capital thereof as residue.

1ST DIVISION. WILLIAM WHITEHEAD died on 24th June 1866, leaving a trust-disposition and settlement executed in 1858 whereby he conveyed his whole estate to trustees.

The first purpose of the deed was for payment of the truster's debts, &c., and by the second purpose provision was made for conveying the deceased's business to his only son, Josiah Whitehead.

The deed then proceeded,—"(Thirdly) I hereby direct and appoint

¹ 4 R. 685.

my said trustees, previous to their dividing the residue of my said estate as after mentioned, to set apart and invest on such good security as they may approve of the sum of £1600, in two sums of £800 each, for behoof of my two unmarried daughters, Marion Mason Whitehead and Wilhelmina Whitehead, said sums to be so invested in the names of my said trustees for their behoof, and the interest thereof to be paid to them respectively so long as they remain unmarried, and that at two terms in the year, Whitsunday and Martinmas, by equal portions; and I also authorise my said trustees to allow my said two unmarried daughters the use and enjoyment of all my household furniture, bed and table linen, silver plate, books, paintings, &c., so long as they remain unmarried; and declaring that, in the event of either of my two daughters contracting marriage or dying, then and in either of these events the interest on the said sum effeiring to such daughter shall be paid by my said trustees to my other unmarried daughter so long as she remains unmarried, and the furniture and other effects above specified shall be enjoyed by such unmarried daughter so long as she remains unmarried: (Fourthly) In the event of the marriage of either or both of my said two daughters Marion Mason Whitehead and Wilhelmina Whitehead, I hereby authorise my said trustees to pay to each of them on her marriage a sum not exceeding £200 out of the said sum of £1600 to be set apart as aforesaid, and that for their outfit: (Fifthly) After payment of all my debts and expense of mournings, and the expenses of realising and recovering my said estate, and after investing the said sum of £1600, I direct and appoint my said trustees to assign, dispoise, convey, and make over the residue of my said estate and effects, heritable and moveable, to and among my three daughters, Euphans Murray Whitehead, spouse of the said John Wallace Wright, and the saids Marion Mason Whitehead and Wilhelmina Whitehead, and that equally among them, share and share alike, but deducting from the shares of my said children any sum or sums of money that may appear to their debit in my business or private ledger at the time of my decease, or any sum or sums that may have been paid by my said trustees to any of my said daughters for outfit in the event of the marriage of either of them: And declaring that in case any of my said children shall die before the division of my said estate, then the share or shares of the child or children so dying shall accresce to the survivors or survivor of my said children, and be equally divided among them, share and share alike: Providing nevertheless that in case the child or children so dying shall have left lawful issue, such issue shall be entitled to the share or shares of the said residue which their deceased parent or parents would have been entitled to if alive."

The trustor was survived by his son (who discharged all claims competent to him against his father's estate), and by his three daughters Mrs Wright, Marion, and Wilhelmina.

In 1897 the two unmarried daughters, who had been receiving the income of the sum of £1600, which had been duly invested by the trustees, intimated to Mr Whitehead's trustees that they were advised that the fee of the £1600 had vested in them, and that they desired the trustees to pay over the capital to them. On the other hand, the trustees of Mr Wright (who had come to be in right of any share of residue and intestate succession of her father's estate which fell to Mrs Wright) maintained that the fee of the £1600 had not been disposed of by the trust-settlement, or otherwise that it fell into residue.

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Accordingly, a special case was presented to the First Division by Mr Whitehead's trustees, of the first part, Miss Whitehead and her unmarried sister, of the second part, and Mr Wright's trustees, of the third part, in which the following questions were submitted for the opinion and judgment of the Court:—"1. Has the fee of the said sum of £1600 been disposed of by the said settlement? Or, 2. Does it fall into intestacy? In the event of the first alternative being affirmed—3. Has the fee of the said sum vested in the second parties? And if so, 4. Are the first parties bound to denude of the said sum now, or must they retain the capital until the expiry of the liferents by the deaths or marriages of both the unmarried daughters? In the event of the second alternative being affirmed—5. Are the second parties entitled to renounce their liferent, and to obtain payment of their respective shares of the capital of the said sum?"

Argued for the second parties;—(1) The fee of the sum of £1600 was vested in the two unmarried daughters by the third purpose. It was true that there was no absolute rule that the bequest of the interest of a sum of money carried the principal, but the presumption was that it did. The phraseology here favoured the presumption, for the expression "for their behoof" meant something more than a liferent, and indeed was exclusive of the idea that any other interest existed in the fund. It was not necessary that there should be express words of gift or direction to pay over the capital.¹ Intestacy, which was to be avoided if possible, was the only alternative, for the residuary clause assumed that the £1600 had been already disposed of, and the £1600 could not therefore be treated as residue. (2) Alternatively, the second parties were entitled to renounce their right to the interest, and to obtain payment of their shares of the capital of the £1600 as being residue. They had not a protected liferent, and there was no other beneficiary with an interest in the fee which could be affected.

Argued for the third parties;—There was no implication in Scots law that a liferent of a sum of money gave the fee.² The question whether it did fell to be determined entirely on the construction of each particular deed. Here the words "set apart and invest" indicated that the trustees were to hold the fee, and not pay it over. There were no words to suggest that it was at any time to be handed over. On the contrary, it was clearly the intention of the truster that so long as his daughters remained unmarried, this fund was to form a source of income to them. The capital of it must either be disposed of as residue, or as intestate succession.

At advising,—

LORD ADAM.—I have found the questions raised in this case attended with a great deal of difficulty. The leading question is, whether the fee of a certain sum of £1600 which the late Mr Whitehead directed his trustees to invest for behoof of his daughters Marion and Wilhelmina Whitehead vested in them *a morte testatoris*, or whether it came under the residuary clause of his settlement and fell to be divided between them and a married daughter, Mrs Wright, or those now in her right.

¹ Lawson's Trustees v. Lawson, July 17, 1890, 17 R. 1167; Ritchie's Trustees v. Ritchie, March 16, 1894, 21 R. 679; Greenlees' Trustees v. Greenlees, Dec. 4, 1894, 22 R. 136.

² Sanderson's Executor v. Kerr, Dec. 21, 1860, 23 D. 227; Alves v. Alves, March 8, 1861, 23 D. 712, 33 Scot. Jur. 354.

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Mr Whitehead by his trust-disposition and settlement conveyed his whole property, heritable and moveable, to trustees, and after certain directions as to the payment of debts and expenses, and the sale of his business to his son, he directed them by the third purpose of the trust, previous to dividing the residue of his estate as thereafter mentioned, to invest the sum of £1600, in two sums of £800 each, for behoof of his two unmarried daughters Marion and Wilhelmina, said sums to be invested in the names of the trustees for their behoof, the interest to be paid to them so long as they should remain unmarried. He further authorised his trustees to allow them the use of his household furniture, &c., so long as they should remain unmarried—declaring that in the event of either of them marrying or dying the interest on the sum effeiring to such daughter should be paid to the survivor so long as she remained unmarried, and that she also should have the use of the furniture. By the fourth purpose the truster authorised his trustees to pay to each of his daughters on marriage a sum not exceeding £200 out of the £1600 directed to be set apart as aforesaid, and that for their outfit.

By the fifth purpose of the trust the truster directed his trustees, after payment of his debts, the expenses of realising his estate, and after investing the said sum of £1600, to assign, dispoise, convey, and make over the residue of his estate to his three daughters, equally among them, share and share alike, but deducting from the shares of his children any sum of money that might appear at their debit in his business or private ledger at the time of his decease, or any sum that might have been paid by his trustees to any of his daughters for outfit in the event of the marriage of either of them; and then there is a destination to the survivors at the period of the division of his estate, failing issue of the predeceasing child.

Now, it will be observed that by the third purpose of the deed the trustees are directed to invest two sums of £800 each in their own names for behoof of his two unmarried daughters, and that there are directions as to the disposal of the interest thereof, so long as either of them continues to live and remains unmarried, but there are no directions at all given as to the disposal of the fee thereof. It is true that by the fourth purpose the trustees are authorised to pay £200 to a daughter for her outfit in the event of her marriage, but that is the only express direction given as to the disposal of the fee of the £1600, or any part of it.

It was argued to us with great force, that as the money was directed to be invested for behoof of the daughters, that necessarily implied that the fee was held by the trustees for them; that the directions as to the payment of interest were not inconsistent with that view; and that the fee accordingly had vested in them.

I should have been disposed to give effect to this construction of the deed had I thought that the fee of the £1600 was not otherwise disposed of, but I think that there are implied directions with regard to it to be found in the residuary clause.

By that clause the truster directed the immediate division among his daughters of the whole of his estate, except this sum of £1600, which was not divisible until both unmarried daughters were either dead or married, and that equally among them. The only sum therefore which would remain in the trustees' hands was this sum of £1600.

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But there is an express direction to deduct from the share of any child any sum which might appear to her debit in the truster's books, or have been paid by the trustees to her for outfit on her marriage. It appears to me that the share of which the truster is here speaking, and from which such payment, if any, is to be deducted, is a share of the residua. But such a payment by the trustees could only be made out of the £1600, and after the death of the truster. It appears to me, therefore, that the truster intended that that sum should be included in and dealt with as part of the residue of his estate. I think, accordingly, that the truster intended that each daughter should have an equal share of the fee of his estate.

My opinion therefore is that the first question should be answered in the affirmative, and that that is the only question which can be answered in terms. But it follows from my opinion that a right to the fee of two-thirds of the £1600 has vested in the second parties, and if they choose to renounce their liferents, there is no reason why the sum should not be immediately divisible. The liferents given to them are not protected liferents.

LORD MONCREIFF.—If the case depended upon the third purpose of the trust-deed alone, there might be grounds for holding that the fee of the sum of £1600 belongs to the truster's two unmarried daughters, the second parties to this case, the direction being that the money is to be "invested" for behoof of these ladies.

The difficulty is created by the fourth and fifth purposes of the trust. By the fourth purpose it is provided that in the event of the marriage of either or both of these ladies the trustees are authorised to pay to each for her outfit a sum not exceeding £200 out of that sum of £1600; and in the fifth purpose it is provided that from the shares of residue falling to any of the truster's daughters, there shall be deducted, *inter alia*, "any sum or sums which may have been paid by my said trustees to any of my said daughters for outfit, in the event of the marriage of either of them." The daughters here mentioned are clearly the unmarried daughters, because to them alone are the trustees authorised to pay sums for outfit on marriage.

Now, these provisions seem to me to indicate that the purpose for which the sum of £1600 was set aside was to provide a fund for the support of the truster's unmarried daughters, so long as they remained unmarried, but that it was intended that when this purpose was served, on both daughters either marrying or dying, the fee of that sum should fall into residue and be divided among the three daughters or their representatives subject to the deductions mentioned.

If the sum of £1600 were a fund in which the third daughter, who was married during the truster's lifetime, had no interest, why should the truster direct that any sum by which that fund might be diminished by advances from capital made by the trustees for the outfit of the unmarried daughters or either of them should be deducted from the shares of residue falling to them? If the argument for the second parties were correct, they, if they both married, would carry off the fee of the £1600, and thus their share of residue would suffer no deduction.

I am therefore of opinion that the fee of the sum of £1600 does not belong in fee to the second parties alone, but that it has been disposed of

in the will as residue, and that right to a share of that fund as residue is vested in the second and third parties. I am further of opinion that the second parties are entitled to renounce their liferent and obtain payment of their shares of the said sum as residue.

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LORD KINNEAR.—I am of the same opinion as that expressed by Lord Adam and by Lord Moncreiff. I see the force of the argument that when a truster has directed a capital sum to be invested for certain beneficiaries there is an inference *prima facie* that the money so invested is to be held for them, or in other words, that there is a gift to them of the capital sum, if there is nothing in the will to set aside or displace that inference. But then, if the purpose of setting apart and investing the money is to provide an annual income to the truster's daughters during their lives, or so long as they remain unmarried, out of money which is ultimately destined to others, either to their exclusion or along with them, it would be perfectly accurate to say that the money is invested in the name of the trustees for their behoof, for the sole purpose of so investing it is their security and protection, the ultimate purpose requiring no such investment for its execution. The construction, therefore, of such a destination appears to me to depend not so much on the introductory direction to invest as upon the true meaning and effect of the clause which directs the appropriation of the money. And if it be clear on a fair and reasonable reading of this clause that the testator intended something else than an absolute gift, then I see no difficulty in giving effect to the direction.

I agree with Lord Adam and with Lord Moncreiff that on a sound construction of this deed the testator did not intend to make an absolute gift to the two unmarried daughters. The express directions in their favour are simply for the payment of interest, while they or one of them remain unmarried and in life. That would probably not be conclusive of itself if there were no directions as to the disposal of the capital. But then there appears to me to be a sufficiently clear direction as to the disposal of the capital to relieve the case of substantial difficulty.

The testator goes on to dispose of the residue of his estate, and although he directs that this money is to be invested before the ascertainment of the residue, there is nothing to indicate that the money so invested is to be excluded from the residue. I say that because in the previous part of the will there is no direction, express or implied, for the disposal of the capital at all, so that if the residuary clause when considered by itself is sufficient to carry it, I see nothing in the direction that the investment is to be made before the ascertainment of the residue to exclude its effect on this particular sum. Now, when the deed goes on to direct what is to be done with the residue, and to declare that it is to be divided among his three daughters, including Marion and Wilhelmina, he goes on to say that in ascertaining the equal shares of these three daughters the trustees are to deduct any sums that may have been paid to any of his daughters for outfit in the event of their marriage. But then the sums so authorised to be paid, and consequently to be deducted, are to be paid out of the invested sums of £800, and therefore when the truster says in order to make the division of the residue equal you are to take into account the advances which may have

No. 182. already been made out of the invested sums, it appears to me that he says in very clear terms that the invested sums are to form part of the residue. Accordingly, I agree with Lord Adam as to the manner in which the questions are to be answered.

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The LORD PRESIDENT and LORD M'LAREN were absent.

THE COURT answered the first question in the affirmative.

ADAM & SANG, W.S.—MELVILLE & LINDESAY, W.S.—A. & A. S. GORDON, W.S.—Agents.

No. 183. WILLIAM TURNER RUSSELL AND OTHERS (Millar's Trustees), Pursuers (Reclaimers).—*Salvesen—W. Thomson.*

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REVEREND JOHN POLSON, Defender (Respondent).—*Shaw—Watt.*

Trust—Personal liability of trustee—Culpa lata—Failure to sue co-trustee for trust-funds misappropriated by him—Defence that no loss resulted from failure.—In February 1895 A, a trustee, discovered that B, his co-trustee, who acted as agent for the trust, had retained in his own hands trust-money amounting to £150 which he had been instructed to place on deposit-receipt with a bank. A at once applied to B for repayment of the amount, and continued at intervals to press for repayment, but he took no legal proceedings against B, although about midsummer he became suspicious that B was in pecuniary difficulties. A also took no steps to prevent B intromitting further with the trust funds, and at Whitsunday 1895 B collected the rent of a heritable property belonging to the trust-estate, and retained it for his own purposes. In November 1895 A was preparing to take legal proceedings against B when B became bankrupt.

Held (rev. judgment of Lord Pearson) (1) that A was guilty of culpa lata in not taking legal proceedings against B without delay for recovery of the £150, but that he was not liable to repay that sum to the trust-estate, in respect that it was proved that nothing would have been recovered from B if proceedings had been taken against him; (2) that A was guilty of culpa lata in not taking immediate steps, on discovering B's misconduct, to prevent him intromitting further with the trust funds, and that he was liable to repay to the trust-estate the amount of the Whitsunday rent which B had appropriated.

1ST DIVISION.
Lord Pearson.

WILLIAM MILLAR, solicitor in Jedburgh, died in 1879, leaving a disposition of his whole means and estate, heritable and moveable, in favour of his widow. In 1880 Mrs Millar, as the result of a family arrangement between herself and her children, executed a trust-deed by which she disposed of her whole estate to trustees. The purposes of the trust were generally that the trustees should pay the income of the estate to Mrs Millar during her lifetime, and hold the capital for behoof of her family.

The trustees appointed by the deed were the Reverend John Polson, William Elliot, Sheriff-clerk of Roxburghshire, and a Mr Catto (who resigned in 1883). Mr Polson and Mr Elliot continued to act as trustees until the spring of 1896, when they resigned, having previously assumed William Turner Russell and others as trustees under the trust.

In August 1896 William Turner Russell and his co-trustees brought an action against the Reverend John Polson for payment of two sums of £150 and £95, 17s. 6d.

It appeared from the averments of parties that the defender's co-trustee, Mr Elliot, had done the work of agent to the trust, and that he had appropriated to his own uses (1) a sum of £150 belonging to

the trust-estate, which he had been instructed, at a meeting of trustees held in the end of November 1894, to put on deposit-receipt; and (2) the rents of heritable estate which formed part of the trust-estate due at Martinmas 1894 and at Whitsunday 1895.

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The pursuers averred that the sums sued for had been lost to the trust-estate through the negligence of the defender. They alleged that the defender had been made aware, shortly after the end of November 1894, that Mr Elliot had not placed the £150 upon deposit-receipt as instructed, and that, if required to do so, Mr Elliot would have repaid the sum.

The defender denied that he had been in any way negligent, and averred that Mr Elliot had been hopelessly insolvent in November 1894, and that proceedings against him would have been fruitless.

The material facts of the case, as disclosed by the proof, were as follows:—From 1881 onwards Mr Elliot had done the work of agent to the trust. Mrs Millar, the liferentrix, died in June 1894, and the sole duty remaining to the trustees was to realise the estate and divide it among the beneficiaries, which they proceeded to do. In November 1894, as the result of the realisation of part of the estate, there was a sum of £200 in bank to the credit of the trust. At a meeting of trustees held at the end of November Mr Elliot was instructed to lift this sum and place it upon four deposit-receipts of £50 each, and to enable him to do so a cheque for £200 was signed by himself and Mr Polson. Contrary to the instructions given him, Mr Elliot only placed £50 on deposit-receipt, and retained the remaining £150 for his own uses. In the beginning of February the defender was made aware that the whole £200 had not been placed on deposit-receipt by Mr Elliot, and he applied to Mr Elliot for an explanation. No satisfactory explanation was given by Mr Elliot, and the result of what Mr Elliot said was to convince Mr Polson that Mr Elliot had retained the sum in his own hands. From this time onwards Mr Polson made repeated applications, both verbally and in writing, to Mr Elliot for repayment of the money, and for an account of his intromissions, without success. About midsummer the defender became suspicious that Mr Elliot was in pecuniary difficulties. Until this date he had no reason to suspect that this was the case, apart from Mr Elliot's conduct in retaining the funds of the trust in his own hands. From information which he received in the latter part of October 1895 the defender's suspicions as to Mr Elliot's pecuniary difficulties were confirmed. On 22d November the defender wrote to Mr Elliot demanding repayment of the trust-money within one month on pain of legal proceedings, and in the same month he appointed a law-agent to act in the matter. On 27th November the defender became aware that Mr Elliot had appropriated the rents of a property belonging to the trust called Bellevue, due at Martinmas 1894 and Whitsunday 1895, and he then took steps to prevent Mr Elliot further intromitting with the trust funds. The month having elapsed without payment being made, the defender again wrote to Mr Elliot, who replied that it was no use instituting proceedings against him as he had granted a trust-deed for behoof of his creditors.

The evidence further shewed that Mr Elliot was hopelessly insolvent long prior to 1895, and that proceedings against him in that year would not have resulted in any benefit to the trust-estate. The details of the evidence on this point appear sufficiently from the opinion of the Lord President.

No. 183. On 19th January 1897 the Lord Ordinary (Pearson) assolizied the defender from the conclusions of the action.*

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* "OPINION.— . . . Now I have considered very carefully whether, in the circumstances of the case, Mr Polson's conduct amounts to *culpa lata* so as to render Mr Polson liable to restoration of that money ; and taking it, as I do, that that is a question to be determined on the circumstances of each case, I have come, though not without hesitation, to the conclusion that Mr Polson's conduct is not within the category of *culpa lata*. Most of the cases where *culpa lata* has been affirmed have had features in them which are markedly absent from this case. In the first place, the leading cases in that branch of the law have nearly all of them been cases where trustees have allowed money to get into the hands of their co-trustees or their factor, and have done nothing at all ; and if a trustee does nothing at all—even for such a time as twelve months, possibly even for a shorter time—he may be held to have omitted his duty, and therefore to be liable as a man who takes no steps whatever for the recovery of what is due to the trust. Then, further, in most of the cases where the Court has affirmed liability on this ground a very much longer period of inactivity had elapsed than in the present case. Then another point that arises on a comparison of this case with others is that here there is no disregard of any express direction or injunction of the truster. Where there is such disregard (as in the recent case of *Carruthers' Trustees*¹), the Court will infer *culpa lata*, and will not closely inquire whether any loss which occurs is proved to have resulted from the omission or the culpable act. No doubt, looking back upon it, one sees that Mr Polson might have taken, and ought to have taken, much more stringent steps. It is suggested that he ought at once to have sued Mr Elliot. I can hardly assent to that proposition. What I think he ought to have done was to instruct an independent agent to write to Mr Elliot and demand the money, as under threat of litigation. But the question whether and at what stage that should be done is to a certain extent a question of judgment or discretion, and though Mr Polson may have exercised his judgment and discretion wrongly, yet, seeing that he pressed Mr Elliot as far as he could press his co-trustee—short of instructing an independent agent to write legal letters to him,—I think on the whole that he has not incurred liability on that head for this money.

"The next part of the case relates to a sum of three* half-years' rents. That stands on a different footing as to the facts. It is in one sense more favourable, and in another sense less favourable to the defender than the other part of the case. On the one hand, trust accounts, if they had been regularly made up and rendered, would have disclosed that the rent for the first half-year of the three now in question had not been paid over to the widow, and had not entered the trust accounts, but had been kept back by Mr Elliot. But although the failure to have regular and stated trust accounts is not a circumstance in favour of a trustee, it is fair to say that it was through no departure from the ordinary course of this trust that the accounts were not made up in due time to shew that Mr Elliot had kept back the first or the second of these half-years' rents. Then again Mr Polson cannot be said to have had it brought to his actual knowledge till about Martinmas 1895 that the rent was kept back ; and therefore he is in a more favourable position as to actual knowledge as to these rents than he was about the other moneys. On the whole I think his position is stronger as to these rents than it was as to the £150, and if I am right in what I

¹ 23 R. (H. L.) 55.

* The pursuers claimed the half year's rent due at Martinmas 1895 as well as the rents due at the two preceding terms, but the proof shewed that the rent due at Martinmas 1895 was received by the trust.

The pursuers reclaimed, and argued;—(1) In omitting for the best part of a whole year to take proceedings against his co-trustee for re-payment of money which he was well aware his co-trustee had misappropriated, the defender was guilty of *culpa lata*.¹ (2) The defence that the loss suffered by the trust-estate was not the result of his negligence had not been made out. The *onus* was upon the defender to establish this defence, and so strong was the *onus* that in no case had this defence been sustained.² (3) The defender was in any view responsible for the loss of the rent due at Whitsunday, for with his knowledge of his co-trustee's misconduct in the matter of the

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have said as to that sum, the same result will follow as to this part of the case.

“The next point argued for the defender was that even if *culpa lata* had been proved, there was no proof whatever of loss resulting to the estate from the default of the trustee; and, inasmuch as this is an action practically for damages for breach of trust, no damage is qualified. In the view I have stated it becomes unnecessary to decide this point, but I must not be taken as assenting to the defender's view that if he had been otherwise liable he could in this case have escaped liability in respect of the plea that the trust-estate has not suffered any loss through his default. The plea is founded upon this undoubted fact, that for at least three years prior to his sequestration in January 1896 Mr Elliot was behind the world to the extent of about £5000, and was hopelessly insolvent all that time; and the argument urged for the defender was this:—That in these circumstances pressure by Mr Polson at any time during 1894 and 1895 would have resulted either in bringing down Mr Elliot and so depriving the estate of the possibility of getting the money back (for there is practically no dividend expected in the sequestration), or else would have produced the money by Mr Elliot getting it unduly and fraudulently from somebody else. Now, if that view were made out, that might be sufficient for the defender's case; but it seems to me that the argument as put lays a burden of proof on the beneficiaries which they are not bound to undertake. When Mr Elliot was brought to bay, and Purvis's trustees raised their action in November 1895 for £700 or £800, a relative came forward and settled the claim—it is true it was settled for 5s. per £—and the action was brought to a conclusion; and I suppose the trust-deed was granted as part of the arrangement. That shews that Mr Elliot had not come to an end of his friends' willingness to aid, and in view of that circumstance I cannot assume that if pressure had been put upon him earlier by Mr Polson, the money might not have been produced otherwise than by Mr Elliot helping himself to other people's money fraudulently. Again there are indications in the proof that Mr Elliot's business credit was not exhausted during the years of hopeless insolvency, for there were bills and advances made to him of larger amount than would have sufficed to restore this money to the trust-estate. I do not at all say that it is impossible for a trustee to make good such a plea if the facts bear it out; but it does appear to me that the burden of proving that part of the case is on him and not on the beneficiaries, and that he has not in the present case discharged that burden.”

¹ Lewin on Trusts (9th ed.), pp. 217 and 290; M'Laren on Wills and Succession, sec. 2269; Forman v. Burns, Feb. 2, 1853, 15 D. 362, 25 Scot. Jur. 221; Billing v. Brogden, 1886, L. R. 38 Ch. Div., 546; Blain v. Paterson, Jan. 28, 1836, 14 S. 361; Styles v. Guy, 1849, 1 Macnaghten and Gordon, 422; Wynne v. Tempest, April 10, 1897, 13 Times Law Rep. 360.

² Styles v. Guy, *supra*; Billing v. Brogden, *supra*; Stiven v. Watson, Jan. 27, 1874, 1 R. 412; Carruthers v. Carruthers, July 13, 1896, 23 R. (H. L.) 55; Dominion Bank v. Bank of Scotland, July 19, 1889, 16 R. 1081; Wynne v. Tempest, *supra*.

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£150 he should have taken care that he had no further intrusions with the trust-estate.

Argued for the defender;—There was no doubt as to the rule to be applied to cases like the present. The prudence which a trustee was required to exercise was the prudence of the average man.¹ Judged by that standard, the defender had not been negligent. He did everything he could short of legal proceedings, and it was not unreasonable that he should hesitate to take that step, looking to Mr Elliot's reputation and credit. If he had been wrong in not suing his co-trustee the error was one of judgment. His delay in instituting legal proceedings was short compared with the period in *Blain*,² where the delay had been for nine years, and in *Styles*³ where it had been for six years. (2) But even if the defender had failed in his duty it was clearly proved that no loss had resulted from that failure, as nothing could have been recovered from Elliot, and no liability therefore attached to the defender.⁴

At advising,—

LORD PRESIDENT.—There is no controversy as to the material facts of this case; and I accept unreservedly the evidence of the defender, which is perfectly candid and distinct.

It appears then, that in the beginning of February 1895 it came to the knowledge of the defender that Mr Elliot, his sole co-trustee, had not lodged in bank on deposit-receipt a sum of £150 of trust money, which had been entrusted to him for that purpose. This information did not come from Mr Elliot. The defender at once went to Mr Elliot and asked for explanations. He got none that satisfied him. Admittedly, Mr Elliot had not put the money in bank, and he gave no account of what he had done with it. Some words were used about a five per cent investment, but they did not deceive the defender. He says, frankly, "I thought he was keeping the money in his possession and using it for his own purposes, and was offering to pay five per cent upon it or something of that kind."

From February onwards then the defender knew that this £150 of trust money was in Mr Elliot's hands, contrary to express instructions, and that it was applied to his own uses. It admits of no doubt that, *prima facie*, it was the duty of the defender to take immediate steps to compel the replacement of the money. Beyond vague promises that the money would be repaid, the defender got nothing to re-assure him. The fact of Elliot's default could only be accounted for by his being desperately in want of money. The defender does not profess to have at first abstained from action for any politic reason, in the belief that some temporary difficulty was to be tided over; and, as time passed, things looked worse and worse, and called more and more clamantly for decisive action. By midsummer the defender knew, apart from the default in question, that Elliot was in difficulties. In October he saw Elliot's brother-in-law, Mr Stevenson, and his suspicions were confirmed. Yet from February to November the defender allowed

¹ Knox v. Mackinnon, Aug. 7, 1888, 15 R. (H. L.) 83, *per* Lord Watson, p. 87.

² Blain v. Paterson, 14 S. 361.

³ 1 Macnaghten and Gordon, 422.

⁴ Hobday v. Peters, 1860, 28 Beav. 603.

himself (to use his own phrase) to be trifled with by Elliot. He clung to the hope that the money would be repaid, and took no legal action. No. 183.

The true state of Elliot's finances and his inability to pay anything were not known to the defender, or indeed to anyone outside Elliot's own office; and accordingly are not advanced by the defender as accounting for his inaction. July 10, 1897.
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It seems to me that these facts constitute a clear, and I may say, a strong case of *culpa lata*. The defender was one of two trustees; his co-trustee appropriates to his own uses £150 of trust money, which he had been entrusted with for investment, and conceals the fact, which was only accidentally discovered; no presentable excuse is made, nor is any reasonable prospect given of the money being replaced, if time is given. It is, of course, disagreeable to take a co-trustee by the throat, but if a man undertakes to act as trustee he must face the necessity of doing disagreeable things when they become necessary in order to keep the estate intact. A trustee is not entitled to purchase a quiet life at the expense of the estate, or to act as good-natured men sometimes do in their own affairs, in letting things slide and losing money rather than create ill-feeling.

If it be asked what ought the defender to have done, the answer is obvious. Owing to the default of his sole co-trustee, the defender was placed in the position of a sole acting trustee, deprived of the legal assistance of his co-trustee. His duty was clear. He ought without delay to have instructed a lawyer to recover the missing £150, and he ought to have seen to it (by himself or through the lawyer) that the rest of the trust-estate was safe, and did not get into the hands of Elliot. A lawyer so instructed would naturally have written Elliot, intimating that unless the £150 was replaced within a given number of days a summons would be served, and steps would have been taken to prevent the Whitsunday rent from getting into Elliot's hands.

The latter precaution as well as the former was omitted by the defender, and the Whitsunday rent of Bellevue was allowed to be uplifted by Elliot. It is nothing to say that the defender did not know that Elliot was uplifting these rents. Once he knew that his sole co-trustee was intercepting trust funds and applying them to his own uses, the defender ought to have taken alarm about the whole trust-estate, and to have seen where it was and where it was going.

The next defence is that, even assuming that the defender has made himself liable for the loss resulting to the trust-estate through his omissions, yet no loss has in fact occurred, because nothing could have been recovered from Elliot. It is necessary to observe that, in the view which I take, this defence does not apply to the Whitsunday rent, for, if the defender had done his duty, it would have been intercepted and would never have got into Elliot's hands at all. Of the two sums which I have mentioned, this defence can only apply to the £150.

Now, it is clear that the burden of proof is on the defender. It is for the defender to prove that if he had done his duty the loss would equally have resulted. The defender has recognised this, and has placed before us very full information about the financial position of Elliot. He has proved that in and for long prior to 1895 Elliot was hopelessly insolvent. Now, where a trustee states the defence which we are now considering, I should

No. 183. not in every case be content with proof that the debtor's own means were exhausted. Some men, after their own means are exhausted, have other resources,—they can appeal to their friends. Take the case of a young merchant, the son of a rich and liberal man. If he were indebted to a trust-estate the circumstances might be such that, even if it were proved that his own means were exhausted, the trustee might not have negatived the likelihood that, if action had been raised, the debt would have been recovered, especially if it touched the honour of the debtor. But the present case is in strong contrast to that which I have figured. The sequestrated estate of Elliot is not expected to pay any dividend at all. He is about seventy years of age. He had been in pecuniary straits for years. He had borrowed from friends, but seems to have come to an end of his resources in that quarter before 1895, and to have betaken himself to less defensible methods. The witness Steadman says,—“He paid pressing creditors by taking from one client to pay another.”

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Now, on this evidence, I am prepared to hold that the defender has made out his case. The only suggestion to the contrary which is at all consistent with the facts comes to be that if the defender had sued Elliot for the £150, Elliot would have stolen the money from some third party and have paid it to the defender. I own that there is great plausibility in this conjecture. But in such a surmise, I feel myself to be out of the region of legitimate inference.

The only other suggestion of possible aid coming from friends arises from the fact that in November 1895 some claim by people called Purvis' trustees was bought off at 5s. per £ by General Boswell, a brother-in-law of Elliot. We do not know anything but the fact, and I am unable to infer from this that General Boswell would again have intervened, or that any other General Boswell was available. The *onus* on the defender cannot impose on him the necessity of negating such remote conjectures.

My opinion on the whole case is that, in February 1895, and certainly before Whitsunday 1895, it was the duty of the defender to take steps for the recovery of the £150 and for the interception of the Whitsunday rent of Bellevue, that his omission to do so constitutes *culpa lata*, that he is liable for the Whitsunday 1895 rent of Bellevue, with interest from that date, and that no loss has been sustained by the trust-estate through the omission of the defender in the matter of the £150. The pursuers claimed from the defender another half-year's rent of Bellevue due at Martinmas 1894. As that rent fell due and was ingathered by Elliot before the defalcation of the £150 and its discovery, some *culpa lata* must be found to support this demand other than that which I hold proved. I have only to say that I think the pursuers' case on this head has entirely failed, but even if it had not, the same defence would avail the defender as I sustain regarding the £150. In my view, the Lord Ordinary's interlocutor must be recalled and decree granted for the Whitsunday rent of Bellevue, with interest, the defender being *quoad ultra* assoilzied.

LORD ADAM and LORD KINNAR concurred.

LORD M'LAREN was absent.

THE COURT pronounced this interlocutor:—“Recall the said interlocutor: Decern against the defender for payment to the

pursuers, as trustees foresaid, of the sum of £30, 17s. 6d., being the rent of Bellevue due at Whitsunday 1895, with interest thereon from said term until paid at the rate of 5 per centum per annum: *Quoad ultra* assoilzie the defender: Find no expenses due to or by either party, and decern."

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M'NAUGHT & M'QUEEN, S.S.C.—WINCHESTER & NICHOLSON, S.S.C.—Agents.

MISS MARY ELIZABETH HENRY, Pursuer (Appellant).—*Watt*.
STRACHAN & SPENCE, Defenders (Respondents).—*Johnston*—*W. Brown*.

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Proof—Accession to composition agreement—Writ—Writ of Agent.
Held that the accession by a creditor to a composition agreement may be proved by the writ of his duly authorised agent.

MISS MARY ELIZABETH HENRY raised an action in the Sheriff Court at Aberdeen against Strachan & Spence, accountants and stockbrokers there, concluding, *inter alia*, for payment of £634, 7s. 10d., being the amount paid by the pursuer to the North of Scotland Bank under a letter of guarantee granted by the pursuer on behalf of the defenders, and also for payment of £1100 contained in a promissory-note granted by the defenders in favour of the pursuer.

The defenders stated that early in 1894 they had found it necessary to make an arrangement with their creditors, and that on 3d April 1894 the pursuer, through her agents, Messrs Morice & Wilson, agreed with the defenders that the pursuer should accept a composition arrangement.

The pursuer denied that she had agreed to accept the composition, and averred that she had not given Mr Wilson authority to accept for her.

The pursuer pleaded, *inter alia*;—5. The defenders' statements can only be proved by writ or oath. 6. The defences, so far as founded on the alleged composition settlement, should be repelled, (1) in respect the pursuer never accepted said settlement, either directly or through her agent; (2) that any acceptance thereof given by Messrs Morice & Wilson was unauthorised by, and is not binding on, the pursuer.

The defenders pleaded;—6. In respect that the pursuer agreed to the composition arrangement made by the defenders, and that there has been no failure on their part in carrying through the arrangement, the defenders should be assoilzied.

The Sheriff-substitute (Robertson) allowed a proof.

The following letters were produced:—

Letter by Messrs Edmonds & Ledingham, the defenders' agents, to Messrs Morice & Wilson, as agents for the pursuer, dated 11th April 1894.—Dear Sirs,—Strachan & Spence.—“ . . . Will you please inform us in writing that your client will, in full of her claim, accept the arrangements formerly proposed, coupled with a guarantee by the debtors to her, in common with other creditors, for 5s. per £ within twelve months, and 2s. per £ per annum additional during the next five years, in so far as the trust funds may be insufficient therefor? Pending your reply we retain your summons and copy.”

Letter from Messrs Morice & Wilson to Messrs Edmonds & Ledingham, dated 13th April 1894.—“ We have now had an interview with Miss Henry as to Messrs Strachan & Spence's affairs, and

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The pursuer deponed that she only authorised Mr Wilson to agree to the composition arrangement on condition that she was allowed interest on the instalments. Mr Wilson deponed that he understood that he had full authority to settle whether he got interest or not. It is not necessary to refer to the other evidence bearing on this question. It is sufficient to state that the Court were satisfied that the pursuer had given authority to Mr Wilson to agree to this composition.

On 23d December 1896 the Sheriff-substitute (Robertson) found in fact, *inter alia*, "that this offer was communicated both verbally and (at her request) in writing to pursuer by her agent, Mr Wilson, and that on 13th April following she authorised Mr Wilson to agree to this composition on her behalf, which he accordingly did by letter to Messrs Edmonds & Ledingham of said date," and found in law "that pursuer is bound to concur in said composition arrangement, having agreed to do so through her duly authorised agent," and dismissed the action.

The pursuer appealed, and argued;—Accession by the pursuer to the composition arrangement, involving as it did the abandonment by her of a large claim against the defenders, could only be proved by her own writ or oath.¹ The mere letter of an agent or factor was not sufficient. In point of fact Mr Wilson had no authority to assent on the pursuer's behalf to the composition arrangement.

Argued for the respondents;—The evidence was clear that the pursuer's agent, Mr Wilson, had full authority to assent to the composition agreement on her behalf. The only question was, Was his writ—viz., the letter of 13th April—competent and sufficient evidence of the fact that the pursuer had acceded? There could be no doubt that his writ was binding on the pursuer.²

At advising,—

LORD M'LAREN.—(After reviewing the evidence, and holding that Mr Wilson was proved to have had authority to accept the composition on behalf of the pursuer)—The only other point in the case is the appellant's plea that accession to the composition agreement can only be proved by writ or oath.

Now, it is a general rule, that where writ is required for the proof of an agreement, as distinguished from its constitution, a letter signed by the party or his agent is sufficient. There may be exceptions, but this is not one of them. Accession to a trust or composition agreement is a matter of fact, and no obligatory writing or other formality is necessary to bind the creditor. According to universal practice, the creditor's signature is sufficient evidence of his accession, and where he is represented by an agent the agent's signature is as good as that of the principal. Assuming that Mr Wilson had his client's authority, which, for the reasons stated, I hold to have been given, Mr Wilson's letter to Mr Ledingham is, in my opinion, sufficient to bind the appellant.

¹ 2 Bell's Comm. 398; M'Gregor v. M'Gregor, June 27, 1860, 22 D. 1264, Lord President at p. 1268, 32 Scot. Jur. 565.

² 2 Bell's Comm. 393, 398; Glass v. M'Intosh, May 12, 1825, 4 S. 1.

No other points were pressed in argument, and my opinion is that we should adhere to the judgment of the Sheriff-substitute dismissing the action, with expenses in the Sheriff Court.

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The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

THE COURT adhered.

ANDREW URQUHART, S.S.C.—ALEXANDER MORISON, S.S.C.—Agents.

MISS MARGARET DOUGLAS CHALMERS AND OTHERS (Chalmers' Trustees), First Parties.—*D. Dundas—Abel.* No. 185.
MRS EMMA JANE SINCLAIR, Second Party.—*W. Campbell—W. Brown.* July 10, 1897.
Minor and Pupil—Curator—Married Woman.—Held (diss. Lord Kin- Chalmers' Trustees v. Sinclair.
near) that a married woman is disqualified for acting as the curator of a minor.

Kerbechill, 1586, M. 9585; *Stuart v. Henderson*, 1636, M. 9585, followed.

MR PATRICK HENDERSON CHALMERS, advocate in Aberdeen, died 1st DIVISION on 19th February 1889, leaving a trust-disposition and settlement whereby he appointed his wife and certain other persons to be his trustees and executors.

With reference to the guardianship of his children the truster made the following provision :—"And I hereby appoint my wife, the said Mrs Emma Jane M'Donell or Chalmers, to be sole tutor and curator during all the days of her life, but so long only as she shall remain unmarried, to our child or children, and from and after the death of my said wife, I appoint the said" trustees, "and in the event of the second marriage of my said wife, she shall cease to act as sole tutor and curator to our child or children, but she shall act along with those herein above appointed to act from and after her death, and the survivors and acceptors, or survivor and acceptor, to be tutors and curators, or tutor and curator, to our said child or children, with the fullest powers, privileges, and exemptions."

The truster was survived by his wife and by two sons.

His widow accepted the office of tutor to her sons, and acted as such up to 17th November 1891, when she was married to Mr James Sinclair, residing in London. From that date she continued to act as tutor in conjunction with the other trustees. The elder son attained the age of fourteen on 1st June 1896.

A question having arisen as to the right of Mrs Chalmers or Sinclair to act as a curator to her minor son, a special case was presented to the Court,—the trustees of Mr Chalmers being the parties of the first part, and Mrs Sinclair the party of the second part.

The parties of the first part maintained that, by the law of Scotland, the second party, being a married woman, was not now entitled to act as curator, and that, upon her second marriage, her appointment as curator *eo ipso* fell and ceased to be of any effect.

The second party, upon the other hand, maintained that she was under the appointment of the truster entitled to act as curator, and that she was not disqualified by her second marriage or otherwise from so acting.

The question submitted to the Court was :—"Is the party of the second part entitled, jointly with the first parties, to the office of curator of her minor son of the marriage between her and the deceased

No. 185. Patrick Henderson Chalmers, and to perform the duties of the said office?"

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Argued for the first parties;—By the law of Scotland a married woman was disqualified from acting as a curator,¹ the principle being that one who was herself under curatory could not act as curator to another. It had been expressly decided that a mother, though appointed the testamentary tutor of her pupil child, became disqualified on her second marriage,² and there was no difference in this regard between tutory and curatory. The rule was practically given effect to in the case of the *Marquis of Montrose*,³ and though in *Stoddart's* case⁴ Lord Meadowbank disputed the rule as laid down by Erskine,¹ Lord Glenlee distinctly affirmed it, while the point actually decided related solely to the office of trustee. The Guardianship of Infants Act, 1886, dealt only with the office of tutor. The Act 1696, c. 8, did not expressly exclude married women, because their incapacity was already recognised and there was no necessity or object in enacting it.

Argued for the second party;—No disability attached to a married woman. The sole authority to the contrary was the statement of Erskine.¹ That was a statement of the Roman rather than of the Scots law, and in any view it had been entirely superseded. As early as the case of *Stoddart*,⁴ it had been challenged. That case decided that a married woman might act as a trustee, and there was no difference in principle between the office of trustee and curator. It had moreover been held that a married woman might act as factor loco tutoris and curator bonis.⁵ The case of *Kerbechill*² dealt with tutory, and the law was admittedly altered with regard to that. The case of the *Marquis of Montrose*³ never reached a decision. It was to be noted that the Act 1696, c. 8, which followed immediately upon the case of the *Marquis of Montrose*³ made no limitation on the persons whom a father might name as guardian. The Guardianship of Infants Act, 1886, as interpreted by *Campbell v. Maquay*⁶ was entirely favourable to the view that a married woman was not disqualified for acting as a curator.

At advising,—

LORD ADAM.—The late Mr Patrick Chalmers left a trust-disposition and settlement by which he appointed his wife, Mrs Emma Jane M'Donell or Chalmers, now Sinclair, to be sole tutor and curator during all the days of her life, but so long only as she should remain unmarried, to their child or children, and after the death of his wife he appointed certain gentlemen, who were named as trustees under his settlement, to be their tutors and curators, and in the event of his wife's remarriage he declared that she should cease to act as sole tutor or curator to their children, but should act along with those therein above named to act after her death.

Mr Chalmers died in 1889, leaving two sons, both in pupillarity.

Mr Chalmers' widow acted as sole tutor to her children until her marriage

¹ Erskine, Inst. i. 7, 12; cf. Bankton, i. 7, 30; Stair, i. 6, 24.

² Kerbechill, 1586, M. 9585.

³ Marquis of Montrose, 1695, 4 Br. Suppl. 277.

⁴ Stoddart v. Rutherford, 30th June 1812, F. C.

⁵ Lambe v. Ritchie, December 14, 1837, 16 S. 219; Anderson, Jan. 31, 1829, 4 F. 445.

⁶ Campbell v. Maquay, June 27, 1888, 15 R. 784.

to Mr Sinclair in 1891. After that event she acted as tutor along with Mr Chalmers' trustees, as she was entitled to do under the provisions of the Guardianship of Infants Act. The elder son attained minority on the 1st of June 1896. He is entitled not only to a share of his father's estate, which is considerable, but he is also heir of entail in possession of the estate of Monkshill previously possessed by his uncle, General Chalmers.

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These being the facts, the question of law which has arisen is whether Mrs Sinclair, who is the party of the second part, is entitled jointly with Mr Chalmers' trustees, who are the parties of the first part, to the office of curator of her minor son, and to perform the duties of the office—the ground of objection being that a married woman is not entitled to act as a curator.

The earliest case on the subject to which we were referred was that of *Kerbecchill*¹ in 1586. In that case Kerbecchill pursued for delivery of the pupil, who was his nephew. The application was opposed by the child's mother, who pleaded that she was *tutrix testamentaria*, to which it was answered *inierat secundas nuptias*, and she replied that it was expressly provided that she should be tutrix, albeit she married again. The Lords found that notwithstanding this provision, the common law ought to be followed forth, and that her tutory testamentary fell *per secundas nuptias*. If this be still law it appears to me to be directly in point, because I do not think any distinction can be taken between a case of tutrix and a curatrix as in this case.

The same decision was repeated in 1636 in the case of *Stuart v. Henderson*.² In that case Stuart, who had been served and retoured as tutor at law to the children of his late brother, pursued his brother's widow for exhibition of certain bonds belonging to the pupil in her hands. She had been appointed by her husband tutrix to the children, but had married again. She pleaded that she had not ceased to be tutrix, because her husband had nominated her to be tutrix during the whole time of their pupillarity as well after her second marriage as during the time of her widowhood. The Lords, however, found that notwithstanding this provision of the testament she had tint her office by her second marriage.

The next case on the subject to which we were referred was that of the *Marquis of Montrose*³ in 1695. The Marquis had nominated his mother as one of his curators along with others. The Lords thought she, being clad with a husband, could no more be a curator than a minor could be, not having a person in law. The rest of the curators then present were sworn *de fideli*, but her ladyship's nomination was forborne till it was farther considered. But it does not appear what the result of such farther consideration was, if there was any.

Lord Stair, i. 6, 24, says that tutory is finished "by the marriage of a tutrix testamentrix, which no provision even of the testator can dispense with."

Mr Erskine, i. 7, 29, says that the office both of tutory and curatory expires by the marriage of a female tutor or curator.

I think the latest case in which this matter has been adverted to is that

¹ M. 9585.

² M. 9585.

³ 4 Br. Suppl. 277.

No. 185. of *Campbell v. Maquay*,¹ in which the late Lord President, in commenting on the 2d section of the Guardianship of Infants Act, said,—“It is said that that section must be read under reference to the common law, which makes it a disqualification for a mother to act as her child’s guardian if she marries a second time. The rule so decided is quite distinctly laid down in decisions pronounced in the 16th and 17th centuries, and it may truly be said that nothing has ever been done in later times to shake these authorities. But one cannot help seeing that these cases were founded, not on the principles of common law or equity, but entirely on the authority of the Roman law. The earliest of the decisions to which we were referred—the case of *Kerbechill*²—is particularly remarkable as illustrating that fact. It was argued that we should disregard these cases, as the spirit which inspired them is irreconcilable with the spirit of modern legal opinion. That is a somewhat dangerous doctrine to adopt, and I am not disposed to rest my judgment on that ground.”

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I agree with the Lord President that nothing has been done in recent times to shake the authority of these cases. The only case to which we were referred as having done so was that of *Stoddart*,³ in which it was held that a married woman might legally be named a trustee. It was said that the reason of the thing applied equally to a married woman being a trustee as to her being a tutrix or curatrix. But the Court, in that case, distinguished between the two cases. Lord Glenlee, in particular, said,—“I conceive it to be fixed that, if a man means to make a married woman tutor or curator, he cannot do so. But it is quite a different matter to make her a trustee,” and he gives his reasons.

I agree with the Lord President that if that be, as I think, the old law of Scotland, we must follow it, whether or not we may think it irreconcilable with modern ideas of what is right and reasonable. I would only remark that the Legislature had a most appropriate opportunity of altering the law in that respect when they did so as regards the guardianship of pupils. Why they did not do so in the case of minors I do not know, but I am of opinion that we cannot do so.

I therefore think that the question should be answered in the negative.

LORD KINNEAR.—I have found this question one of difficulty. I regret that, in the result, I have not been able to concur in the opinion which has been delivered by Lord Adam, and in which I understand your Lordship to agree. I can see no ground in reason, or in any principle of the law of Scotland, as it is now established, why a married woman should be disqualified for acting as the curator of her minor child. It is now settled by a series of decisions, which cannot be called in question, that a married woman may be a trustee, that she may be a tutor of pupil children, that she may be a factor loco tutoris or a curator bonis of a lunatic, and that she is not only entitled to the exclusive beneficial enjoyment of her own separate estate, but that she has the uncontrolled management and administration of it as fully and freely as an unmarried woman. I am unable to see any reason for holding that a person who is capable of administering

¹ 15 R. 784.

² M. 9585.

³ June 30, 1812, F. C.

her own affairs, and capable also of administering the estate of a pupil child or of a lunatic should be incapable of administering the estate of a minor. I agree that if there is a settled rule of positive law that a married woman cannot be a curator, we are bound to give effect to that rule, whatever we may think of its reason. But I am not satisfied that there is sufficient authority for holding that such a rule has been established, or now subsists. It is true that Mr Erskine says so, and the authority which was chiefly pressed upon us in argument was his statement of the law. I cannot regard his statement as authoritative, not only because it is, to say the least, very much shaken by the observations of Lord Meadowbank in the case of *Stoddart*,¹ but because his doctrine is applicable in terms to tutory as well as curatory; and it is certain that, in so far as the office of tutor is concerned, it is not now the law of Scotland. He says,²—"All persons may be appointed either tutors or curators to minors who are fit for the management of an estate, and are not debarred by law and custom. Tutory being accounted by the Romans *officium virile* could not be exercised by women, excepting mothers in special cases." Then he goes on to say,—“Married women are utterly disqualified for the office,” that obviously means for the office of tutor as well as for the office of curator. “For if it be, as Justinian reasons in a parallel case, a shameful confounding of names and things that the same person should be both tutor and minor, it must be equally absurd for one who is always subjected to the power or curatory of an husband to have another under her care and tuition. A father may name for tutors to his children either his own widow, or any other woman who is not married, and such nominee may lawfully exercise the office till she be *vestita viro*, and no longer, though the nomination should expressly provide the contrary.” Then he goes on to point out that certain other persons are equally disqualified, including Papists, and also all persons who are even suspected of popery. Now, it appears to me that if the statement that married women are incapable of the office of curator is still the law of Scotland, it is the only statement in that passage of which that can be said, because everything else is displaced by subsequent decision; and the doctrine which he lays down as the sole ground for the alleged disqualification is completely displaced. A married woman is not necessarily subject to the power or curatory of her husband. Mr Erskine’s statement of the law therefore appears to me to rest upon a statement of principle which cannot be assented to. It is not, I think, a statement of the law of Scotland, but a statement of the Roman law, and the authority which would otherwise belong to it as the doctrine of Mr Erskine is, I think, as I have already said, shaken by what was said in the case of *Stoddart*.¹

If we are not to proceed solely upon Mr Erskine’s authority, is there any other authority of greater weight? Lord Adam referred to a *dictum*, I think, of Lord Glenlee in the case of *Stoddart*,¹ which is certainly entirely in accordance with his Lordship’s own opinion; but, in the first place, Lord Glenlee’s *dictum* was *obiter*, and, in the second place, it goes too far for the present purpose. For what his Lordship says is that he thinks that a married woman cannot be a tutor or curator, and there is no question that

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¹ June 30, 1812, F. C.² Ersk. i. 7, 12.

No. 185. she may be a tutor. But then, further, his Lordship says that he conceives the case to be fixed by the decisions, and I must presume that the decisions to which he refers are those in the 16th century which have been cited to us—the case of *Kerbechill*¹ and the case of *Stuart*.² I think the judgment in the case of *Stoddart*³ itself is inconsistent with Mr Erskine's doctrine, and it was manifestly so held by the Judges, notwithstanding the saving clauses introduced into their opinions by Lord Glenlee and Lord Robertson. Because the question was whether a married woman's person was so sunk in marriage as to render her incapable of performing the functions of a trustee, and in support of that proposition the doctrine of Mr Erskine was cited. Lord Meadowbank says about that, that he holds that she is not incapable. He says,—“I see there is a doctrine of Justinian to that effect quoted by Mr Erskine, which he seems to have adopted very loosely. I don't know any authority for it in the law of Scotland. There may have been some feeling of that kind in the infancy of the law with regard to tutors and guardians, but that does not seem to have been countenanced at any time by the enlightened principles of the law of modern Europe. It was never the law of Scotland that a woman in Scotland lost her *status* because she chose to marry. There is no sinking of the rational person, as I understand, by marriage.” It is true that Lord Robertson indicates a contrary opinion. He says,—“In general, I think that marriage does create such an incapacity, and on this ground, that by our law the person of the wife is completely sunk. All deeds done by her without her husband's consent are void and null, and personal obligations undertaken by her, even with his consent, are null.” And for this last *dictum* the learned Judge might have cited, although he does not actually cite, the authority of Mr Erskine, who lays down the law in these terms. But then the question on which Lord Meadowbank and Lord Robertson were thus at variance in 1812, has now been finally settled by the judgment of this Court in *Biggart v. The City of Glasgow Bank*,⁴ in which it was held, after a very elaborate discussion of all the authorities, that the obligations of a married woman in the administration of her separate estate were just as valid and binding as the obligations of anybody else. Erskine's doctrine to the contrary was pressed upon the Court in a very learned speech by the late Lord Fraser, who was then Dean of Faculty, and his authority was disregarded on the express ground that his discussion as to the capacities and incapacities of a married woman was obsolete law, and no longer the law of Scotland. I cannot therefore regard this passage as an authority. Now, then, are the cases of *Kerbechill*¹ and *Stuart*² still law?—because these are the only authorities left, unless we are to consider the case of the *Marquis of Montrose*⁵ as an authority also. The late Lord President, in the case of *Campbell v. Maquay*,⁶ makes certain observations in regard to these decisions, which I am inclined to interpret somewhat differently from my learned brother Lord Adam,—“One cannot help seeing that those judgments are founded not on the principles of common law or equity, but entirely on the authority of the Roman law.”

¹ M. 9585.² June 30, 1812, F. C.³ 4 Br. Suppl. 277.⁴ M. 9585.⁵ 6 R. 470.⁶ 15 R. 784.

And then he goes on to observe,—“The earliest of the decisions to which we were referred, the case of *Kerbechill*,¹ is particularly remarkable as illustrating that fact.” It is quite true that when his Lordship proceeds to decide the case then before the Court, he prefers to rest his judgment upon what he thinks safer ground than that of the change of legal opinion since the case of *Kerbechill*¹ and the case of *Stuart*,² viz., on the Act of Parliament of 1886. He says that he thinks it would be a somewhat dangerous ground to hold that the decisions are to be disregarded merely because the spirit which inspired them is not reconcilable with the spirit of modern legal opinion. That certainly was a caution which was very natural for his Lordship to express in considering an argument such as had evidently been submitted to the Court in that case, and it was quite unnecessary for the Court to adopt any uncertain ground of judgment in the construction of an Act of Parliament, since there was a perfectly clear provision by the Legislature in the Act of 1886, which is entirely inconsistent with those decisions. Whether we are to disregard them merely because they are inconsistent with the spirit of modern legal opinion or not, I do not consider, but I think the basis on which they rest was, in the first place, never the law of Scotland, but only the law of Rome; and, in the next place that, in so far as it appears to have been incorporated into the law of Scotland by those decisions, it has been displaced by subsequent decision, and by subsequent legislation. It is quite true that the Guardianship of Infants Act of 1886 does not directly apply to the office of curator, but I do not think that any inference can be drawn from that circumstance unfavourable to the capacity of a married woman to act as a curator, because the direct purpose of that statute was not to remove incapacities, although as an incidental result of its provisions it was held that the incapacity of married women to act as tutors had been removed. Its purpose was to give the mother the absolute right to act as guardian in certain cases. Now, it may very well have been considered unnecessary or undesirable, in giving the mother new rights as the guardian of pupil children, to introduce any change into the law of Scotland with regard to curators and minors, which might have had the effect of depriving minors of the voice which they themselves had in the appointment of their own guardians. So that there is no reason in the limitation of that Act, considering what its purpose was, to the case of pupil children, that can possibly suggest an inference that the Legislature denied the capacity of married women to act as curators while allowing them to act as tutors. But it is true that the statute does not directly provide for the case of curators, and therefore we cannot decide this case upon the ground on which *Campbell v. Maquay*³ was decided; but then that decision displaces entirely the ground upon which, according to all the authorities cited, the incapacity of married women to act as curators is based, because it displaces the ground upon which the similar incapacity of married women to act as tutors is based. If there is no distinction with reference to its basis in law and reason between the alleged incapacity of a married woman in cases of tutory and in cases of curatory, then when the basis of the supposed disqualification in

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¹ M. 9585.² M. 9585.³ 15 R. 784.

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The LORD PRESIDENT.—I entirely concur in the opinion of Lord Adam.

LORD M'LAREN was absent.

THE COURT answered the question in the negative.

TODS, MURRAY, & JAMIESON, W.S.—MORTON, SMART, & MACDONALD, W.S.—Agents.

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GEORGE NELSON, Pursuer (Respondent.—*D. Anderson*.
JAMES IRVING, Defender (Appellant).—*W. Hunter*.

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Reparation—Slander—Privilege.—A, the tenant of the shootings on a certain estate, complained to an innkeeper in the neighbourhood that poach-

¹ M. 9585.

² May 10, 1853, 15 D. 535.

³ M. 9585.

⁴ 4 Br. Suppl. 277.

* Decided July 7, 1897.

ing had been taking place on the estate, and the innkeeper promised to assist A in finding out who the poachers were. Thereafter the innkeeper was told by a gamekeeper that B had been poaching on the estate. The innkeeper communicated this information to A. No. 186.
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In an action of damages for slander brought by B against the innkeeper, *held* that in making this communication to A the defender was privileged.

IN February 1897, George Nelson, farm manager, Eaglesfield, in the parish of Middlebie, Dumfriesshire, brought an action in the Sheriff Court at Dumfries against James Irving, hotel-keeper, Irving Arms Hotel, Kirtlebridge, praying for decree for £50 as damages for slander. 2D DIVISION.
Sheriff of
Dumfries and
Galloway.

The slander averred was that the defender, on 6th November 1896, told Mr William Clark Muir, tenant of the shootings of Blackwoodhouse, Eaglesfield, that the pursuer had been poaching on Blackwoodhouse.

The defence was privilege, the defender averring that prior to the date in question Mr Muir had frequently complained to defender about the poaching on Blackwoodhouse estate, and expressed to defender his desire to trace the poachers; that on the date in question, John Thompson, a gamekeeper with Major Irving of Burnfoot, Ecclefechan, called at defender's hotel, and in the course of conversation, stated to defender that the pursuer and another man named had been poaching on Blackwoodhouse; and that on the same day defender met Mr Muir and repeated to Mr Muir, in confidence, the information received from Thompson.

A proof was allowed. The defender, adduced as a witness by the pursuer, deponed,—“ I am tenant of the Irving Arms Hotel at Kirtlebridge, and have been so for a number of years. Mr Muir, the tenant of Blackwoodhouse, is in the habit of walking down to Kirtlebridge Station in the morning for the newspapers, and once in a while he drops into the hotel. I remember him coming from the station one morning with two friends from Glasgow, when he came forward and spoke to me, while his friends stood at the road-end. He had made frequent complaints about the trapping of rabbits on the estate, and said he wished very much that someone could give him a hint who was doing it. I had asked Thompson, the gamekeeper on Burnfoot, to try and find out for me who the parties were. I saw Thompson early in the forenoon of the day of which I have spoken, perhaps about an hour and a half before my meeting with Mr Muir. Thompson came to me on that occasion, and told me that he thought he had found out who had been poaching. I asked him then for the names, and he gave me them. One of them was the pursuer. He did not give the names just at the minute, but he did so shortly afterwards, when pursuer came out of one of the rooms of the hotel while we were talking . . . Thompson did not say that he had himself seen the men poaching. It was weeks before this that I asked him to find out if he could. Meeting Mr Muir shortly after the conversation with Thompson, I told him in confidence that I heard that the pursuer had been trapping rabbits, and that Thompson was my informant. I did not state to him that pursuer had been poaching on Blackwoodhouse estate, but simply repeated what Thompson had told me. I had not of my own knowledge any ground for suspecting pursuer of poaching.”

Muir deponed, adduced by defender,—“ I remember on 6th Novem-

No. 186. ber last being at Kirtlebridge Station. On the way back I passed defender's hotel. I saw defender on the road. There were two gentlemen with me. Seeing that defender apparently wished to speak to me, I went to him, leaving the other two at the parting of the roads close to the hotel. Defender asked me what about the game on Blackwoodhouse estate just now. I said it was very scarce. He said there had been a good deal of poaching going on as usual. I said Yes. He said,—‘I can give you the names of two parties who have been poaching.’ He gave me the names of ” pursuer and another man. “I asked, ‘Who told you?’ Defender said it was Thompson, one of Mr Irving’s gamekeepers. I said ‘All right; thank you,’ and went away On a subsequent occasion defender said, ‘I’ll send this man Thompson up to your house, and he will tell you himself.’ I said, ‘All right; send him up to me.’ . . . I had often complained to defender about the poaching, thinking he might have an opportunity of finding out who the parties might be, and he promised to try to assist me. I understood that he gave me that information as following on the request I had made. I had a call from Thompson. I took him into my sitting-room, and said,—‘Well, Mr Irving has sent you up.’ He said Yes. I said, ‘You know who have been poaching Blackwoodhouse estate.’ He said,—‘Oh, yes; quite well.’ I said,—‘Did you see Nelson and ’ the other man ‘poaching?’ He said,—‘Oh, no; I did not say to Mr Irving that I saw them, but I said I knew that they had been poaching.’”

There was no evidence that the pursuer had ever in fact been poaching.

On 2d April 1897 the Sheriff-substitute (Campion) pronounced the following interlocutor:—“Finds (1) that the pursuer is farm manager to his brothers, who are postmasters and merchants at Eaglesfield, and that defender is an hotel-keeper, carrying on business at the Irving Arms Hotel, Kirtlebridge; and (2) that on or about 6th November 1896, near the Irving Arms Hotel, the defender made a statement to Mr William Clark Muir, tenant of Blackwoodhouse, to the effect that the pursuer had been poaching on the estate of Blackwoodhouse: Finds that said statement, thus made by the defender, of and concerning the pursuer, was false and calumnious, and that the defender was not protected by privilege; that in consequence of said statement the pursuer has suffered injury and damage to his feelings and reputation, and that the defender is liable to him in damages therefor: Assesses said damages at £15 sterling, for which sum decerns against defender,” &c.

The defender appealed, and argued;—The defender was privileged. The statement complained of was not mere idle gossip, but was a confidential communication made in response to a request for information by a person who had a right and interest to make inquiry and to receive information.¹ Even if the defender had misunderstood what Thompson told him, still, as he *bona fide* believed that he was doing no more than repeating what he understood Thompson to say, he did not lose his privilege.² Being, then, a case of privilege, malice was not to be presumed, but must be proved, and here malice had not been proved.

¹ Shaw v. Morgan, July 11, 1888, 15 R. 865; Jenoure v. Delmege, L. R. [1891], A. C. 73; Stuart v. Bell, L. R. [1891], 2 Q. B. 341; Coxhead v. Richards, 1846, 2 C. B. 569; Whiteley v. Adams, 1863, 15 C. B. (N. S.) 392.

² M'Lean v. Adam, Nov. 30, 1888, 16 R. 175.

Argued for the pursuer;—Assuming that the defender was privileged in communicating to Muir the information which he got from Thompson, that did not entitle him to communicate as fact what he had got as mere suspicion or rumour,¹ and that was what he did here. But the defender had no privilege in repeating mere rumours; what Muir wanted was facts, not rumours; no one was privileged in repeating mere gossip which would serve no useful purpose.² The defender's proper course was either to have sifted Thompson's information before passing it on to Muir—and very little further interrogation would have shewn that Thompson knew nothing against the pursuer—or the defender ought to have referred Muir to Thompson, or sent Thompson to Muir without mentioning the pursuer's name to Muir at all. But in saying to Muir as on the authority of Thompson that the pursuer had been poaching on Blackwoodhouse, the defender either was not privileged, or, what was the same thing in practical effect, had shewn such recklessness as in law amounted to malice.³

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LORD JUSTICE-CLERK.—I take this case on the footing that to accuse a man of poaching is defamatory. Poaching is an offence against the law of the land.

The facts here are plain enough in their general aspect. Muir asked the defender to get him information to aid him in ascertaining who had been poaching on his lands. The defender got the information, as he thought, from a gamekeeper Thompson, and told Muir what he had heard, and also told him who was his informant. He also told him he would send up the gamekeeper to see him.

It is true that the gamekeeper does not give evidence to quite the same effect as the defender with regard to what was said at their interview. But I may say that I am not very well satisfied as to the candour of Thompson's evidence. I feel justified in holding on the evidence that the defender only said to Muir what he was reasonably justified in saying in consequence of what the gamekeeper had said to him.

Now, the communication made by the defender to Muir was one in which Muir was properly interested. If an offence is committed against anyone, he is properly interested in discovering who has committed it. A communication made under such circumstances is *prima facie* privileged. In such a case a pursuer cannot succeed in obtaining damages because of a defamatory statement unless it can be proved that it was made maliciously,—that is, unless it be proved otherwise than by the mere fact that the defender has made a false and defamatory statement, which in the ordinary case is sufficient to infer malice. I think the Sheriff has erred here in holding that there was no privilege. But if the statement was privileged, then malice must be proved. Here there is no proof whatever of malice. It follows that the defender must be assolized.

LORD YOUNG.—I am of the same opinion. This case is one of general

¹ Maclean v. Adam, Nov. 30, 1888, 16 R. 175.

² Jenoure v. Delmage, L. R. [1891], A. C. 73, *per* Lord Macnaghten, p. 79; Stuart v. Bell, L. R. [1891], 2 Q. B. 341, *per* Lindley, L. J., at p. 350.

³ Lockhart v. Cumming, Feb. 7, 1852, 14 D. 452, 24 Scot. Jur. 223; Denholm v. Thomson, Oct. 22, 1880, 8 R. 31.

No. 186. importance,—I mean to say that I think what we are deciding will be of importance in considering cases of slander in the future.

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The pursuer here sues an innkeeper in a country district for saying that he was a poacher. The defender was applied to by the shooting tenant of a small estate to get information for him as to who were poaching his rabbits. The innkeeper applied to the gamekeeper on a property adjoining that occupied by the shooting tenant. The gamekeeper came to the defender and said (I am taking that as proved) "that he thought he had found out who had been poaching," and gave the name of the pursuer. Then the defender informed Muir that the pursuer was one of the persons who were poaching his rabbits. He also said that he would send Thompson, the gamekeeper, up to see Muir in order that he might tell what he knew himself, and he did so.

I think this was a privileged occasion,—that is to say, the occasion was such as to exclude the presumption of malice which arises from making any defamatory statement. When a statement is made in circumstances which shew that there was any moral or social duty to make the statement, the presumption of malice is excluded. The word privilege is an unfortunate one. It is apt to convey an erroneous impression. No one is privileged to slander another, but a defamatory statement may be made under such circumstances that the malice which is essential to slander is not to be inferred simply from the defamatory statement having been made. This is all that is meant by privilege. I think that the law on this subject is very well stated in the case of *Stuart v. Bell*,¹ which was referred to in the course of the argument, by Lord Justice Lindley, who gave the leading opinion. That case is the more interesting as shewing how the law is progressing in the direction of holding more occasions privileged than was formerly the case. Mr Justice Wills directed the jury that the occasion was not privileged. This ruling was reversed by the Court of Appeal on the grounds explained by Lord Justice Lindley. He says,—“This is an action for slander. At the time when the slander was uttered the plaintiff was a valet in the employ of Mr Stanley. Mr Stanley was the guest of the defendant, who was the Mayor of Newcastle. The plaintiff was staying with his master at the Mansion-house at Newcastle. They had come from Edinburgh, and were going on further visits. Whilst Stanley and the plaintiff were still at the Mansion-house at Newcastle, the Chief Constable of that town received from the Chief Constable of Edinburgh a letter to the effect that a lady who had been staying at the same hotel as the plaintiff had lost a gold watch, and that suspicion had fallen on the plaintiff as the person who stole it. The Chief Constable of Newcastle sent this letter to the defendant, who read it and returned it, and then told Stanley privately what I have above stated.” This was the slander complained of, and the Court of Appeal, reversing the judgment of Mr Justice Wills, held that it was uttered on a privileged occasion. Lord Justice Lindley quotes and approves what Chief Justice Erle said in the case of *Whiteley v. Adams*,² which was an action for libel on two letters. Chief Justice Erle said,—“Each of these letters contains matter which is clearly defamatory of the plaintiff, and

¹ L. R. [1891], 2 Q. B. 341.

² 15 C. B. (N. S.) 392.

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forms the foundation of an action, unless the circumstances under which it is written bring it within the protection afforded by the law to what are called privileged communications. I take it to be clear that the foundation for an action of defamation is malice." I may say that I have frequently had occasion, both when I was at the bar and also since I came on to the bench, to point out—not invariably I must admit with success—that malice is essential to slander, that is, malice either presumed or proved. I desire to emphasise what Chief Justice Erle, approved by Lord Justice Lindley, lays down:—"I take it to be clear that the foundation of an action of defamation is malice." He then goes on—"But defamation pure and simple affords presumptive evidence of malice. That presumption may be rebutted by shewing that the circumstances under which the libel was written or the words uttered were such as to render it justifiable. The rule has been laid down in the Court of Exchequer, and again lately in the Court of Queen's Bench, that if the circumstances bring the Judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then if the words pass in the honest belief on the part of the persons writing or uttering them, he is bound to hold that the action fails." Then he describes the facts of the case and goes on:—"Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest, will afford a justification; but all are clear that it is a question for the Judge to decide." Then he goes on to say that "the rule has since become gradually more extended, upon the principle that it is to the general interest of society that correct information should be obtained as to the character of the persons in whom others have an interest. If every word that was uttered to the discredit of another is to be made the ground of an action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth." Then Lord Justice Lindley says, referring to the facts in the case of *Stuart v. Bell*,¹—"Under these circumstances I am clearly of opinion that it was the defendant's moral or social, though not legal, duty to communicate to Stanley the information which the defendant had received . . . Suppose the suspicion which had fallen on the plaintiff had been well founded, and not ill founded, and that the defendant had withheld the information from Stanley, could the defendant have morally justified reticence? I answer No; he would not have been acting up to his duty either to the public or to Stanley. Suppose the plaintiff had proved dishonest at the next place he visited, would the defendant then have been free from moral blame if he had not communicated to Stanley what he had learned from the police? In my opinion the defendant would then have been greatly to blame if he had held his tongue. The question of moral or social duty being for the Judge, each Judge must decide it as best he can himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal."

¹ L. R. [1891], 2 Q. B. 341.

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I assent to that. I think it is the interest of the public that people should not be deterred from giving relatives or friends correct information on matters which concern them by fear of an action of damages for slander. I think it is not for the public interest that fathers or uncles or friends should be deterred from saying to sons or daughters, or nephews or younger friends, that a person with whom they see those they are interested in associating, and of whose character they do not approve, is not a proper friend for them to have, and from warning them against frequenting that person's company. I think it is for the public interest that they should have full freedom to give such advice and such warnings without fear of having an action brought against them.

I have made these observations quite generally and without any special reference to the particular facts of this case, although I think that here also the presumption that false and defamatory statements are malicious does not apply. As the presumption does not apply, it lies upon the pursuer to prove malice. I think he has not done so. I am therefore of opinion that the interlocutor of the Sheriff-substitute should be recalled, and that with the appropriate findings in fact which we are bound by the statute to make in this case, we should assoilzie the defender from the conclusions of the action.

LORD TRAYNER.—I agree. I am sure your Lordships will concur with me in saying that nothing we are deciding in this case is to be construed into an approval of anyone ultroneously repeating defamatory statements which he has heard, but into the truth of which he has not inquired. If a man goes about recklessly spreading defamatory reports regarding another which are not true he will be responsible for such statements. But we have not such a case here. The defender was asked by Mr Muir if he could inform him or could find out who had been poaching his rabbits, a matter in which Mr Muir was interested. The defender did make inquiry of a person who was likely to be able to afford the desired information, and he got an answer which he communicated to Mr Muir. I think the evidence shews that what Thompson the gamekeeper told the defender was that the pursuer was poaching. The defender privately communicated to Mr Muir what he had heard from Thompson, and that communication was, I think, privileged.

It is said that the defender repeated as a fact of which he had knowledge what he got from Thompson as mere hearsay or rumour. I do not think he did, but if he had made a statement to Muir which was somewhat incautiously worded in view of all the information he had got, it would not have altered my judgment. I think in the circumstances the defender was privileged in making the statement he made to the person to whom he made it. If there was privilege, then malice, which is necessarily the basis of an action of slander, and in the ordinary case is presumed, must be proved. Here I think the idea of malice is not only not supported by the evidence but is rebutted by it. The defender was not acting recklessly, and there is no ground whatever for supposing that he was actuated by any personal ill will against the pursuer.

I think it fair to the pursuer to add that there is no room, in my opinion,

on the evidence before us, for believing that the pursuer was a poacher, nor any reason for suspecting him of poaching. No. 186.

I concur in thinking that the Sheriff-substitute's judgment should be recalled, and the defender assoilzied.

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LORD MONCREIFF was absent.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against: Find in fact (1) that the pursuer is the farm manager to his brothers, who are postmasters and merchants at Eaglesfield, and that defender is an hotel-keeper, carrying on business at the Irving Arms Hotel, Kirtlebridge; (2) that Mr William Clark Muir, tenant of the estate of Blackwoodhouse, had complained to the defender about poaching taking place on said estate, and that defender promised to assist him in finding out who the parties were; (3) that the defender received a communication from John Thompson, gamekeeper, Birnam Cottage, that he had been told who had been poaching on said estate, and that pursuer and another were the parties who had done so, and that defender told Mr Muir what had been communicated to him by said John Thompson, and gave him the name of his informant; (4) that said statement of and concerning the pursuer was false and calumnious, but that under the circumstances the defender in making said statement was privileged: Therefore assoilzie him from the conclusions of the action, and decern: Find him entitled to expenses in this and in the inferior Court," &c.

JAMES A. B. HORN, S.S.C.—THOMAS M. HORSEBURGH, S.S.C.—Agents.

PETER JOHNSTON, Pursuer (Reclaimer).—*Balfour—Rankine—Wilton.* No. 187.

THE WALKER TRUSTEES, Defenders (Respondents).—*Johnston—Cook.*

MISS EMMA HOFFORD AND OTHERS, Defenders (Respondents).—

Johnston—Cook.

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Superior and Vassal—Restrictions imposed by common superior—Right of one vassal to enforce restrictions against another—Jus quæsitum tertio.—A feu-charter granted by the superior of all the feus in a street provided "that as the tenement built on said area has been erected in strict conformity to the plan and elevation adopted for" the street "(and the plan and elevation of the said tenement now subscribed by" the superior and feuar "as relative hereto) . . . it shall not be in the power of the said" feuar "or his foresaids to convert the said dwelling-house and others hereby disposed into a shop or shops or warerooms for the sale of goods or merchandise of any description, but that they shall be bound to use the same as a dwelling-house only."

The charter also contained provisions relative to the use of a pleasure-ground in front of the feus, and to the formation and maintenance of sewers, inferring community of interest and obligation among the feuars with regard thereto, and also a provision that the superior should have power to alter any of the proposed plans and streets and lanes upon the ground belonging to him, and not built upon at the date of granting the respective feu-rights thereof. The provisions were declared to be real burdens, and were appointed to be inserted in all future investitures.

Held, in a question between the feuar and other feuars in the street, whose charters contained similar provisions and references to the feuing-

No. 187. plan, that the reference to a common plan and scheme of building in the feu-charter was sufficient to shew that the restrictions were imposed and accepted for the benefit not merely of the superior, but also of the body of feuars, and that the other feuars were entitled to enforce them.

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Property—Superior and Vassal—Restrictions imposed in feu-charter—Acquiescence.—All the feuars in a street held of a common superior under titles which prohibited them from making any deviation from the plan and elevation adopted for the street, and from converting the subjects feued by them into shops or warerooms for the sale of goods, and bound them to use their subjects as dwelling-houses only.

In 1896 the proprietor of the sunk and street flats of the corner tenement raised an action to have it declared that the clauses of restriction had been departed from and could no longer be enforced, and that in any view he was not bound to use his subjects as a dwelling-house only.

It was proved (1) that after the houses in the street had been erected in conformity with the plan dormer windows had been—from time to time—added to twelve of them, including the corner tenement, and a complete storey to three of them; (2) with regard to the pursuer's own subjects, that these had, without objection on the part of anyone, been used from 1871 to 1884 as writing chambers by a firm of law-agents; and (3) that these subjects had been used from 1884 onwards as a shop or wareroom for the sale of millinery, costumes, and other goods, but only under a strong protest and threatened action by the co-feuars with the approval of the superior, followed by a letter from the feuar agreeing that their abstention from proceedings should not be construed into consent or approval. The Court, holding that the restrictions were still binding, *assolized* the defenders.

Stewart v. Buntin, July 20, 1878, 5 R. 1108, *followed*.

1st Division.
Ld. Kyllachy.

By feu-charter, dated May 1859, Miss Mary Walker, of Coates, disposed to and in favour of George John Murray, and his heirs and assignees whomsoever, "All and Whole that dwelling-house, marked 22, in Coates Crescent, Edinburgh, and consisting of the street and sunk flats of the corner tenement erected at the south end of Manor Place and west end of Coates Crescent, on that area or piece of ground, consisting of 51 feet 6 inches or thereby, in front to Coates Crescent . . . as also right in common with the whole other feuars from me or my predecessors or successors, of areas or stances in Coates Crescent, to the space or area of pleasure-ground in front of the street way of said crescent, now enclosed with a parapet wall and iron railing, and that as a common property of the feuars in the said crescent . . . But it is hereby expressly provided and declared that the foresaid dwelling-house and others, with the privileges and pertinents thereof, are hereby disposed . . . under the burden of a proportional part of the expense, along with the other feuars, of keeping the common sewer, and the causeway, and the surface drains and gratings, in perpetual repair . . . and it is also provided and declared that the foresaid area or pleasure-ground in front of the said crescent shall be used allenarly for pleasure or other accommodation of the several feuars and their families, but shall nowise be converted into a common thoroughfare, and that the said space, with the parapet-walls, railings, entries, gravel walks, trees, and grass ground, shall be made, preserved, and kept in order and repair at the common and rateable expense of the whole feuars." It was further declared that the sewer should remain the property of the superior for the benefit of all concerned.

The deed further expressly provided and declared,—“That as the tenement built on the said area has been erected in strict conformity to the plan and elevation adopted for Coates Crescent and Manor

Place, and the plan and elevation of the said tenement now subscribed No. 187. by me and the said George John Murray as relative hereto, with balconies and iron railings on both fronts thereof, conform to the pattern adopted for said crescent and place, it shall not be in the power of the said George John Murray or his foresaids to convert the said dwelling-house and others hereby disposed into a shop or shops or warerooms for the sale of goods or merchandise of any description, but that they shall be bound to use the same as a dwelling-house only ; and, further, that it shall not be in the power of my said dis-
 ponee or his foresaids to erect or make common stairs or separate tenements within the said house, nor to make any deviation from, or alteration upon, the plans and elevations and pattern balconies and iron railings before mentioned . . . And it is hereby expressly provided and declared that I and my foresaids shall have full power and liberty to vary or alter any of the proposed plans and streets or lanes upon the ground belonging to me, and not already built upon or feued, or as I or they shall think fit . . . which whole burdens, conditions, and provisions herein contained are hereby declared to be real burdens affecting the said subjects before disposed, and are as such appointed to be verbatim engrossed or validly referred to in all the future charters and investitures and writs whatsoever of the said subjects."

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In April 1896 Peter Johnston, who carried on business as a coach-builder in Edinburgh, and who had acquired the subjects No. 22 Coates Crescent, presented an application to the Dean of Guild for authority to make certain alterations for the purpose of enabling him to use the premises as a carriage saloon. The application having been opposed, proceedings were sisted to enable Mr Johnston to bring the present action.

Accordingly, on 28th May 1896, Mr Johnston raised the present action against (1) the Walker Trustees, the superiors ; (2) the Misses Hofford, and the other proprietors of flats above the pursuer's premises ; and (3) the Misses Cook, proprietors of No. 21 Coates Crescent.

The conclusions of the action were for declarator that "notwithstanding the terms of" the feu-charter above referred to, "the pursuer, as heritable proprietor of the subjects No. 22 Coates Crescent, Edinburgh, with the parts and pertinents thereof, thereby feued, in the first place is not bound to use the same as a dwelling-house only, and in the second place is entitled to possess and occupy the same as a shop or wareroom, or to convert the same into a shop or wareroom, and to possess and occupy them as such ; and it should also be found and declared by decree of our said Lords that any conditions, restrictions, or prohibitions in the said feu-charter limiting the pursuer in his use of the said subjects as a dwelling-house only, or preventing him from possessing and occupying the same as a shop or wareroom, converting the same into a shop or wareroom, and possessing and occupying them as such, have been departed from, and that the defenders and the said other parties, or any one of them, have no right or title to enforce the said conditions, restrictions, or prohibitions against the pursuer."

The pursuer, after setting forth the terms of his feu-charter, averred that "notwithstanding the said provision and declaration, the subjects belonging to the pursuer have wholly ceased for many years back to be used for residential purposes." That from 1871 to 1884 the pursuer's property had been occupied as writing chambers

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by a firm of Writers to the Signet, and that none of the partners had resided there, and that no objection had been taken by the superiors or the other proprietors; that in 1884 the pursuer's predecessor, John Aitken, had acquired the subjects, and had since occupied them as a millinery shop or warehouse without objection till Whitsunday 1896, when the pursuer got possession. Further, that the superiors had consented to or permitted material deviations from the plans by allowing dormer windows to be erected on the roofs of various houses mentioned, and by allowing storeys to be added to some of the houses, and that the other proprietors had also acquiesced.

The pursuer pleaded;—(1) The restrictions condescended upon in the feu-charter referred to having been departed from by the consent or acquiescence of all parties having an interest in the enforcement thereof, the pursuer is entitled to decree of declarator as concluded for, with expenses. (2) The defenders, the Walker Trustees, as superiors, having acquiesced in the occupation and use of the said subjects as condescended upon, are now barred by personal exception from insisting upon compliance by the pursuer with the said restrictions, and *separatim*, having now no interest to insist upon the preservation of the said restrictions, the pursuer *quoad* them is entitled to decree of declarator, with expenses. (3) The said defenders having, as condescended upon, consented to or permitted material deviations from and alterations upon the general plan and elevation referred to in the said feu-charter, are not now entitled to enforce observance of the relative restrictions as to use or conversion in the pursuer's title. (4) The defenders, proprietors of subjects in the same tenement as the pursuer's property, either as having no title to insist upon the pursuer's compliance with the said restrictions, or, if having such a title, as being now barred from maintaining the same by their acquiescence in the conversion of the said subjects, have no right to resist the decree of declarator craved by the pursuer. (5) The proprietors of adjoining properties having no *jus quæsitum* in the enforcement of the said restrictions against the pursuer, and even if they had such a right, the same having been lost by their acquiescence in the said conversion, or in any event by their failure to take any steps in vindication of such right, the pursuer *quoad* them is entitled to decree of declarator as craved. (6) In any event the whole of the defenders are barred from objecting to the pursuer's using the said subjects as an office, and he is entitled to decree of declarator in terms of the first alternative of the leading conclusion of the summons.

Defences were lodged for the Walker Trustees, the superiors, the Misses Hofford, and the Misses Cook.

The Walker Trustees, the superiors, pleaded;—(3) By the terms of his titles derived from these defenders, the pursuer is prohibited from making the alterations he proposes upon his property, and from converting it to and occupying it as a carriage showroom. (4) The alteration on and occupation of his property proposed by the pursuer being in violation of the terms of his titles, and these defenders never having acquiesced in the abandonment on the part of their vassals of the conditions and restrictions contained in their feu-charters, are entitled to absolvitor.

The other defenders pleaded;—(3) These defenders, in virtue of their titles and in virtue of the conditions and restrictions contained in the titles of the pursuer and their other co-feuars under the Walker Trustees, are entitled to insist on the fulfilment by the pursuer of the

conditions and restrictions in his charter. (4) The right to insist upon such fulfilment never having been abandoned by these defenders or their predecessors in title, and there never having been any acquiescence on their part in any alleged deviation from said conditions and restrictions, at all events as regards the occupation and use of the subjects, these defenders are entitled to absolvitor.

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A proof was allowed. The parties subsequently lodged a joint minute of admissions and renounced probation.

The following statement is taken from the joint minute:—The tenement, of which the pursuer's property formed part, was built about 1825, but no charter was granted until the feu-charter of 14th May 1859. The defenders other than the Walker Trustees were duly vested in their respective properties, and held of the same superiors as the pursuer. The titles of the pursuer, of the defenders Misses Cook, and of the other proprietors in Coates Crescent of their respective properties therein, contained clauses of prohibition against the use thereof otherwise than as dwelling-houses only, and against making any deviation or alteration upon the plan and elevation adopted for Coates Crescent, and pattern balconies and iron railings in front of such subjects, in terms substantially identical. All such titles also contained provisions relative to the pleasure-ground in Coates Crescent and to the formation and maintenance of the sewers, inferring community of interest and obligation among the feuars with regard thereto. All such titles also contained a clause providing and declaring that the superiors should have power to vary or alter any of the proposed plans and streets and lanes upon the ground belonging to them and not built upon at the time of granting the respective feu-rights thereof. In the feu-charter, dated 11th May 1854, in favour of the author of the defenders Misses Hofford, there was inserted a clause obliging the superiors to observe the prohibitions in reference to the remaining parts of the said tenement of which the pursuer's property forms part, and to insert the said prohibitions in the feu-charters of the tenement, or of parts thereof, that might be thereafter granted by them in so far as the same might be applicable thereto. The whole of the areas known as Coates Crescent and Manor Place was built upon at the date of the feu-charter.

From 1871 to 1884 No. 22 Coates Crescent was owned by Messrs Dalgleish & Bell, W.S., and occupied by them as writing chambers. The partners of the firm occupied the subjects during the day as writing chambers, but they did not sleep on the premises. They maintained resident caretakers (a man and his wife), who occupied the basement portion of the subjects, and the defenders the Walker Trustees were aware of, but did not take any steps to prevent, this use of the subjects. No change was made upon the house internally or externally during Messrs Dalgleish & Bell's ownership and occupancy thereof, except that upon the front door, which was kept shut, they placed a brass plate upon which was engraved "Messrs Dalgleish & Bell, W.S."

At or about Whitsunday 1884 John Aitken, the immediate author of the pursuer, acquired the subjects in question from Messrs Dalgleish & Bell, and immediately thereafter began to use the same as a shop or wareroom for the sale of millinery, mantles, costumes, and other goods, which he advertised in the newspapers by the name of "Manor House," and in circulars addressed to residents in Edinburgh as "Private showrooms for millinery, mantles, and costumes."

No. 187. Several of the proprietors in Coates Crescent objected to such use of the subjects by John Aitken, and two meetings of such proprietors in connection therewith (at the first of which the agent of the superiors was present as representing their interests) were held on 23d December 1884, and 16th January 1885. Thereafter a correspondence took place between Mr Aitken and his agent, Mr Lockhart Thomson, S.S.C., on the one side, and a committee of proprietors in Coates Crescent, and Mr Ralph Richardson, W.S., their agent, on the other, and in respect of this correspondence, and of a letter from Mr Aitken of 16th March 1885, a copy of which was sent to the Walker Trustees, no legal proceedings were then taken.*

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The general feuing-plan of Manor Place and Coates Crescent referred to in the titles of the pursuer and of the defenders Misses Cook and Misses Hofford had been lost.

The following deviations or alterations upon the general plan in conformity with which the houses in Manor Place and Coates Crescent were originally erected had been made and existed for many years, viz., three dormer or attic windows had been added to the roof of the tenement of which No. 22 Coates Crescent formed part; two dormer windows had been made in the roofs of the dwelling-houses, Nos. 4, 6, 7, 9, 10, 13, 16, 17, 18, 19, and 20 Coates Crescent; and in the case of the dwelling-houses, Nos. 8, 14, and 15 Coates Crescent, complete storeys had been added to their front elevation, the additional storey of No. 8 consisting wholly of a stone front, and the additional storey of Nos. 14 and 15 consisting chiefly of timber fronts.

The agents of the pursuer were notified previous to his purchase of the subjects by the agents of the superiors, the Walker Trustees, and by the agents of the defenders the Misses Cook, that any intended use of the subjects for trade purposes would be objected to as an infringement of the feu-charter, and the pursuer's agents were also informed that proceedings had not been taken to prevent such occupation during Mr Aitken's time in consequence of the undertaking of 16th March 1885.

The Lord Ordinary (Kyllachy), on 7th January 1897, assoilzied the compearing defenders.†

* "Gentlemen,—I address you as a committee representing the proprietors of houses in Coates Crescent, with reference to the intimated objection to my using my own house, No. 22 Coates Crescent, as a place of business.

"It is certainly not my intention to utilise my property in any way that can be construed into a nuisance, as I have as much interest as any other proprietor in preserving the amenity of the crescent.

"While I am advised that I am acting quite within my rights in using my property as I am now doing, I have no hesitation in recording that, if the objecting proprietors abstain from pressing their objections so long as I occupy and use the house as I am now doing, I bind and oblige myself that it will not afterwards be pled as acquiescence on their part, and that the respective rights of parties shall in no way be prejudiced thereby. That is to say, it will be quite open to any of the proprietors to adopt whatever proceedings they may be advised to take to have their legal rights determined, without my pleading that their being at present passive be construed into consent or approval."

† "OPINION.— . . . The points which I have to decide are, I think, sufficiently raised in the pleadings, and appear to be these (1) have the co-feuars on a just construction of the titles, a title to enforce the restriction? (2) have they barred themselves from doing so by what is called acqui-

The pursuer reclaimed, and argued;—The superior had no interest No. 187.
to enforce the restriction. His only interest was to protect his feuduty, and it could not be seriously suggested that that would be imperilled. The feuars had no title. It was settled that the fact of the same conditions appearing in feu-charters, derived from a common superior, even when coupled with a substantial interest in their observance, did not confer a right upon any one feuar to enforce them against another.¹ There was nothing else in the titles here to confer mutuality of rights and obligations among the feuars, either expressly or by implication.² There was no obligation by the superior in any of the titles to take the other feuars bound,³ nor had the titles of the feuars a common origin as in the case of *Robertson*.⁴ The superior, on the other hand, had reserved a right to dispense with conformity to the plans, and that was itself sufficient to negative the existence of mutuality among the feuars.⁵ The defenders the Misses Hofford were not even members of the Coates Crescent community. They belonged to Manor Place, and their title contained no reference at all to the pleasure-grounds. The plan referred to in their title

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escence? (3) have the superiors (whose title is not disputed) so barred themselves? (4) has the acquiescence by the defenders been such as in any view to bar enforcement of the condition that the premises shall be used 'as a dwelling-house only'?

"The first of these questions, in the view I take, is not perhaps necessary to the decision of the dispute. For if the superiors have a title and are not barred, the title of the co-feuars is, as regards the actual controversy, immaterial. But the action being a declarator to determine generally the rights of parties, and it being always possible that the superiors and co-feuars may not always, as now, act in concert, I do not see how I can avoid deciding whether, as against the co-feuars, the pursuer is or is not entitled to the declarator which he asks. Now in this view the question raised is, I think, both important and difficult. It stands, I think, thus. There is no doubt that the restriction in controversy is common to all the feus in Coates Crescent,—at least to all the feus held of the Walker Trustees. But the question is, whether there is sufficient evidence deducible from the titles of parties, and in particular from the titles of the pursuer, that the restrictions in controversy were imposed, and accepted as being imposed, for the benefit, not merely of the superiors, but of the body of feuars. That is, I think, according to the judgment in *MacRitchie's Trustees v. Hislop*, 7 R. 384, the point to be settled.

"Now, it is certain that there are not here present either of the *indicia* which are instanced by Lord Watson in that case as sufficient for the purpose. The feuars, including the pursuer, do not each of them stipulate with the superiors that the conditions to which they submit shall be imposed upon them all. Neither is this a case where the titles of all the feuars have a common origin, as, *e.g.*, where the entire subject has been feued off to a building company, who are bound to insert in their subfeus or dispositions identical conditions. The case therefore is not within the category of *M'Gibbon v. Rankin*, 9 Macph. 423, on the one hand, or of *Robertson v. North British Railway Co.*, 1 R. 1213, on the other. But the question is,

¹ *Hislop v. MacRitchie's Trustees*, Dec. 17, 1879, 7 R. 384, revd. June 23, 1881, 8 R. (H. L.) 95.

² *North British Railway Co. v. Moore*, July 1, 1891, 18 R. 1021.

³ *M'Gibbon v. Rankin*, Jan. 19, 1871, 9 Macph. 423, 43 Scot. Jur. 205.

⁴ *Robertson v. North British Railway Co.*, July 18, 1874, 1 R. 1213.

⁵ *Turner v. Hamilton*, Feb. 21, 1890, 17 R. 494.

No. 187. was the plan of Manor Place, not of Coates Crescent. Besides, to have the effect contended for by the defenders, a plan must be made part of the contract. It was not enough merely to exhibit it. Here a plan was not referred to in any of the titles to found a stipulation or agreement. In any view, the defenders were barred by acquiescence. The pursuer's property had for years been occupied otherwise than as a dwelling-house, and the defenders had stood by and not interfered. The use of the subjects as writing chambers was just as clear a departure from the restriction as use as a shop. But the use as a shop had also gone on for many years with nothing more than a protest from some of the feuars. Whether the acquiescence amounted to abandonment was a jury question.¹ The author of the *Misses Hofford* had herself made purchases in the shop. There could be no stronger case of acquiescence than that.² The superior, moreover, had done nothing even in the way of protest, and had therefore released the pursuer, if not the other feuars, from the restriction.³ The deviations from the original design of the buildings was very marked, and the superior could not now intervene.⁴

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after all, as to the sufficiency of evidence—evidence no doubt to be gathered by reasonable implication from the terms of the titles—but still a question of evidence. And what I have here to consider really is, whether, to put the point as put by the Lord Chancellor in *MacRitchie's* case, there is not here, in the pursuer's title as in the other titles, such a 'reference to a common plan or scheme of building,' as reasonably implies that each feuar consented to be bound not merely to his superiors, but to his co-feuars.

"Now although the point is narrow and difficult, and I am far from confident that I am right in the view which I have come to take, I am disposed to be of opinion that there is in the pursuer's feu-contract, as well as in those of the defenders', a sufficient reference to a common plan and scheme of building, a reference, that is to say, sufficient to afford the necessary evidence of consent to a mutual servitude. The feuars are not, it is true, taken bound in terms to conform to a common plan or scheme of building. But the clause of restriction which is in question, and which as I have said is common to all the feus, starts in each case with a reference to 'the plan and elevation adopted for Coates Crescent and Manor Place'; and sets out as the reason for the restriction that the tenement (or dwelling-house) built on the area feued has 'been erected in strict conformity' with that plan and elevation. Moreover each feu-contract contains provisions with respect, *e.g.*, to pleasure-ground, sewers, &c., which seem plainly to point to a common scheme of residential building; and also other provisions as to the rights of the superiors over their unbuilt upon ground, which, by implication, seem to restrict the superiors from making or consenting to any change with respect to their ground (like Coates Crescent) already built upon. Altogether the inference is, I think, legitimate and fairly strong that as to elevation and external structure, the restrictions in question were imposed and accepted as for the common benefit; and, if that be once assumed, it is not I think specially difficult to extend the inference to the conditions as to use and occupation, which are introduced in the same clause, and as ancillary (which they fairly are) to the other conditions.

"On the whole, therefore, I am of opinion that the co-feuars have a title to

¹ *Glover v. Coleman*, 1874, L. R., 10 C. P. 108.

² *Sayers v. Collyer*, 1884, L. R., 28 Ch. Div. 103, at 107.

³ *German v. Chapman*, 1877, L. R., 7 Ch. Div. 271.

⁴ *Campbell v. Clydesdale Banking Co.*, June 19, 1868, 6 Macph. 943, 40 Scot. Jur. 539; *Fraser v. Downie*, June 22, 1877, 4 R. 942.

Argued for the defenders ;—The title of the superior to enforce the restrictions arose *ex contractu*, and it was not necessary for him to qualify a direct patrimonial interest.¹ The feuars also had a right to enforce them. Building restrictions were presumably inserted for the benefit of the co-feuars. Here the feuars had contracted with reference to, and in reliance on, a common plan or scheme of building. That was sufficient to infer mutuality.² The right to vary the plan reserved to the superior was of a very restricted nature, and really made for the defenders, for once a dwelling-house was up the superior's right to alter ceased. Then, again, mutuality, both of obligation and of right, was apparent throughout the titles, *e.g.*, the burden of maintaining the sewers, and the right to the pleasure-grounds. The corner tenement was really within the Coates Crescent community. There had been no acquiescence on the part either of the superior or of the feuars. There had been nothing of the nature of *rei interventus*,³ and no agreement had been entered into. The deviations founded on by the pursuer were not material, and could not be held to infer total abandonment of the restrictions.⁴ The use as writing chambers was

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object to the pursuer's operations, and to resist his obtaining decree in terms of the summons.

"The second and third questions, which turn on the effect of alleged acquiescence, may be taken together ; and the acquiescence is said to consist (1) in permitting without objection the erection—contrary to the terms of the titles—of what are called storm windows, in the roofs of certain of the houses in Coates Crescent ; (2) in permitting the use and occupation of what is now the pursuer's house for thirteen years as writing chambers, and for twelve years as millinery showrooms.

"With respect to the storm windows, my view may be stated shortly. One of course recognises the doctrine of the cases of *Campbell v. Clydesdale Bank*, 6 Macph. 943, and *Fraser v. Downie*, 4 R. 942. That doctrine is, that wherever in a feuing area some building restriction imposed for the general benefit has been generally contravened, and the contravention is past challenge, the restriction so placed in abeyance can no longer be enforced in individual cases either by the superior or co-feuars. But it has never, so far as I know, been held that because one building restriction has, by common consent, been abandoned, that involves an abandonment of all building restrictions, and in particular of other and different restrictions, which are, or may be, of much greater importance. Indeed, the contrary has been decided more than once—*Stewart v. Bunten*, 5 R. 1108. Accordingly, while it may be that the pursuer, if he owned the roof of this tenement, could, if he chose, throw out storm windows like his neighbours, I cannot hold that acquiescence in a contravention of that sort by some of the neighbours bars the defenders, or any of them, from now objecting to a contravention of a quite different kind, viz., the conversion of the pursuer's dwelling-house into a shop or warehouse.

"With respect again to the use and occupation of the pursuer's own premises,—which occupation is said to have been permitted for twelve years—there appear to be several difficulties in the pursuer's way. In the first

¹ Magistrates of Edinburgh v. Macfarlane, Dec. 2, 1857, 20 D. 156, 30 Scot. Jur. 86 ; Earl of Zetland v. Hislop, June 12, 1882, 9 R. (H. L.) 40, at 47.

² Hislop v. MacRitchie's Trustees, Dec. 17, 1879, 7 R. 384, revd. June 23, 1881, 8 R. (H. L.) 95.

³ Muirhead v. Glasgow Highland Society, Jan. 15, 1864, 2 Macph. 420, 36 Scot. Jur. 201.

⁴ Stewart v. Bunten, July 20, 1878, 5 R. 1108.

No. 187. of a wholly different character from use as a shop, and had not necessitated structural alterations of any sort. The use as a shop had been vigorously objected to, and the rights of the feuars safeguarded by the letter of 16th March 1885.

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At advising,—

LORD ADAM.—The pursuer is proprietor of the house No. 22 Coates Crescent. The original feu-charter granted by Miss Walker of Coates in favour of his predecessor in title, George John Murray, which is dated in May 1859, contains a clause in the following terms :—“It is hereby expressly provided and declared, that as the tenement built on the said area has been erected in strict conformity to the plan and elevation adopted for Coates Crescent and Manor Place, and the plan and elevation of said tenement now subscribed by me and the said George John Murray as relative hereto, with balconies and iron railings on both fronts thereof, conform to the pattern adopted for said crescent and place, it shall not be in the power of the said George John Murray or his foresaids to convert the said dwelling-house

place, it is difficult to see how acquiescence—mere acquiescence—can ever go further than to bar challenge of the thing acquiesced in. It may be true that structures erected, or structural alterations made in breach of building restrictions, in the knowledge of, and without objection by, those having right to object, cannot after completion be pulled down. But the mere use of a dwelling-house in a manner contrary to the title, however long permitted in the past, cannot, as it seems to me, have any efficacy as to the future.—See *Carron Co. v. Henderson's Trustees*, 23 R. 1042. In the next place, even if this were otherwise, it does not seem reasonable that acquiescence in the use of a dwelling-house, say for writing chambers, or even for millinery showrooms—should be held to imply consent to the use of the premises say for a butcher's shop or even for a coachbuilder's saloon or wareroom. The difference is considerable, and is marked, if by nothing else, by the avowed necessity in the present case of extensive—although internal—structural alterations. Finally, and in the third place, it has to be considered whether, at least as between the pursuer and the co-feuars, it is not conclusive that when Mr Aitken, the pursuer's author, began to use this house as a millinery establishment, the proprietors in the Crescent intervened and obtained from Mr Aitken the letter of 16th March 1885, No. 11 of process. I confess I do not well see how in the face of that letter, and the correspondence which then passed, the pursuer can plead acquiescence in his author's contravention. It may be that as between Mr Aitken and the superiors there was no contract. It may even be—though I do not think so—that as between him and the co-feuars the letter was not so accepted as to form a concluded contract. But the fact remains that Mr Aitken's use of the premises was not acquiesced in, but objected to ; and that in order to prevent proceedings he wrote and delivered to a committee, who in fact represented both the superiors and the body of feuars, a letter by which he undertook that if he was not disturbed he would not afterwards found on the committee's inaction. I do not, as I have said, see how in these circumstances Mr Aitken's possession can affect the case ; and with regard to the possession of Messrs Dalgleish & Bell who occupied the house as writing chambers, I think it was hardly contended that their use of the premises for that purpose could support the pursuer's leading and main conclusions.

“This however brings one to consider the last question in the case, that viz., raised by the pursuer's alternative conclusion to the effect that he is at least not bound in future to use the house ‘as a dwelling-house only.’ His

and others hereby disposed into a shop or shops or warerooms for the sale of goods or merchandise of any description, but that they shall be bound to use the same as a dwelling-house only."

The pursuer has brought the present action to have it found and declared that notwithstanding the terms of the foresaid charter he is not bound to use the same as a dwelling-house only, and is entitled to possess or occupy the same as a shop or wareroom, or to convert the same into a shop or ware-room, and to occupy them as such; and farther, that it should be found and declared that the foresaid restrictions have been departed from, and that the defenders have no right or title to enforce the same.

The parties called as defenders are the superiors, the Walker Trustees, and certain adjoining proprietors, of whom the Misses Hofford are proprietors of an upper flat of the same tenement of which the pursuer's house forms the street and ground flats, and the Misses Cook, the proprietors of the adjoining house in Coates Crescent.

It was not maintained to us that the restrictions in question were in themselves illegal and incapable of being enforced, but it was maintained that the superiors had lost their right to enforce them in consequence of certain proceedings which I shall afterwards have to consider.

As regards the adjoining proprietors, it was maintained that they never had any title to enforce these restrictions, and that if they had had, they also had now lost the right. As regards the matter of title, therefore, the position of the superiors and that of the other defenders is different. That of the superiors depends upon contract, and it is not disputed that they had a title to enforce the restrictions, that of the other defenders on other considerations; and it appears to me that the first question which arises for decision is, whether these other defenders had also a title to enforce these restrictions.

I have already set forth the restrictions or prohibitions in question contained in the pursuer's titles, and I need not repeat them. It is made matter of admission that the titles of the pursuer, of the Misses Cook, and of the other proprietors in Coates Crescent, of their respective properties

relative plea is that he is in any view entitled to use it 'as an office,' and that plea is of course founded on the occupation of Messrs Dalgleish & Bell. Now I think this question must be considered as if it had arisen in 1885, when Messrs Dalgleish & Bell removed; and for a reason already stated, my view is that nothing had occurred in the time of Messrs Dalgleish & Bell to prejudice the rights either of the superiors or the co-tenants. There had been no structural alteration. There had been no agreement. Nothing had been done which could not be undone. There had been simply non-interference during Dalgleish & Bell's time; and when they removed matters were exactly *in statu quo ante*. Whether Dalgleish & Bell's occupation could have been successfully challenged, except at first, need not be considered. I incline to think that it was throughout precarious, except in so far as it might have been held that their occupation was in substance a residential occupation. But however that may be, I am unable to affirm that in respect of their occupation the pursuer is entitled to a declarator which would abridge the effect of the restriction in the title, whatever upon its just construction that effect may be.

"On the whole, therefore, I am of opinion that the defenders must be absolved generally from the conclusions of the summons, with expenses."

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therein, contain clauses of prohibition against the use thereof otherwise than as dwelling-houses only, and against making any deviation and alteration upon the plan and elevation adopted for Coates Crescent, and pattern balconies and iron railings in front of such subjects, in terms substantially identical.

It is farther admitted that all such titles also contain provisions relative to the pleasure-ground in Coates Crescent, and to the formation and maintenance of the sewers, inferring community of interest and obligation among the feuars with regard thereto.

At the date of the original feu-charter granted to the pursuer's predecessor houses had been built on the whole of the areas in Coates Crescent, and the charter shews that they, including the pursuer's house, had been built in strict conformity with the plan and elevation which had been adopted for the Crescent, and it is because such a common plan had been adopted that the feuar comes under the restrictions in question. Now, we learn from the case of *Hislop*,¹ that although the titles of the several feuars contain identical restrictions, that may not be of itself sufficient to infer mutuality of obligation, yet that if it appears that the restrictions are entered into for the benefit of the feus already existing, or to be created thereafter, the restrictions may be enforced by each co-feuar. In the case of *Hislop*¹ the Lord Chancellor stated that this mutuality of obligation can only be established by express stipulation in the respective contracts, or by reasonable implication from some reference in both contracts to a common plan or scheme of building. Now we have in this case what the Lord Chancellor desiderated in that case, viz., a reference to a common plan or scheme of building adopted by the whole feuars. Farther, it appears that the titles of all the feuars contain a clause declaring that the superiors shall have power to vary or alter any of the plans, and streets and lanes upon the ground belonging to them, and not built upon at the time of granting the respective feu-rights thereof. The inference is that the superiors had not power to vary or alter the plans, &c., on the ground built on. At the date of the pursuer's charter the whole of the areas known as Coates Gardens and Manor Place were built upon. The superiors therefore could not vary or alter, or consent to the variation or alteration of the common feuing-plan of Coates Gardens and Manor Place. This seems sufficient to shew that the common feuing-plan was not adopted in the interest of the superiors alone, but of all the feuars, thereby indicating common right and interest. It appears to me that we have in this case sufficient to imply common interest, and common obligation, on the part of all the feuars, and that therefore the defenders have a title to insist on the enforcement of the restrictions in question, unless the pursuer can shew that they have lost that right.

The grounds on which the pursuer maintains that the defenders have done so (and in this matter I do not think that there is any distinction between the case of the superiors and of the other defenders) are that the restrictions have been departed from by the consent or acquiescence of all parties having interest to enforce them, in respect that they have consented to or permitted material deviations from and alterations upon the general

¹ Dec. 17, 1879, 7 R. 384, revd. June 23, 1881, 8 R. (H. L.) 95.

plan and elevation, and have consented to or permitted a use and occupation of the pursuer's premises inconsistent with the restrictions. No. 187.

The material alterations founded on by the pursuer are that dormer windows have been added to the roof of the tenement of which the pursuer's house forms part, and to the roofs of eleven other houses in Coates Crescent, and that complete storeys have been added to the front elevations of three other houses, one wholly of stone and the other two chiefly of timber. July 10, 1897.
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The question would seem to be whether these deviations from the building restrictions amount to a total abandonment of them.

I agree with the Lord Ordinary that the consent to the abandonment of certain building restrictions, implied from acquiescence, does not imply consent to the abandonment of all building restrictions which may be imposed upon the feuars. I think that, as stated in *Stewart v. Buntin*,¹ the true principle is that the consent implied in acquiescence goes no farther than the things acquiesced in or things *ejusdem generis*, and that it is only when the acquiescence shews a virtual departure from the whole servitude that it will receive such effect. The alterations consented to, or at least permitted, in this case, are entirely consistent with the use and occupation of the premises as dwelling-houses only, which was certainly one of the principal reasons for introducing the restrictions, whereas the alterations proposed by the pursuer would convert his house into a shop or warehouse, which, as the Lord Ordinary says, is a contravention of quite a different kind, and one which is specially prohibited.

I am accordingly of opinion that the alterations already made on the buildings do not imply an abandonment of the whole building restrictions, and do not entitle the pursuer to make the alterations proposed by him.

With reference to the use and occupation of the pursuer's premises, which are alleged to have been in contravention of the restrictions in question, the facts founded on are that the pursuer's predecessors, Messrs Dalgleish & Bell, W.S., used and occupied them as writing-chambers from 1871 to 1884, and that from 1884 until the pursuer purchased them in 1896, the pursuer's predecessor, Mr Aitken, used and occupied them as a shop.

With reference to the occupation of them by Messrs Dalgleish & Bell as writing-chambers, no objection was made to it by either the superior or the feuars. On the other hand, Messrs Dalgleish & Bell made no change on the house externally or internally, except that upon the front door, which was kept shut, they placed a brass plate with "Messrs Dalgleish & Bell, W.S." engraved on it.

It appears to me that their occupation of the premises in this way must be ascribed to tolerance merely.

It does not follow that because the superior and feuars allowed Messrs Dalgleish & Bell so to occupy the premises they were bound to allow any or everybody else so to do. Still less do I think that it is to be inferred, from their non-interference with such a harmless and unnoticeable occupation as this, that they must be held to have consented to the conversion of the premises into a shop or warehouse, or their use as such.

¹ 5 R. 1108.

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With reference to the occupation of the premises by Mr Aitken as a shop, the alterations made by him as affecting the appearance of the premises are set forth in the joint minute of admissions. He certainly made it perfectly plain that he was using them as a shop for the sale of millinery, but he made no change on the external or internal structure of the building.

Several of the proprietors of Coates Crescent, among whom were the defenders the Misses Cook, with the consent and approval of the superiors, objected at once to this use of the premises.

A correspondence thereupon ensued between the parties, which it is not necessary to consider in detail. It resulted in a letter, of date 16th March 1885, addressed by Mr Aitken to a committee representing proprietors of houses in Coates Crescent, which concluded in these terms, and which was communicated to the superiors,—“It will be quite open to any of the proprietors to adopt whatever proceedings they may be advised to take to have their legal rights determined without my pleading that their being at present passive be construed into consent or approval,” and it is admitted that in respect of this correspondence no legal proceedings were then taken.

It is perfectly clear that so far from Mr Aitken's use and occupation of the premises as a shop being acquiesced in by the defenders, such use of the premises was objected to and protested against all along. I do not see how implied consent can be inferred in the face of express objection.

The case would have been different if the defenders had stood by and allowed Mr Aitken to incur considerable expense in the conversion of his premises into a shop. In that case I think it is clear that they would have been barred from objecting to his occupying it as a shop, and if the pursuer had purchased the premises as converted, I think he would have been entitled to use them as such. But we have no such case here. Mr Aitken incurred no such expense with the knowledge of the defenders, and the pursuer was informed before he purchased that any use of the premises for trade purposes would be objected to.

I think the interlocutor of the Lord Ordinary should be adhered to.

LORD M'LAREN.—I concur in the opinion of Lord Adam, and have little to add. It does not admit of doubt that the superior is entitled to enforce building conditions which he or his authors caused to be inserted in the feu-rights, unless he has debarred himself from enforcing these conditions by acquiescing in alterations of the character described in the summons, or unless he has expressly authorised the particular thing. If the parties were willing to limit the discussion to this question, I should have no difficulty in affirming that it was impossible for the pursuer to obtain decree of declarator in the face of the superior's objections. I shall say nothing on the question of acquiescence or implied abandonment of the building conditions, because I agree with all that Lord Adam has said. The principle to be applied in such questions is, that where alterations or variations of the conditions of the feu-right have been permitted, the presumption is not for abandonment, but only for relaxation of the conditions of feu, according to the nature of the variations which the feuars have presumably consented to.

But then the co-feuars, who are defenders, are not satisfied that their rights would be sufficiently protected by a decree of absolvitor in favour of the superior for all interested. They desire also to have this declarator negatived at their instance, standing on their own rights under their title-deeds. Now, the condition of the right of a co-feuar to enforce a building condition is, according to the highest authority, that he has either obtained from the superior an express authority to enforce the conditions contained in the feu-rights of his neighbours, or that there is such a reference to a common system of conditions in the titles of each of the feuars as makes it clear that these conditions were inserted for their common benefit, and not merely for the protection of the superior's rights. The clearest case of such a right accruing to feuars by implication is the case where the superior in each feu-right, or in the case of any particular feu-right, agrees that he shall insert like conditions in all feus hereafter to be granted, because his doing so amounts to a plain declaration that every vassal is to have a right to enforce the common plan or system of conditions. The feuar stands creditor in the obligation to insert such conditions in the feu-rights of his neighbours in order that he may enforce them. There could be no reason for putting the superior under such an obligation, unless the vassal was to enforce the conditions agreed to be inserted. But then this is not so strong a case. Still, where a feuar is taken bound to observe building conditions, described as elements of a common building plan which the superior intends to make binding on all the feuars within an area described, this, I consider, is equivalent to a grant to the feuar of a right to enforce the conditions. Obligatory language is not absolutely necessary to give an interest to the feuar, and it may fairly be deduced from the words used in these feu-contracts that what the feuar is bound to is, not the observance of a certain elevation or building plan for the security of the superior's feu-duty, but the preservation of a common building plan for the amenity of the street or place and the convenience of the feuars. According to the opinions delivered in the House of Lords in the case of *Hislop*,¹ the question is reduced to one of intention. Where it is made to appear as matter of intention, or agreement between the superior and the feuar, that the feuar shall have the right to enforce the conditions, this suffices for the decision of the question in the feuar's favour.

I agree with Lord Adam that, according to the intention of the parties and their authors, these building restrictions were imposed for the common benefit, and with the intention of giving a right to the individual feuar to insist on the fulfilment by others of the system of conditions.

The LORD PRESIDENT and LORD KINNAR concurred.

THE COURT adhered.

JAMIESON & DONALDSON, S.S.C.—W. & J. COOK, W.S.—Agents. •

No. 188. JOHN ROBERTSON & COMPANY, LIMITED, Pursuers (Respondents).—

C. J. Guthrie—Craigie.

ALEXANDER P. BIRD & COMPANY, Defendants (Appellants).—

Jameson—Cook.

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Process—Admission qualified by counter claim—Irrelevancy of counter claim.—Where a defender judicially admitted the pursuer's claim to a sum of money subject to an alleged counter claim, but failed to state any relevant ground for the alleged counter claim, *held* that the pursuer was entitled to found on the admission as unqualified.

X
1st Division.
Sheriff of
Glasgow.

JOHN ROBERTSON & COMPANY, LIMITED, were, as proprietors of John Street Mill, Bridgeton, Glasgow, entitled under the Glasgow Corporation Waterworks Amendment Act, 1866, and the Glasgow Corporation Waterworks Amendment Act, 1879, to a supply of water for trade purposes from the Glasgow Corporation at the rate of 230,000 gallons for each working day, the price to be paid therefor being at the rate of 5s. 6d. per 100,000 gallons. Under the same statutes they were also entitled to a further supply of 30,000 gallons per working day, upon the same conditions, in respect of their Newhall Factory, Bridgeton, Glasgow, adjoining John Street Mill.

The firm sold part of the John Street Mill to Alexander P. Bird & Company, with entry at 15th February 1892. The total area of John Street Mill was 23,800 square yards, while the area of the part sold was 12,840 square yards. The proportion of the water supply effeiring to the part sold was 124,084 gallons. From the date of Bird & Company's entry down to 16th February 1894 they drew this quantity from the pipes connected with the mill through a water meter belonging to the Corporation at the entrance to their works. Robertson & Company paid the Corporation for this supply as part of the 230,000.

Robertson & Company raised an action in the Sheriff Court at Glasgow against Bird & Company for the water supplied down to 16th February 1894 at the rate of 15s. per 100,000 gallons, the market price, on the assumption that Bird & Company had no statutory right to the water. The Sheriff dismissed this action on the ground that Bird & Company had a right to a share of the statutory water supply proportional to the ground acquired by them, but reserved to the pursuers their right to payment from the defenders at the rate of 5s. 6d.

Robertson & Company then raised the present action in the Sheriff Court against Bird & Company for payment of £203, as the amount paid by them to the Corporation for the water supplied to the defenders at the 5s. 6d. rate, with interest.

The defenders, in their answers to the condescendence, stated "that the subjects sold by the pursuers had right to a proportion of the water supply in question, which right passed with the sale of the subjects to the defenders," and that under conveyance to them "the water rights attaching to the John Street Mill under the said statutes and under the titles passed as parts and pertinents with the said mill to the defenders." The defenders admitted their liability for the water supply for the two years, and for meter rent and interest, amounting in all to £190, 11s., but added to this admission,—“From this sum the defenders claim to deduct the sum of £150, with corresponding interest, being sums disbursed by defenders and damages sustained by them through the pursuers' breach of contract in refusing to share the

water supply and in relinquishing part of same, as set forth in the No. 188. defenders' statement of facts, to which reference is hereby made."

The defenders stated;—(Stat. 3) "On 21st October 1892 the pursuers, in breach of contract, without the knowledge of the defenders, ^{July 10, 1897.} Robertson & Co. v. Bird & and without any warrant or authority, relinquished 130,000 gallons of Co.

the daily water supply . . . That left 130,000 gallons per day to divide among the proprietors of the John Street Mill, including Mr Strang [who was entitled to 56,040 gallons] and the defenders. The pursuers were, therefore, no longer able to give to the defenders the said quantity of 124,084 gallons per day. . . ." (Stat. 4) "The defenders were unable to carry on their work without a daily water supply, and they were compelled to apply to the Corporation for a supply. A long negotiation followed. The Corporation insisted upon a payment of £100 by the defenders as a condition of their giving to the defenders a direct supply. A minute of agreement was executed on 15th February 1894 embodying the agreement arrived at, which is produced. The defenders were also obliged to pay the legal expenses of the Corporation and of their own agents connected with the negotiation and minute of agreement. They estimate their outlay and damages in consequence of the pursuers' said breach of contract (including the said sum of £100) as £150, with corresponding interest, which they claim to set off against the pursuers' claim in this action."

The defenders pleaded;—(2) The defenders having suffered outlay and damage through the breach of contract of the pursuers, as condescended on, are entitled to set off the said outlay and damage in this action against the pursuers' claim.

On 27th March 1896, the Sheriff-substitute (Spens) decerned against the defenders *ad interim* for the sum of £190, 11s., with interest, as craved, on the ground that the pursuers' claim was rendered liquid to that amount by the defenders' admission, and that the defenders' counter claim being illiquid could not be set off against it.

On appeal, the Sheriff (Berry) adhered.

The defenders appealed to the First Division, and argued;—The defenders' admission must be taken subject to the counter claim, which they relevantly averred, and they were entitled to proof of that counter claim in the present action.¹

Argued for the pursuers;—The defenders had failed to state any relevant counter claim. Their admission was therefore unqualified, and the pursuers were accordingly entitled to decree.

At advising,—

LORD PRESIDENT.—The Sheriffs have rejected the counter claim of the defenders as being illiquid. It seems to me that a more satisfactory ground for the decision is that the claim is irrelevant.

The statements of the defenders do not seem to me to set forth any breach of contract on the part of the pursuers, or any loss caused by them. On the shewing of the defenders it would appear that they were entitled to demand from the Corporation, without any payment, the supply which they have now obtained. Their right to that supply seems to depend on the

¹ Taylor v. Forbes, Dec. 2, 1830, 9 S. 113; Scottish North-Eastern Railway Co. v. Napier, March 10, 1859, 21 D. 700, 31 Scot. Jur. 350; Johnston v. Robertson, March 1, 1861, 23 D. 646, 33 Scot. Jur. 335; Sawers v. McConnell, Jan. 22, 1874, 1 R. 392; Macbride v. Hamilton & Son, June 11, 1875, 2 R. 775; Gibson & Stewart v. Brown & Co., Jan. 13, 1876, 3 R. 328.

No. 188. fact of their proprietorship of the subjects occupied by them. From their statements it seems that the Corporation had no right to the £100, and on that footing it seems impossible to say that the defenders' payment of that sum can found any claim against the pursuers.

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We were informed that the question about £13 no longer requires decision. That being so, I think that we ought to replace the Sheriff's interim decree for £190, 11s., with a final decree for the same sum.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR.—I think the Sheriff's judgment is substantially right, but I am not prepared to assent without qualification to all the reasons he has given for it. The Sheriff holds that the pursuers' claim is liquid, and that the counter claim of the defenders for damages for an alleged breach of contract, not being liquid, cannot be pleaded as a set-off, but must be established in a separate action. I think it clear that the pursuers' claim is not liquid unless it can be held to be liquidated by the admissions of the defenders, and it cannot be so held if the defenders' averments in support of their counter case are relevant. To render a claim liquid it is necessary that it should be constituted, and that its exact amount should be fixed either by an obligatory writing or by the judgment of a competent Court.

The pursuers produce no such writing, and if their claim were denied it would be necessary for them to prove the facts out of which it arises, and the precise amount of the sums which they allege to be due. The question therefore is whether they are dispensed from that necessity by the defenders' admissions. Now, the defenders admit their liability for the sum of £190, 11s. for which the Sheriff has given decree against them, but the admission is made under the qualification that they are entitled to deduct from the amount decreed for a sum of £150, as the amount disbursed by them, and damages which they have sustained through the pursuers' breach of contract.

Now, it is well settled that where an admission is made under a qualification the party founding upon it must take it as it stands, and that he cannot adduce the part of his opponents' statements which is favourable to him and exclude the remainder. If therefore the allegations of fact upon which the defenders' counter claim is based were relevant, there would be no admission upon the record as it stands which could dispense the pursuer from proving his case. But, on the other hand, it would be open to him to disprove the qualification, and when that had been done, to found upon the admission as conclusive. This has been frequently decided, and I have no doubt that on the same principle the qualification may be displaced by shewing that, assuming the facts to be as stated, they afford no good answer to the claim. The question, therefore, appears to me to be, not whether the defenders can set off a claim of damages against a liquid claim, but whether the averments by which their admission is qualified are relevant to support a claim against the pursuers. I am of opinion that they are not relevant.

Their case is that they have suffered damage by the pursuers' breach of contract in relinquishing a part of the water supply which had originally belonged to the entire property of the pursuers before the defenders had

acquired a portion of it. But, according to their own case as set forth in their averments, their right to a portion of this water supply did not depend upon any personal contract by which the pursuers were bound to communicate, and which it was possible for the pursuers to perform or to violate, but was a right attached to the property which the defenders had acquired, so that after their title to the property was completed it was no longer in the power of the pursuers to give or withhold the water supply. No. 188.

July 10, 1897.
Robertson &
Co. v. Bird &
Co.

Their averment in answer to the third article of the condescendence is "that the subjects sold by the pursuers to the defenders had right to a proportion of the water supply in question, which right passed with the sale of the subjects to the defenders." Again, in answer to the fifth article, they say,—"Under the agreement between the parties, and the conveyance following thereon, the waterrights attaching to the John Street Mill under the said statutes and under the titles passed as parts and pertinents with the said mill to the defenders." And they go on to say that this had been held in an action in the Sheriff Court to which the pursuers and defenders were parties. Their case, therefore is, that a certain water right had passed to them with the disposition of their property. They go on to say that the pursuers, having relinquished to the Corporation 130,000 gallons per day of the water supply appropriated to their original property, were not able to give to the defenders the 124,084 gallons which was the proportion appropriated to the subjects which they had purchased; that, accordingly, the defenders were compelled to apply to the Corporation for a direct supply, and the Corporation insisted upon a payment of £100 as a condition for giving it. This is the most material item of damages which they allege that they have suffered in consequence of the pursuers' breach of contract. But it appears to me to be plain, upon their own shewing, that the demand of the Corporation, whether it was well founded or not, did not arise out of any breach of contract on the part of the pursuers, and that the latter are in no way answerable for the demand or its consequences.

The defenders' case is that they had acquired right to this water supply as a part and pertinent of their property, and that this right was carried along with the property by the disposition in their favour. If that be so, the pursuers had done all that they could be required to do, and all that it was possible for them to do in order to communicate the right, by granting the disposition. I do not think it necessary to inquire whether the Corporation had any right or title to insist upon a payment of £100. If the defenders had a complete right to the water already, which is their own averment, it is obvious that the Corporation could have no such claim, and in that case the payment was unnecessary, and the defenders who choose to make it without any obligation to do so can have no claim to recover it from their authors.

On the other hand, if it was a quality of the right which they acquired, that before it could be made effectual they should pay a fine to the Corporation, the pursuers had given them all to which they were entitled when they conveyed the property, and along with it the right so qualified. There is no averment of any contract with the pursuers to relieve their purchasers of any claim at the instance of the Corporation. I am therefore of opinion that the defenders have stated no relevant case to found their claim of damages against the pursuers, and that their admission of liability for the

No. 190. The pursuer averred that this pasture was not included in the lease of the farm.

July 13, 1897.
Gregson v.
Alsop.

By the lease in question, which was dated in 1888, the pursuer let to James Alsop that portion of the farm of Mains of Afforsk, which belonged to the estate of Tilliefour, "all as some time occupied by James Brown." The lease further provided :—"Farther, the proprietor undertakes to put the dwelling-house, office-houses, and the ring fence into a proper state of repair, but he shall not be bound to fence the rough pasture land lying towards the Millstone Hill, which has no boundary fence, but which the tenant may fence at his own cost."

The material results of the proof were as follows :—James Brown, who preceded the defender James Alsop as tenant of the farm had not possessed the rough pasture in dispute. This pasture lay immediately beyond the fence which the pursuer was erecting, and towards Millstone Hill. There was also some rough pasture immediately within the fence. The farm had been advertised to let in October 1888, the advertisement stating that a Mr Rule (who acted as factor for the property) would point out the boundaries. The defender deponed that before offering for the farm he had applied to Mr Rule (who had since died) to point out the boundaries of the farm, and that Mr Rule had pointed out the rough pasture in dispute as belonging to the farm. The defender's evidence received some corroboration from that of other witnesses. Since his entry the defender had grazed his cattle on the disputed ground.

On 17th February 1897 the Sheriff-substitute (Robertson) pronounced this interlocutor :—"Finds (1) that defender James Alsop is tenant under pursuer of the farm of Mains of Afforsk under lease, No. 12 of process ; (2) that on 30th July 1896 pursuer caused workmen to commence to erect a fence along what he considered part of the west boundary of said farm ; (3) that defender John Alsop, who is a son of the other defender, and manager for him on said farm, interfered with the workmen so erecting the fence, and threatened to throw it down, and thereafter, about 10th August, the pursuer's workmen having persisted in erecting the fence, actually did interfere with, and throw down, or cut through part of said fence or gate therein ; (4) that said fence was not upon the boundary of the farm, but was erected upon land included in the let to defender, and if it remained would have interfered with the access of defender's cattle to pasture included in the let to him : Finds in law that, in above circumstances, pursuer was not entitled to erect the said fence against the wish of defender, and is not entitled now to interdict the defenders from interfering with it : Therefore refuses the interdict craved, assoilzies the defender from the conclusions of the action, and decerns ; finds defender entitled to expenses," &c.*

* "NOTE.— . . . The facts I think are pretty clear. James Alsop became tenant of the farm at Martinmas 1888. The farm had been advertised as containing a certain number of acres, and that the boundaries would be pointed out by the then land-steward, Mr Rule. Mr Rule did point out the boundaries to defender, and I take it as proved that the boundary he pointed out included the pasture in question ; the defender says so, and he appeared to be quite a reliable witness, and he is corroborated by the witnesses Fraser and also Watt, who speaks to what Rule said to him just after defender had taken the farm, while, as against this evidence, there is upon this point really nothing. We may take it, therefore, as proved that

On appeal the Sheriff (Crawford), on 22d March, affirmed the No. 190. Sheriff-substitute's interlocutor.

The pursuer appealed, and argued ;—The measure of the defender's right was the occupation of the preceding tenant, and it was proved that the preceding tenant had not occupied the pasture in dispute. The plain terms of the lease could not be controlled by extrinsic evidence of communings between the parties prior to its date.¹ There was no repugnancy between the letting and the fencing clause, as the latter clause might reasonably refer to the rough pasture which was admittedly within the boundaries of the farm.

July 18, 1897.
Gregson v.
Alsop.

Argued for the defenders ;—Extrinsic evidence was competent for the purpose of identifying the subjects let, and the evidence adduced shewed that the lease included the ground in dispute. The reference in the lease to the occupation of the preceding tenant was not taxative, and the tenant was under no obligation to inquire into the extent of his predecessor's possession.² By the advertisement of the farm he had been referred to Mr Rule as the person who would point out the

Rule, whether rightly or wrongly, pointed out a boundary which includes the disputed portion as in the farm. We may further, I think, take it as clear that ever since defender entered the farm he has regularly pastured this now disputed ground. He and his son speak to it, and also other witnesses, and it is practically admitted in pursuer's letters, though of course the position taken up in the letters is that defender had been allowed to encroach over the pasture for a number of years.

"No doubt whatever was proved as to the boundaries pointed out, or subsequent possession, would be of no avail against clearly defined boundaries if stated in written lease between the parties ; the lease must, if clear and unambiguous, be conclusive as to what is let. The first question therefore that must be disposed of in the case is, whether the terms of the lease here are so unambiguous as to be conclusive. In my opinion they are not. It will be seen that the farm is said to be let 'all as some time occupied by James Brown,' who was the former tenant.

"But in a subsequent portion of the lease the following clause appears with reference to fencing :—'Further, the proprietor undertakes to put the ring fence into a proper state of repair, but he shall not be bound to fence the rough pasture land lying towards the Millstone Hill, which has no boundary fence, but which the tenant may fence at his own expense.'

"It appears, according to Brown's, or rather his son's, evidence, that he did not pasture the disputed ground. His march, he stated, was as contended for by pursuer, but it appears from Brown's lease, which is in process, that he occupied 'as lately possessed by George Milton.' Milton possessed under a lease granted to Charles Thom. Thom had desired to give up the farm, and Milton was accepted by the proprietor as instead of him, and he possessed under Thom's lease. Thom is examined as a witness, and states that he pastured this disputed ground, and considered he had the right to it under his lease.

"If there were nothing further therefore it would be a little difficult to say what Brown's rights were, or what 'as possessed by Brown' really meant. But when the subsequent clause I have quoted is taken into consideration, I do not think there can be much doubt of what really was let to defender. Various plans and sketches are produced, but to my mind no intelligible explanation of the phrase 'rough pasture lying towards the

¹ Carmichael v. Penny, June 26, 1874, 11 S. L. R. 634.

² Critchley v. Campbell, Feb. 1, 1884, 11 R. 475, *per* Lord President Inglis, p. 479-80 ; Duncan v. Scott, June 20, 1876, 3 R. (H. L.) 69.

No. 190. boundaries, and it was satisfactorily proved that Mr Rule pointed out the ground in dispute as part of the farm subsequently let to the defender. The farm having been taken on the faith of this representation, the landlord was barred from disputing its accuracy. Further, on the pursuer's construction of the lease there was a repugnancy between the letting and fencing clauses, for the reference in the fencing clause to the rough pasture lying towards Millstone Hill could not be reasonably explained as applying to any other ground than that in dispute. This difficulty could only be got over by holding that ground to be included in the lease.

July 13, 1897.
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At advising,—

LORD PRESIDENT.—The Sheriffs have pointed out that the question upon which the parties have joined issue is as to the boundaries of the land let to the defender James Alsop. The lease is a probative writing, and, in my opinion, it affords a definite and conclusive criterion of this dispute.

One naturally turns first to the description of the subjects let in the clause of actual lease, just as in a disposition the dispositive clause is the primary and authoritative place for ascertaining the subject of the grant. Well, this lease purports to let a certain part of a former and larger farm

Millstone Hill, which has no boundary fence,' is given, except that it is the pasture here in question, and if so, it must have been included in the let, otherwise the tenant could have no reason for fencing it. This view is, I think, also borne out by the letter and sketch produced, which defender says he got from Rule.

"I am disposed therefore to think that the lease is at least as favourable to defender's view as to pursuer's, and looking to the evidence I have already referred to as to the march actually pointed out by the man authorised to do it, and the subsequent possession, I am prepared to hold that defender has proved his case. With reference to the question of possession, I should probably have referred before to what is unquestionably, in my view, a very strong indication of how matters stood,—I mean as to the way in which Mr Alsop junior seems to have been dealing with and working at fences which, according to pursuer's contention, were not on the farm. Some of his statements as to these fences are not admitted, but in regard to one of the fences, viz, the one going from the south-west corner of field 763 in plan out to the old dyke, there is no doubt that he both erected this fence and knocked it down, surely indicating pretty clearly the state of possession as regards the ground on which the fence was.

"It is no doubt stated by the witness Troup, and also by Coull, what the recognised boundary of this farm was, and there is no reason to doubt their evidence. I think likely the mistake arose in consequence of the idea of there being a ring fence round the arable part of the farm, and the disputed part being outside of the ring fence.

"It is also the fact that an acreage is given in the advertisement which corresponds with the acreage of the farm as the boundaries are stated by the landlord. I am prepared to hold, however, that even if this advertisement can be relevantly adduced as evidence when followed by a written lease, which is at least doubtful, the acreage in it is not taxative of the actual farm let to defenders (Rankine, Landownership, pp. 96, 97). In the present case the words of the lease, the boundaries which have been proved to have been pointed out, and the state of possession, constitute a more reliable guide than the acreage advertised.

"I therefore hold that the land upon which this fence was being put up was included in the farm as let to defender, and that pursuer is not entitled to interdict defender from interfering with it."

called Mains of Afforsk, and then states certain boundaries of the subjects No. 190. let, none of which touch the part of the farm which we are concerned with, or afford any help in the solution of the present question. But July 13, 1897. *Gregson v. Alsop.* then the lease adds the words,—“all as some time occupied by James Brown.”

Now, in my opinion, this description prescribes a standard and criterion of the boundaries of the farm, which can only be got over by some clear and unequivocal addition or subtraction contained within the lease itself, or by some independent or subsequent grant. On the face of the clause which I have quoted, the tenant has right to what James Brown occupied, and to no more. Anything that passed before the lease was executed is superseded by this contractually accepted standard of boundaries—the possession by James Brown. Accordingly, I hold that, even supposing that the ground officer had said, in shewing the tenant over the farm, that the boundary was here, or was there, this does not avail, as the parties afterwards set down in writing that the farm is let (not as pointed out by the ground officer but) as occupied by James Brown. Of course if it had been proved that the person authorised to shew the farm had said that James Brown occupied up to a certain point, another question might arise, viz., whether the landlord was not barred from questioning the truth of this statement. But nothing of that kind occurs in this case. And I am unable to admit into consideration the various circumstances to which both Sheriffs give weight as entering into competition with the criterion set up by the lease, viz., what was in fact occupied by James Brown.

Now, the peculiarity of the case is, that on this question of fact there is no dispute whatever. James Brown did not occupy the ground now claimed by the tenant.

The only remaining question would therefore seem to be, does any other clause in the lease extend the area of possession, and the defenders point to the fencing clause. The proprietor undertakes to put “the ring fence into a proper state of repair, but he shall not be bound to fence the rough pasture land lying towards the Millstone Hill, which has no boundary fence, but which the tenant may fence at his own cost.” The defenders' argument is that the rough pasture land here referred to is the ground in dispute, and that the clause implies that it is part of the farm.

Now, a fencing clause is necessarily subordinate to the letting clause, in this sense, that it naturally is confined to the fencing of the subjects already described as let. It would, to say the least, be a very unusual and unexpected thing in a formal lease for the parties to use the fencing clause for the purpose of incidentally, and by implication, granting a lease of something outside the boundaries already laid down in the part of the lease which professes to do this. It is only if the facts compelled such a construction that it could be adopted. Now, I do not think that any such necessity arises. We have to see whether there is not within the limits of the farm as possessed by James Brown something which reasonably meets the description of rough pasture land lying towards the Millstone Hill which has no boundary fence; and I think that the field 763 is in this position. It lies towards Millstone Hill, and on that side it was unfenced. Historically, it was once under tillage, but it has not been so for years, and

No. 190. at the date of the lease there was nothing but its history to distinguish it from rough pasture land.
 July 13, 1897. Accordingly, I do not find any repugnancy between the fencing clause
 Gregson v. and the letting clause. What the effect of such a repugnancy might have
 Alsop. been is therefore a question which does not arise.

The defenders have no case of any extension of the farm by agreement subsequent to the lease. Mr John Alsop's own evidence as to what passed when Mr Rule visited the ground and the absence of any averment on record shew that this theory cannot be maintained.

I am for recalling the interlocutors appealed against, and granting the interdict craved.

LORD ADAM concurred.

LORD M'LAREN.—I also concur. In your Lordship's opinion there is a reservation of a question which may hereafter arise for our consideration, when there is a discrepancy between the terms of the description given in the lease and the lands pointed out by the agent of the landlord as falling within that description. In such a case the question might arise whether the landlord was not barred by the representations of his authorised agent. Another point might perhaps arise in the case of a farm defined by boundaries and also by reference to past possession. If there was a discrepancy between the boundaries and the possession as proved, the question might arise whether effect was to be given to the description by boundaries or by possession. In all such cases the question of the identity of the subjects is a question of fact, and I do not think that any absolute rule can be laid down for their decision.

LORD KINNEAR was absent.

THE COURT pronounced the following interlocutor:—"Find in fact (1) that the only title of possession proponed by the defenders is the probative lease No. 12 of process; (2) that the ground now in dispute was not occupied by James Brown mentioned in the lease; (3) that within the farm as occupied by James Brown the field No. 763 was, at the date of the lease, rough pasture land lying towards the Millstone Hill, and had no boundary fence; (4) that the fence which has been interfered with does not encroach on the farm as occupied by James Brown: Find in law that the defenders have no right to interfere with or injure the said fence: Sustain the appeal: Recall the interlocutors of the Sheriff-substitute and of the Sheriff, dated 17th February and 22d March 1897 respectively: Interdict the defenders in terms of the prayer of the petition," &c.

SOMERVILLE & WATSON, S.S.C.—ANDREW URQUHART, S.S.C.—Agents.

No. 191. JOHN FRANCIS SMYTH, Pursuer (Respondent).—*Watt—Wilton.*
 July 13, 1897.* LACHLAN MACKINNON, Defender (Reclaimier).—*Balfour—W. Brown.*
 Smyth v. *Reparation—Slander—"Misappropriation of money"—Innuendo—Privi-*
 Mackinnon. *lege—Relevancy.*—In an action of damages for slander, brought by an auctioneer against a solicitor. the pursuer averred that, on 16th May 1896,

the defender had employed him to sell some furniture belonging to a trust-estate; that the pursuer sold the furniture, and rendered to the defender a statement of the prices realised for which he was liable to account to the defender; that on 15th August the defender wrote to the pursuer a letter in which the defender, after acknowledging receipt of a letter from the pursuer, intimated that he (the defender) was to "convene the trustees early next week, and shall put before them your misappropriation of their money, and take their instructions. The consequences, I have little doubt, will be of a very serious character to you"; and that in the said letter the defender falsely, calumniously, and maliciously intended to represent, and did represent, that the pursuer had been guilty of dishonest misappropriation of money.

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The defender denied the innuendo averred, and referred to a correspondence between himself and the pursuer, of which the letter founded on formed a part. From this correspondence (the authenticity of which the pursuer admitted on record) it appeared that the defender had, for several weeks prior to the date of the letter founded on, been pressing the pursuer to pay the sums realised at the sale of the furniture, and that the pursuer intimated his present inability to do this in consequence of having made advances with the money in the erroneous belief that he would be in funds by the time the money became payable to the defender.

The pursuer further averred that after he had paid the money realised by the furniture to the defender, the defender had falsely, maliciously, and calumniously stated to the agent of a bank that the pursuer had misappropriated trust money, meaning thereby that the pursuer had dishonestly appropriated to his own uses moneys belonging to the trustees.

The defender averred in answer that the agent of the bank was his father and partner in business, and pleaded privilege. At the hearing in the Inner-House counsel for the pursuer, in answer to a question from the Bench, stated that he understood that this averment was accurate.

Held (1) that as the letter of 15th August bore to be part of a correspondence it was competent, even on a question of relevancy, to look at the whole correspondence of which it formed a part; that so regarding the letter it was not in itself slanderous, and did not support the innuendo put upon it by the pursuer; and therefore (*rev. judgment of Lord Kincairney*) that an issue founded on the letter fell to be disallowed; but (2), *aff. judgment of Lord Kincairney, diss. Lord Young*, that the pursuer's averments of verbal slander uttered to the bank agent were to be taken as they stood on record; that they relevantly set forth a case of verbal slander, but did not disclose a case of privilege, and therefore that an ordinary issue of damages for slander fell to be allowed, the question of privilege being left to be determined by the Judge at the trial.

IN February 1897 John Francis Smyth, auctioneer, Crown Court, 2nd DIVISION. Aberdeen, raised an action against Lachlan Mackinnon, youngest, Lord Kin-advocate, 23 Market Street, Aberdeen, concluding for decree for *cairney.* £1000 as damages for slander.

The pursuer averred;—(Cond. 2) "On or about 16th May 1896 the defender, on the instructions of the trustees of the late Mr Thompson, of Pitmedden, employed the pursuer to remove from Pitmedden House the furniture therein to Aberdeen for private sale. . . ." (Cond. 3) "The pursuer duly removed the said furniture, and disposed of the same on account of the said clients of the defender, and rendered a statement of the prices of the various items thereof, for which he was liable and willing to account to the defender as their agent." (Cond. 4) "On or about 15th August 1896 the defender wrote and sent, or caused to be written and sent, to the pursuer a letter in the following terms:—

' 23 Market Street, Aberdeen, 15th August 1896.

' Sir,—I have received yours of 14th. I know nothing about your

No. 191. brother, and must decline your proposal. If he requires three months to get a remittance from Canada, his obligation is presumably no better than your own. I am to convene the trustees early next week, and shall put before them your misappropriation of their money, and take their instructions. The consequences, I have little doubt, will be of a very serious character to you.—Yours obediently,

July 18, 1897.
Smyth v.
Mackinnon.

'L. MACKINNON, Yo^{rs}.

'Mr John F. Smyth, Auctioneer,
'Crown Court.'

(Cond. 5) "In the said letter the defender falsely, calumniously, and maliciously, and without probable or any cause, intended to represent, and did represent, that the pursuer had been guilty of the dishonest and fraudulent misappropriation of money belonging to his said clients, and of such a kind as to subject the pursuer in a criminal prosecution therefor. The defender was well aware when he wrote the said letter that the pursuer was only liable to account to his said clients for any balance due by him upon his intromissions with the said furniture, and that he was able, upon obtaining the short delay for which he asked the defender, to meet his said liability, but he unwarrantably, maliciously, and illegally used the threat of criminal proceedings contained in the said letter, to obtain payment of such balance. The explanations in answer, subject to the terms of the letters mentioned, are denied. . . ."

The defender in answer to cond. 5 denied the pursuer's averments, and referred to the correspondence quoted below.*

* Letter, pursuer to defender, dated 17th July 1896.—"When I sent in the statement of sale of the remainder of Pitmedden goods I said I would pay the cash to-day. Much to my annoyance the money on which I calculated for this purpose will not reach me, I find, before the beginning of August, and I have to ask you kindly to wait till then, as I cannot well press for payment without damage to my business."

Letter, defender to pursuer, dated 21st July 1896.—"I have received your letter of 17th inst., but am not disposed to wait longer for the money due to Mr Thompson's trustees. There is no reason why you should not at least make a substantial payment on account, and I await the same in course."

Letter, pursuer to defender, dated 24th July 1896.—"I did not at once reply to yours of 21st, because I thought I might get in some money, and be able to comply with your request to make a substantial payment to a/c., but I find it impossible meantime. I depended for the whole am^t at the date I fixed (17th inst.) on a gentleman who has been travelling, and has been detained. I am quite certain to have it next month, and early in the month, and shall at once square up. I was misled into making some advances on the assumption that I would have the money referred to above on the 16th inst., and thought it unnecessary to make any other provision, and I cannot recover my advances yet. I am exceedingly sorry for this irregularity, but have to ask you kindly to extend your indulgence as far as you can, and shall make payment as early as possible next month."

Letter, defender to pursuer, dated 31st July 1896.—"On returning here after a few days' absence, I find your letter of 24th inst., which is very far from satisfactory. You have no excuse for withholding at least a substantial payment, because you have received the money, and my clients have nothing to do with your private difficulties. If you do not settle the balance due in course of next week, I shall advise the trustees to take immediate proceedings against you, and you will get no further notice."

Letter, pursuer to defender, dated 14th August 1896.—"I regret I have

The pursuer further averred,—(Cond. 6) “Upon 18th August 1896 No. 191. the pursuer paid the defender £73, 5s. 8d., in payment of the said balance due by him to his said clients, and received his discharge therefor. . . .” (Cond. 7) “Notwithstanding that July 13, 1897. *Smyth v. Mackinnon.* the pursuer had duly accounted for the said balance, the defender, on or about 5th September 1896, and in or near his office at 23 Market Street, Aberdeen, falsely, calumniously, and maliciously, and without probable or any cause, stated to Lachlan Mackinnon junior, advocate, Aberdeen, agent of the branch of the British Linen Company at Market Street, Aberdeen, of and concerning the pursuer, that the pursuer had shortly before misappropriated moneys belonging to the trustees of the late Mr Thompson of Pitmedden, or used words of the like import, meaning, and effect, meaning thereby that the pursuer had dishonestly appropriated to his own uses moneys belonging to the said trustees. The said Lachlan Mackinnon junior thereupon communicated the said false statement to John Montgomerie, the subagent of the said bank at Aberdeen.”

The defender made the following answer to cond. 7:—(Ans. 7) “Denied. Explained that the said Lachlan Mackinnon junior is the father and partner in business of the defender, and as such partner had access to and knowledge of the correspondence passing between the pursuer and defender in the months of July and August 1896. At that time the said Lachlan Mackinnon junior was agent of the Market Street branch of the British Linen Bank in Aberdeen.”

The defender pleaded, *inter alia*;—(1) The pursuer’s averments are irrelevant and insufficient in law to support the conclusions of the summons. (3) The letter of 15th August 1896 not being libellous or calumnious in its terms, and containing no false, malicious, or calumnious representations regarding the pursuer, the defender ought to be assolizied. (4) Privilege.

On 21st May 1897 the Lord Ordinary (Kincairney) approved of the following issues:—*

“1. Whether the defender wrote and sent, or caused to be written

not yet got possession of the cash, out of which I expected, ere now, to have settled your a/c. Being very anxious to keep faith with you, I applied to my brother, who is home on a visit from Canada, where he carries on a large business in stores and lumber. I enclose his letter in reply, and trust you will accept his offered bill in security, though I shall without doubt discharge the debt myself within a very short time, though I am unwilling to fix a *definite* date, lest I should again be disappointed and have to ask further time. I enclose my brother’s card, and have only to say that he is very well able to meet anything he puts his name to; and if you will let me know your mind in course of Saturday, I shall at once send on a bill for his acceptance so that it may be returned on Tuesday morning.”

The letter from the pursuer’s brother was to the effect that the writer could not lend the pursuer £75 in cash, but offered his acceptance for that amount at three months.

Then followed the letter from the defender of 15th August 1896 founded on by the pursuer on record.

* “OPINION.—The first question is, whether the charge of misappropriation warrants the innuendo of dishonest misappropriation, or dishonest appropriation, and I think that it does. That is to say, that it may be put as a question to the jury whether the charge was an accusation of dishonesty or not. The pursuer desired that the issue should be whether the defender had charged him with dishonest appropriation; and I think the issue may

No. 191. and sent, to the pursuer a letter in the terms contained in the schedule hereto annexed [*i.e.* the letter of 15th August 1896], and whether the said letter is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had dishonestly appropriated moneys belonging to the clients of the defender, being the trustees of the late Mr Thompson of Pitmedden, to the loss, injury, and damage of the pursuer?

July 13, 1897.
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"2. Whether on or about 5th September 1896, and in or near his office at 23 Market Street, Aberdeen, the defender falsely and calumniously stated to Lachlan Mackinnon, advocate, Aberdeen, of and concerning the pursuer, that the pursuer had shortly before misappropriated moneys belonging to the said trustees, or used words of the like import, meaning, and effect, meaning thereby that the pursuer had dishonestly misappropriated said moneys, to the loss, injury, and damage of the pursuer?"

The defender reclaimed, and argued;—(1) The first issue ought to be disallowed. The letter of 15th August 1896, founded on by the pursuer, was part of a business correspondence between the pursuer himself and the defender, in the course of which the pursuer described his conduct as an "irregularity." The defender called it "misappropriation" of money, which was a practically equivalent expression. The pursuer said that by "misappropriation" the defender meant dishonest misappropriation. That was a forced innuendo, looking to the whole correspondence. If the pursuer had made a very specific averment of extrinsic facts and circumstances to shew that the defender meant dishonest misappropriation, the issue might possibly have been supported, but there was no such averment. In any view, the defender was clearly privileged, and there must therefore be specific averments shewing malice, which here there were not. (2) The second issue ought also to be disallowed. If the letter of 15th August did not *per se* support the innuendo, it would not become action-

be allowed in that respect as he suggests. I should have preferred the words dishonest misappropriation, as more nearly approaching the words actually used, and I do not think such words would be objectionable as redundant, because there may no doubt be misappropriation which is not dishonest, as well as appropriation which is not dishonest. But there is not much to choose between the two phrases, and I am prepared to adjust the issue in the words which the pursuer prefers.

"The defender maintained that the first issue should be disallowed, because the occasion averred was privileged, and that the averments of malice on record were irrelevant for want of specification. I think it is a narrow question whether privilege is disclosed on the pursuer's record. Several recent decisions were referred to, but I think that the case of *Wilson v. Purvis*, 1st November 1890, 18 R. 72, comes nearest to the present case, and that I ought to follow it, and adjust the issue without inserting malice. It was not contended that malice should be put in the second and third issues.* It was indeed maintained that the pursuer could not get a verdict without proof of malice; but it was admitted that it could not be determined until the facts were proved, whether the occasion were privileged or not. I think that, with reference to all the issues, the question whether it is necessary to prove malice must be left for decision at the trial. The further question will then also arise, whether the averments are such as to admit of proof of malice, or whether the averment of malice is irrelevant. That cannot be determined at present.

* The pursuer abandoned the third issue.

able by being shewn to Lachlan Mackinnon junior, who was the defender's father, and partner in business, and there was nothing in the pursuer's averments to shew that the defender did anything more than tell his partner what he himself knew about the pursuer as appearing from the correspondence. [LORD YOUNG.—Do you, Mr Watt, admit that Lachlan Mackinnon junior is the father and partner in business of the defender? Watt.—I understand that that is the case, but the pursuer does not aver it.] In any case the second issue ought also to be disallowed on the ground that the defender was clearly privileged in communicating what he knew to his partner regarding a business matter of the firm, and malice was not relevantly averred.

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Argued for the pursuer;—"Misappropriation of money" *prima facie* meant dishonest misappropriation; at all events it was susceptible of that meaning; it was very different from "irregularity."¹ If then the words fairly bore the meaning put on them by the pursuer, the truth of the innuendo was for the jury,² and the question of privilege was also for the jury, as no case of privilege appeared *ex facie* of pursuer's averments. Malice therefore ought not to be put in issue. The case for the second issue was *a fortiori* of the first. It might be that the defender did no more than communicate the correspondence to Lachlan Mackinnon junior, and it might also be that Lachlan Mackinnon junior was the defender's father and partner; but the pursuer's averments must be taken as they stood; and taking these averments the pursuer's case was this,—That the defender, after the money had been paid, told a bank-agent that the pursuer had misappropriated money. That was plainly actionable, and was not privileged.

At advising,—

LORD JUSTICE-CLERK.—On consideration I have come to the conclusion that the first issue ought not to be allowed. The whole basis of that issue is a letter in answer to a letter of pursuer's own, and the basis for an innuendo there does not seem to me to be sound. Therefore I do not think the first issue should be allowed.

As regards the second issue, it is in a different position, because it relates to a statement made verbally to another person, and that issue, I think, should be allowed. That issue, therefore, will go to trial if your Lordships are of the same opinion.

LORD YOUNG.—I am of the same opinion with respect to the first issue, but I differ from your Lordship, and also from the Lord Ordinary, with respect to the second.

With regard to the first issue, I think it is only necessary to say—but I think it is necessary and important to say—with reference to the judgment of the Lord Ordinary and to the argument before us, that the slander or alleged slander founded on being in a letter which, on the face of it, bears to be part of a correspondence, we must look at the correspondence of which it is part. If that correspondence had not been produced and

¹ H. M. Advocate v. Lee, Oct. 20, 1884, 12 R. (Just. Cases) 2, 5 Coup. 492.

² Sexton v. Ritchie, March 18, 1890, 17 R. 680, aff. March 19, 1891, 18 R. (H. L.) 20; Ramsay v. MacLay & Co., Nov. 18, 1890, 18 R. 130.

No. 191. admitted, I think we would have required that it should be produced, and that we would have required to see whether it was genuine or not.

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This letter containing the alleged slander, which is the subject of the first issue, is dated 15th August 1896, and is a letter addressed by the defender as a man of business acting for clients to the pursuer, with whom he had been in correspondence about the clients' business as to which he had employed the pursuer—(His Lordship read the letter). Now, in that letter of 14th August, which is referred to, the pursuer wrote to the defender asking for delay to allow him to get money to pay what he was bound to pay, and offering his brother's security; and the letter containing the alleged slander is in answer to that. But that letter is only a part of the correspondence in which the pursuer was pressed on the one hand to remit the money belonging to the defender's clients which he had in his hands, and in which, on the other hand, he was pleading for delay. And the important letter is dated 24th July, written by pursuer—(His Lordship read the letter).

Now, it appears from the statement on record, and from the whole of this correspondence, that the history of the matter is that the defender as a man of business had employed the pursuer as an auctioneer to sell the property of his clients, that the pursuer sold it, and irregularly made advances out of the money to somebody who could not return them. He calls that an irregularity. I think no one would doubt that it was an irregularity that an auctioneer who has sold the property of an employer and got the cash for it should advance it to anybody—a friend or anybody else—and put it out of his power to pay it up to his employer. It is for that money, to which the whole of this correspondence relates, that he is being pressed, and in the letter of 15th August, which is proposed to be the subject of the first issue, the defender avers nothing except what the pursuer had stated that he had done, and irregularly done. He calls that irregularity, of which the pursuer himself informed him, a misappropriation of money, which he finds it to be his duty to bring before his clients unless the money is paid. Now, there is here no imputation of any fact or of any conduct. I put the question more than once in the course of the argument, Was the irregularity that the pursuer himself admits not misappropriation, and if it was, was it libellous to call it by that name? The answer was,—“But it would be actionable if he thought it was dishonest, and we wish to put the defender into the box and ask him,—‘Was it dishonest misappropriation which you meant when you used that word in the letter?’” Well, I should have thought that a very singular question for anybody to put, as singular as for us to give the opportunity by allowing an issue on such a matter. For it would come to this,—“Your letter is actionable if you thought that the pursuer to whom you addressed it had acted improperly in committing an irregularity which he himself told you he had done.” I think that is extravagant on the statement of it. Slander is imputing some transgression to a man—saying or suggesting that he did something which he never did. There is nothing imputed to the pursuer here which he does not say he did, and as to having an opinion on the matter as to whether it was a more or less dishonest misappropriation—for misappropriation it certainly was—I am very clearly and distinctly of

opinion that that is not a subject for an action for libel at all. With No. 191. regard to the first issue, I therefore agree with your Lordship, but I have thought it necessary to make these observations in consequence of the judgment of the Lord Ordinary and the argument that was maintained before us for the pursuer.

Now, with regard to the second issue, I think I must take the fact to be this. It is not stated by the pursuer, but it is stated by the defender—and the statement is admitted at the bar to be the truth, so that if we proceed upon any other view we would be proceeding on a view that was not true—that Lachlan Mackinnon junior is the father and partner in business of the defender. As such partner he would have access to and knowledge of the correspondence passing between the pursuer and defender in July and August 1896. Well, then, the communication alleged in condescendence 7 is a communication between two parties in business, and in relation to the business. Both parties were equally entitled to know of this correspondence, and it was certainly the right of either party to bring it under the notice of the other. Now, what is proposed here—and the case, so far as I know, is unique in that respect—is to make the subject of an issue a communication made by one partner in the business to another—a son to his father, who is his partner in the business—on a matter relating to that business. The averment is this—(His Lordship read cond. 7). It could not fail to occur to anybody, reading the record and correspondence, that the communication here referred to was in respect to the irregularity admitted by the pursuer in the letter which I have already mentioned. The pursuer's counsel admitted that he had no reason to think that there was anything else. Then it comes to this, that the junior partner of the business calls the attention of his father, the senior partner, to this irregularity, which the pursuer stated in his letter he had committed, and we are asked to decide that a communication of that sort may be the subject of an action of damages for slander. It was pressed on us—and I thoroughly understand and appreciate the argument—that the father was not only a partner of that business but also agent for the British Linen Company. But I cannot see that that makes any difference. I cannot assent to the idea that one partner is to be restrained by the law of defamation and slander from making a communication to another partner—a son to his father—because the father happens to be also agent for a bank. I must therefore deal with this as a communication made by one partner to another in regard to the business of the firm in transacting the business of a client. Now, I cannot think that that is a subject for an action of defamation at all. And therefore, with respect to the second issue, as well as with respect to the first, I am very clearly of opinion that it ought to be disallowed.

I have said enough to shew, I think, that there is here no room for the idea of innuendo—there is no innuendo here at all. To innuendo is to suggest by some indirect words—by nodding, grimacing, making faces, or otherwise (nodding is the real meaning of the word)—that a man did suggest something which you are going to put into distinct words. There is no suggestion here that he did anything more than merely make reference to the pursuer's letter in which the pursuer states what he did. And therefore I think there is no room for innuendo.

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The only other remark I have to make is on what is comparatively of little importance—on the form of the issue, as to which we had some discussion—the insertion of “malice.” Dealing with the case as *prima facie* one of privilege, I should like to make this general observation—that I think our practice ought to be, and I think generally has been, where the case is one of privilege, upon the statement of the pursuer, to insert “malice.” In cases where there may be privilege or not, according to circumstances which are in dispute, then it is left to be determined at the trial—to the direction of the Judge; but where the question of privilege does not depend on circumstances—matters of fact in dispute between the parties—then I think, in the interests of the parties themselves and for the guidance of the Judge at the trial, it ought to be dealt with as a case of privilege and malice put into the issue. I repeat it, for I think it is a safe general rule for adoption—and I have been under the impression that it was the generally adopted rule—that unless the question of privilege or malice depends on matter of disputed fact it ought to be determined in adjusting the issues. If it depends on matter of disputed fact then it may—indeed must—be left for consideration at the trial. Now, I do not think here, with respect to this communication by one partner to another, that it depends upon disputed fact at all. I think I put the question more than once, What is the fact in dispute on which it depends whether this will be privileged or not? None occurs to me. The statement is that the misappropriation was of moneys belonging to the trustees of the late Mr Thompson of Pitmedden. Now, it is the pursuer’s case that the trustees of the late Mr Thompson of Pitmedden were clients of the defender. It is also admitted by the pursuer’s counsel that the defender and his father, Lachlan Mackinnon junior, were in partnership. I cannot avoid repeating that. If it turns out that they were partners,—that is to say, if it turns out that the fact on which parties are agreed (although the pleading is not correct) is true,—then it was a statement by one partner to another in regard to the business of a client of the partnership. Now, is that not *prima facie* a case of privilege? I cannot make it an actionable slander at all; but assuming that it is, then the case is one of privilege, in which malice is not to be presumed from the mere statement, but must be proved, and it would be right enough to put it into the issue.

LORD TRAYNER.—I would not have been sorry if I could have come to the same conclusion as Lord Young, because I cannot help thinking and saying that I regard this as a very ill-advised action on the part of the pursuer, but as the pursuer insists in his right to go to trial on the issues which he has proposed, these must of course be considered.

I agree with both your Lordships that the first issue cannot be allowed, for the reasons which Lord Young has assigned are unanswerable, and I concur with his Lordship’s views.

But I take a very different view of the second issue from my learned brother who last spoke. An issue when granted and put before a jury is controlled by the record, and in making or granting an issue I think the Court is controlled by the record. Now, in cond. 7 there is no averment made by the pursuer that the defender and Lachlan Mackinnon junior are partners in

business. It was no doubt stated at the bar, but it was stated in answer to questions put from the bench, and which the bar could not with any propriety decline to answer. But it is not part of the pursuer's case. The pursuer's case is that the defender stated to Lachlan Mackinnon junior, advocate, Aberdeen, and agent for the British Linen Company there, that he, the pursuer, had been guilty of misappropriation of money. Now, I think the word "misappropriation" may fairly enough, without any straining of its natural meaning, be read as the pursuer proposes to read it, namely, as dishonest misappropriation, and therefore, according to the practice of the Court, I am not prepared to refuse the pursuer an issue under which he proposes to prove that the misappropriation which the defender said he had been guilty of was dishonestly appropriating to his own use moneys belonging to other persons.

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But just assume for a moment that the defender and Lachlan Mackinnon junior are partners, it does not in the least appear that one partner may speak to another in libellous terms of a third party without being responsible for it. The mere fact that they are partners does not excuse or warrant a slanderous statement. It may very well introduce the element of whether or not a statement which is in itself slanderous is privileged, but that is a totally different matter. But if one partner states to another that a third party, whom he names, has been guilty of dishonestly appropriating to his own uses moneys belonging to another person, I take that to be a slander just as much as if the parties had not been partners at all.

Now, with regard to the question of malice, I think that if it had been stated on record that the one partner laid before the other the correspondence that had passed between him (the speaker) and a third person charged with misappropriation, as part of the communications by one partner to another in relation to the company's business, it would have been privileged. But again, I say that is not the pursuer's record, and we cannot force the pursuer, I should think, by questions from the bench or otherwise, to alter his record, or make his record other than he proposes to make it himself. Now, taking that view of the statement in cond. 7, I am of opinion that the pursuer is clearly entitled to this second issue. If it had appeared, as I have already said, that the parties were partners, and that the only thing the defender had done was to lay before his partner the correspondence that had taken place in the course of the firm's business with the pursuer, I should have held that that was a case for putting "malice" into the issue. But cond. 7 bears no reference to the correspondence, but states that notwithstanding that the pursuer had duly accounted for the balance—and that is after the correspondence had ceased—the defender made this false and slanderous statement to Lachlan Mackinnon junior, which he (the pursuer) proposes to make the subject of this issue. In these circumstances I think the pursuer is entitled to the second issue, and with respect to the statements on record I think it is not *prima facie* a case of privilege, although privilege may appear at the trial. The defender's interest will be amply protected by the Judge who tries the case, for if privilege does appear he will direct the jury that malice must be proved.

LORD MONCREIFF.—I think the first issue should be disallowed. The

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question turns entirely upon the correspondence, and on the correspondence I do not think that there is room, or that there are materials, for the innuendo which the pursuer seeks to put upon the terms of the defender's letter of 15th August 1896. I do not see how the defender could have used a milder or more appropriate term to describe the irregular application of the money which the pursuer himself deplors in the most deprecatory language in his letter of 24th July 1896. The word "misappropriation" or the word "misuse" would, according to the pursuer's argument, have been equally open to this innuendo.

The second issue does not stand in exactly the same position. The slander alleged in cond. 7 is a verbal slander said to have been uttered on 5th September 1896 after the money had been replaced. If, as there is no reason to doubt, the communication, if made, was made to the defender's father and partner, there is a strong probability that it will be shewn to have been not only privileged but unavoidable. At the same time we have not, as in the case of the first issue, the whole materials for forming an opinion as to the meaning intended to be conveyed by the words used, and the circumstances in which they were uttered; and therefore with some reluctance I agree that this issue should be granted.

I entirely agree with the observations made by Lord Trayner as to the character of the case. I do not think we can avoid granting the second issue, but I am certainly most reluctant to do so.

THE COURT recalled the interlocutor appealed against, disallowed the first issue proposed for the pursuer, approved of the second issue proposed for the pursuer to be the issue for the trial of the cause, and remitted the cause to the Lord Ordinary to be tried before him on a day to be afterwards fixed.

ALEXANDER BOWIE, Solicitor—MORTON, SMART, & MACDONALD, W.S.—Agents.

No. 192.

THE SCHOOL BOARD OF THE PARISH OF CRIEFF, Petitioners.—*Clyde*.
WILLIAM STOWELL HALDANE, Minuter.—*Grainger Stewart*.

July 14, 1897.
School Board
of Crieff.

Charitable Bequest—Petition for alteration of scheme framed by Endowments Commissioners—Competency of considering amendment of scheme not within scope of petition.—By clause 21 of a scheme settled by the Educational Endowments Commissioners for the administration of the "Innerpeffray Mortification," it was provided that the governors of the mortification might grant the use of the school at Innerpeffray to the School Board of Muthill, and might pay that School Board the sum of £15 annually, on condition that they maintained a school therein. The district in which the school was situated having been in 1893 transferred by the Boundary Commissioners to the parish of Crieff, the School Board of Crieff presented a petition, craving the Court to alter the scheme for the administration of the mortification by substituting their name in clause 21 for that of the School Board of Muthill, and to reduce the payment from £15 to £10, the latter sum having been found sufficient to meet the charges of the school. In the course of the proceedings under this petition one of the governors of the mortification lodged a minute, in which he raised the question whether any part of the funds of the mortification should be paid to the School Board.

Held that the question raised in the minute could not be entertained, as it did not form the subject of the petitioners' application.

By clause 21 of the scheme settled by the Educational Endow-
 ments Commissioners for the administration of the "Innerpeffray
 Mortification," it was provided that the governors might grant the
 use of the school and teacher's house at Innerpeffray to the School
 Board of Muthill, and might pay to that School Board the annual
 sum of £15, under the condition that they should keep the school and
 teacher's house in repair, and should maintain a school there.

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1ST DIVISION.

At the date of this scheme the school and teacher's house were
 situated in the parish of Monzie and *quoad sacra* parish of Muthill,
 and were under the administration of the School Board of Muthill,
 but the part of the parish in which they were situated was subse-
 quently transferred by the Boundary Commissioners to the parish of
 Crieff.

The School Board of Crieff having obtained the consent of the
 governors of the mortification, the School Board of Muthill, and of
 the Scotch Education Department, petitioned the Court to amend the
 scheme for the administration of the mortification, by substituting in
 clause 21 the name of the School Board of Crieff for that of the
 School Board of Muthill, and by reducing the sum payable by the
 governors from £15 to £10, the former sum having been found more
 than sufficient to pay the usual charges of the school.

A remit was made to Mr Bremner P. Lee, advocate, to report on
 the petition.

From Mr Lee's report it appeared that he had been called upon by
 Mr Haldane, one of the governors of the mortification, who had
 objected to the annual sum of £10 being paid to the petitioners, and
 requested him to report fully on the question whether that payment
 should be made, but that the reporter had not thought it his duty to
 enter on this inquiry, as the petition was merely for the removal of
 an administrative difficulty.

Mr Haldane subsequently lodged a minute, in which he craved the
 Court "to remit back the petition to the reporter to report upon the
 question whether any part of the grant of £15 per annum . . .
 should be paid to the School Board of the parish of Crieff."

The petitioners opposed the remit, on the ground that it was
 incompetent to entertain the question raised by the minute under the
 present application.

LORD PRESIDENT.—The petition in this application is not by the
 Governors of the Innerpeffray Mortification, but by the School Board of the
 parish of Crieff. Owing to the change made by the Boundary Commis-
 sioners the School Board of the parish of Crieff, instead of the School Board
 of Muthill, is the natural recipient of the grant from the Innerpeffray
 Mortification—I say the natural recipient according to the view embodied
 in the scheme settled in 1888. Now, the petitioners say that they do not
 require £15 a year, but that £10 is enough for their needs, and accordingly
 their present proposal is that we should make the requisite change in the
 recipient of the grant, and limit the amount to their avowed requirements.
 Now, the minuter takes the occasion of this change being made to say that
 he is very much dissatisfied with the scheme, because in his view none of
 the money should go away from the library. That question may be an
 appropriate subject for another application to the Court, but what we do
 to-day, if we affirm the report and grant the application, will not affect the

No. 192. reconsideration of the question whether any of the money should be kept for the school, or whether all of it should be applied to the library. That question does not form the subject of this application, has not been submitted to the Scotch Education Department, or anything of the kind, and I think we cannot entertain it.

LORD ADAM, LORD M'LAREN, and LORD KINNENAR concurred.

THE COURT altered the scheme as craved.

DRUMMOND & REID, S.S.C.—W. & F. HALDANE, W.S.—Agents.

No. 193. WILLIAM BAIKIE, Pursuer (Respondent).—*Watt—A. M. Anderson.*
 JOHN WORDIE AND OTHERS (Wordie's Trustees), Defenders
 (Reclaimers).—*W. C. Smith—Cook.*

July 14, 1897.
 Baikie v.
 Wordie's
 Trustees.

Reparation—Landlord and Tenant—Defective Drainage.—In an action of damages by a tenant against his landlord for loss arising from defective drainage, the pursuer averred that the drainage of the house was defective; that the subjects let were old, and that the drains had not been examined for seven years; further, that for many years prior to his occupation the premises had been occupied, and "complaints have been made to the defender by previous tenants regarding the insanitary condition of the premises." *Held* that the last averment was not sufficiently specific to be admitted to probation, and that *quoad ultra* there was no relevant averment of fault on the part of the landlord.

2D DIVISION.
 Lord Kin-
 cairney.

WILLIAM BAIKIE, bird-dealer and grocer, obtained a lease of the house and shop, 20 Cables Wynd, Leith, from John Wordie and others, the trustees of the late William Wordie, at an annual rent of £16, 10s. per annum. He raised this action against the landlord, concluding for £300 as damages sustained by him from the defective drainage of the premises.

The pursuer averred (cond. 2) that he had received a verbal undertaking from the defenders' factor that the premises would be put into a healthy condition. "For many years prior to the pursuer's occupation the premises had been occupied, by different tenants, as a house and shop. Complaints have been made to the defenders by previous tenants regarding the insanitary condition of the premises." (Cond. 3) "The pursuer took possession of the said premises on 28th May 1896, and placed in the shop his stock in trade, consisting of, *inter alia*, a number of fancy birds which were of considerable value. No sooner were the birds placed in the said premises than they began to droop and pine away. In a few days all the birds had died. The pursuer informed the defenders of what had occurred, and they sent a plumber who examined and made some repairs on the gas-pipes in the premises." (Cond. 4) "When the plumber had finished his work the pursuer got another lot of birds, but they also drooped and died in the same way, and in about the same length of time as the first lot. This happened about the end of June 1896, and the pursuer again informed the defenders of what had occurred. They again sent a plumber to examine and repair the gas-pipes." (Cond. 5) "The pursuer got a third lot of birds about September 1896, but once again the birds drooped and died." (Cond. 6) "In addition to the birds, the pursuer shortly after he entered the premises placed in stock 100 fancy fishes. Within two days the fishes were all dead. After the

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second repair of the gas-pipes, the pursuer placed in stock a second lot of 100 fancy fishes, but they also died on the premises within two days of their being placed there. . . . The pursuer further averred that in October he applied to the burgh engineer, who had the drains examined, and reported that the drains were in bad order, and allowed sewage-gas to pervade the premises. (Cond. 10) "When the defenders were made aware of the burgh engineer's report on the state of the drains, they instructed a bricklayer named Shaw to put the drains into repair. Some work was done by Mr Shaw upon the drains, but he failed to check the escape of sewer-gas or the prevalence of bad smells. The pursuer finding the situation unbearable removed his family to another house in November 1896. He could not get a shop till December, when he secured one at 12 Coburg Street, Leith. Admitted that the rent has not been paid. Explained that no demand for the rent was ever made by the defenders. . . ." (Cond. 11) "The defenders were in fault in failing to put the premises into a tenantable and healthy condition at the commencement of the pursuer's tenancy, as they were bound to do. They also failed to repair the floor and plaster the room as stipulated in the missives. The condition of the premises was such that the defenders ought to have known that repair of the drains was necessary before the premises could be occupied with safety. The buildings are old, and the drains had not been examined for seven years. At that time the drains were not renewed, but merely patched up in a rough-and-ready way. These facts were known to the defenders, and ought to have put them on their guard to see that at the commencement of a new lease or tenancy the premises were made fit for human habitation. The death of the birds and fishes ought to have been a sufficient warning to the defenders that the drains were bad, but until the burgh engineer had reported they did nothing to the drains, but merely sent a man to repair the gas-pipes."

The pursuer pleaded;—(1) The pursuer having suffered damage through the fault and negligence of the defenders is entitled to reparation therefor.

The defenders pleaded, *inter alia*;—(1) No title to sue. (2) The pursuer's statements are irrelevant and insufficient in law to support the conclusions of the summons.

On 29th June 1897 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Repels the first plea in law for the defender as a plea to exclude the action, reserving it *quoad ultra*; and before further answer, allows the parties a proof of their respective averments."*

* "OPINION.—The pursuer may have extreme difficulty in proving this case, and if he fails to prove it, there may possibly be hardship on the defenders. But I have been unable to see that the risk of such hardship can be avoided, or that the case can be thrown out without inquiry. The notion of birds and fish being killed through drainage-gas is a novelty, and at first sight seems an absurdity. But the pursuer has averred that that happened; and whether it did or not is a question of fact, which I am not entitled to decide without proof merely from a strong impression that it is extremely improbable. The averments are far from satisfactory; still they seem to be relevant. Both parties, as I understand, preferred a proof to a trial by jury. As I think there should be inquiry, it is better that I should say very little on the law of the case, but I refer to *Erskine*, ii. 6, 43; to *Goskirk v. The Edinburgh Railways Station Access Company*, 19th De-

No. 193. The defenders reclaimed, and argued;—A tenant might remove from an unhealthy house, and refuse to pay rent, but he could not claim damages for injuries arising from insanitary conditions without specific averments and proof of fault on the landlord's part. There was no right to damages against the landlord *ex dominio*.¹ There was no relevant averment of fault. A general averment of previous complaints was insufficient. The specific complaints and the names of the complainers should have been stated. The averment of fault in cond. 11 was irrelevant. It was not enough to say that the defenders ought to have known of the defect. The pursuer made it clear that whenever the defenders were advised of the defect they sent a proper tradesman to remedy it. They thus discharged their duty. At the most it was clear that the pursuer was as much aware of the defects of the premises as the defenders, and yet he remained in the premises. He had thus lost any right to damages.²

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Argued for the pursuer;—There was relevant averment of fault. The defenders had been warned by previous tenants; they knew the premises were old and had not been examined for seven years, when they were only roughly patched; they were in such circumstances bound to anticipate defects. When the pursuer's stock in trade died the defenders were put on their inquiry, and should have had the premises examined. In any case they failed to repair properly after receiving the burgh engineer's report. Insufficient repairs did not discharge their obligation.³ In the case of *Henderson*⁴ the particular defect was not stated, and the alleged death was not properly connected with the defect. The pursuer in this case had made specific statements of the defect and the result ensuing therefrom. To remain in the premises did not necessarily bar a tenant from recovering damages.⁵

During the argument the pursuer's counsel were asked if they desired to make specific statements regarding the complaints made by previous tenants. They stated that they did not wish to amend the record.

LORD YOUNG.—I do not think it is necessary to call for any further argument. I should have been disposed to do so if the Lord Ordinary had pro-

ceeded to cite *Macph. 383*; *M'Nee v. Brown & Company*, 24th June 1889, 26 S. L. R. 459; and to Lord Kyllachy's judgment in *Maitland v. Allan*, 28th October 1896, 34 S. L. R. 148, as indicating the grounds on which I have sustained the relevancy of the averments.

"The defenders have stated a plea to title. I understand that that plea is pointed at the pursuer's statement that his wife and children have suffered in their health. The defenders submitted that the pursuer had no title to sue for damages done to them, which could only be recovered in an action of damages by themselves. That plea, however, relates rather to the amount of damages than to title.

"In allowing a proof in general terms, I mean to leave all questions of relevancy and competency open, and not to decide whether the pursuer is entitled to prove injury to his wife and children, or that he can affect by parole evidence the contract constituted by written offer and acceptance."

¹ Ersk. Instit. ii. 6, 43; Hamilton, 1667, M. 10,121; *Henderson v. Munn*, July 7, 1888, 15 R. 859.

² *Webster v. Brown*, May 12, 1892, 19 R. 765.

³ *Maitland v. Allan*, Oct. 28, 1896, 34 S. L. R. 148.

⁴ *Henderson v. Munn*, 15 R. 859.

⁵ *Shields v. Dalziel*, May 14, 1897, 34 S. L. R. 635; *Hall v. Hubner*, May 29, 1897, 34 S. L. R. 653.

nounced any opinion upon the question of relevancy, but he informs us that by his interlocutor he means to leave all questions of relevancy and competency open.

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I think this case is irrelevant. It is an action at the instance of a tenant who took a house and shop at a rent of £16, 10s. from Whitsunday 1896 to Whitsunday 1897. He remained in the house and shop till November 1896. I should wish to point out with regard to his leaving in November 1896, that I mean to say nothing here with regard to the right of a tenant to leave a house and to have the cost of removing, and also the possible increase of rent he may have to pay, if he can shew good cause for removing. But there is no averment here as to that. I put the question, What was the expense of removing? And the answer was that it was not known. I also asked, Is the rent paid for the new house and shop greater, and if so how much? And the answer was that it was not known. There is no case here stated for recovery of the cost of removing to another house or of extra rent. Plainly, any action on these grounds could only have been for a sum which could not have been sued for in this Court. I proceed therefore to deal with this case as an action of damages for the death of canaries and fishes, and for injury to the pursuer's own health, and the health of his wife and family. The sum sued for is £300, nearly twenty times the amount of the yearly rent. I am of opinion that such an action can only rest on actionable *culpa*, and that *culpa* must be plainly set forth on the record. Notice was taken of an averment contained in article 2 of the pursuer's condescendence—"For many years prior to the pursuer's occupation the premises had been occupied by different tenants as a house and shop. Complaints have been made to the defenders by previous tenants regarding the insanitary condition of the premises." If that was meant to suggest, and apparently it was, that the landlord was to blame, that there was *culpa* on his part because he had let an uninhabitable house in knowledge, on account of warnings that he had received, that it was unhealthy, there ought to be specification as to who made the complaints and what they were, and if they were to be proved, these details could have been given and ought to have been given. An opportunity was offered for amending the record by adding these particulars, but the pursuer's advisers are not prepared to amend, they prefer to take a judgment on the record as it stands. Now, taking it as it stands, besides the averment which I have read, and which I think insufficient, we have nothing except that the buildings and drains were old, and that the drains had not been examined for seven years. There is nothing actionable in a landlord letting a house in that state. It is said that when the first lot of birds died the pursuer informed the defenders. Both the pursuer and the defenders then thought the death of the birds was due to some defect in the gas-pipes, which were examined and repaired, and both landlords and tenant were satisfied that everything had been done which was required. The tenant was satisfied with what had been done, having all the knowledge as to the condition of the premises that the landlords had. A second and third lot of birds were brought in and died, and there were further examinations, and at last it was found that the drainage was defective. I have said that that might have entitled the tenant to go into a new house, and to have an action for

No. 193. the cost of removing and for any additional rent paid. I have explained the reasons why we cannot deal with that question here. I am of opinion that there are no averments here which would sustain an action of any other kind—any action of damages on the ground of *culpa* on the part of the landlord. I think, therefore, that we should recall the Lord Ordinary's interlocutor and dismiss the action.

LORD TRAYNER and LORD MONCREIFF concurred.

The LORD JUSTICE-CLERK was absent.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor reclaimed against: Sustain the second plea in law for the defenders: Therefore dismiss the action, and decern: Find the defenders entitled to expenses," &c.

J. B. W. LEE, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

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JOHN CAMPBELL SMITH, Pursuer (Appellant).—*Rankine—
M'Lennan.*

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W. J. HENDERSON, Defender (Respondent).—*Hunter.*

Landlord and Tenant—Obligation of tenant to occupy premises let—Damage to premises from leaving them unoccupied—Relevancy.—The landlord of a dwelling-house raised an action of damages against the tenant, and averred that the defender, without the pursuer's knowledge, left the house for seven months entirely unoccupied and uncared for, without fire or cleaning, and exposed to damp, frost, and dirt, greatly to the permanent injury of the house and its chances of finding another tenant; that one of the water-pipes burst and ran for days, to the injury of the floor, paper, and walls; and that the windows were broken because of the filthy, deserted appearance of the house, and because of its being left without protection. *Held* that the pursuer's averments were relevant.

2D DIVISION.
Sheriff of the
Lothians and
Peebles.

JOHN CAMPBELL SMITH, advocate, one of the Sheriff-substitutes of Forfarshire, raised this action against W. J. Henderson, formerly tenant of the pursuer in the dwelling-house, No. 16 Nelson Street, Edinburgh, concluding for payment of £50 as damages for injury caused by him to said house.

The pursuer averred,—(Cond. 3) "Notwithstanding that the defender was tenant of the said house, and as such bound to keep it properly plenished and in good order, so far as reasonable care of the occupant could keep it in good order, he, in or about October 1894, deserted the house, and took up his abode in a cottage at a place called Lothian Bridge, said to be in the neighbourhood of Dalkeith. He, without pursuer's knowledge, left the house entirely unoccupied and uncared for, from in or about October 1894 to Whitsunday 1895, without fire or cleaning, and exposed to damp, frost, and dirt, greatly to the permanent injury of the house and its chances of finding another tenant. One of the water-pipes burst and ran for days, to the injury of the floor, paper, and walls. The windows were broken because of the filthy, deserted appearance of the house, and because of its being left without protection. He removed from said 16 Nelson Street all his own furniture to said cottage in the country, or to some other place or places to the pursuer unknown, and he also carried off, without lawful title, a number of articles belonging to pursuer. He knew

that a variety of articles in the house belonged to the pursuer, but, in his irregular and lawless process of fitting, he gave the pursuer no opportunity of preventing his proceedings, as to his own effects, or of preventing the abstraction of articles that were not his own, and which, when once removed, could with difficulty be traced and identified. The defender's statements ostensibly in answer, so far as inconsistent with the pursuer's, are denied, except that it is admitted that pursuer gladly consented to the subletting of the house, but not to its being left untenanted; that the defender left the keys in the care of Messrs Clapperton, for the purpose of shewing or subletting the house and discharging the other ordinary duties of factor. The pursuer, about February 1895, as he knew that they had been trying to let the house, authorised them to act for him also. He borrowed the front door keys from them on two or at most three occasions, and returned them on each occasion within two hours. . . .

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The pursuer pleaded;—(2) The defender having, in breach of his obligations as a tenant, deserted and displenished the house let by pursuer to him, and left the house without fire, cleaning, or care, for many months, to the injury of the house, ought to be found liable in damages.

The defender pleaded;—(1) The action is irrelevant.

On 11th March 1897 the Sheriff-substitute (Maconochie) found, *inter alia*, that article 3 of the pursuer's condescendence was irrelevant.*

* "NOTE.—I have found it exceedingly difficult to come to a conclusion on the question whether there is any damage for which the defender may be liable relevantly averred in the condescendence, owing to the extremely discursive way in which the pursuer has set forth his case. The libel concludes for payment of £50. In February 1878 the pursuer let his house, 16 Nelson Street, to the defender and his two aunts. There were a number of fittings, gas-brackets, grates, &c., left in the house by the pursuer, for the use of which the leasees were to pay £6, 10s. per annum. The first ground of damage stated (cond. 3) is that, in October 1894, the defender, who is now the sole tenant, left the house unoccupied and uncared for until Whitsunday 1895, 'without fire or cleaning, and exposed to damp, frost, and dirt, greatly to the permanent injury of the house, and its chances of finding another tenant.' The damage first averred is that during the tenant's absence 'one of the water-pipes burst and ran for days, to the injury of the floor, paper, and walls.' Now, it is not stated when this burst occurred, and the pursuer admits that he had given permission to the defender to sublet, and that 'the defender left the keys in the care of Messrs Clapperton for the purpose of shewing or subletting the house, and discharging the ordinary duties of factors. The pursuer, about February 1895, as he knew they had been trying to let the house, authorised them to act for him also.' I do not think the averment of damage is relevant. It is not said when the burst occurred, and it may quite well have been during the time when Messrs Clapperton were acting as joint factors for the pursuer and for the defender. The averment of the damage done is also very vague; it is not said on which floor the burst occurred, or even approximately which walls were damaged. The defender was not in the house at the time, and he is not stated to have seen the damage at the time. He is, I think, entitled to know the exact case he has to meet, and ought not to be made to meet a loosely stated case, under which almost any damage appearing on the walls of the house might be proved and attributed to the burst pipe. The only other item of damage stated as having followed on the house being left empty is that 'the windows were broken because of the filthy, deserted

No. 194. The Sheriff (Rutherford) on appeal, adhered.

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The pursuer appealed to the Court of Session, and argued;—A tenant was bound to occupy premises let to him, and to give them the benefit arising from care and use. This was an implied term of the contract, and a breach of it rendered him liable in damages.¹ The pursuer had relevantly averred such a breach. The Clappertons were only the joint agents of the pursuer to secure another tenant, not to take care of the house. This was the clear statement of the pursuer.

Argued for the defender;—The pursuer's averments were irrelevant. It must be inferred that he knew of the vacation of the premises, and he must be taken to have acquiesced in this. He stated that he was willing that the house should be sublet. The bursting of the pipe would have injured the house even although it had been occupied, and there was no averment that more damage had ensued from the fact of the tenant's absence. The windows were not broken through the fault of the defender. There was no authority for the proposition that the tenant of a dwelling-house was responsible for damage caused by his temporary absence, much less would such liability be reasonable when the damage arose from accident. The blame truly lay with the Clappertons, who ought to have supervised the house as joint agents.

LORD YOUNG.—I do not think it necessary to call for any further argument. I am of opinion that article 3 is relevant, and that the interlocutor of the Sheriff, which refuses proof of article 3, must be recalled.

LORD TRAYNER and LORD MONCREIFF concurred.

The LORD JUSTICE-CLERK was absent.

THE COURT remitted to the Sheriff to allow the pursuer a proof of his averments, *inter alia*, in article 3 of the condensation.

DANIEL TURNER, S.L.—BOYD, JAMESON, & KELLY, W.S.—Agents.

No. 195.

July 14, 1897.
Todd v. Wood.

MRS ANN TODD (Claimant), Respondent.—*Crole*.

WILLIAM JAMES WOOD (Douglas's Trustee), Appellant.—*Craigie*.

Stamp—*Stamp Act*, 1891 (54 and 55 Vict. cap. 39), secs. 33 (1), 101 (1), and *First Schedule*, voce *Agreement*—*Bills of Exchange Act*, 1882 (45 and 46 Vict. cap. 61), secs. 3, 10, 89—*Document shewing state of account between parties not requiring a stamp*.—A, a claimant in a sequestration, produced a document in the following terms:—"Borrowed from A, £67 Pounds, July 1878. Paid back £5 Pounds, May 1885. Leaving a balance of £62 Pounds to pay still." The document was holograph of and signed by the bankrupt, but was neither dated nor stamped. Held that the document was neither a promissory-note, nor an agreement, nor a receipt, within the meaning of the Stamp Act, 1891, and that it might be received as an item of evidence in support of A's claim without a stamp.

appearance of the house, and because of its being left without protection.' Again, there are no dates or particulars of damage given, and further, the relation of cause and effect seems to be much too vague to be admitted to probaton. . . ."

¹ *Graham v. Stevenson*, Feb. 21, 1792, Hume's Decisions, 781; *White-law v. Fulton*, Nov. 1, 1871, 10 Macph. 27.

MRS ANN TODD, Cowhill, Rickarton, a claimant in the sequestration of John Douglas, mason, lodged the following account along with her affidavit :—

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" 1885.

" May. Balance of sum lent to bankrupt as per acknowledgment 2^d Division.

produced,	£62	0	0	Sheriff of Perthshire.
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" Add interest on same,	34	2	0	
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<u>£96</u>	<u>2</u>	<u>0"</u>
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The acknowledgment produced was in these terms :—

" Borrowed from Mrs Todd £67 Pounds, July 1878.

" Paid back £5 Pounds, May 1885.

" Leaving a balance of £62 Pounds to pay still.

" JOHN DOUGLAS."

This acknowledgment was alleged to be holograph of the bankrupt, and to be signed by him. It was written in pencil; it was not dated, and it was unstamped.

On 6th May 1897 the trustee in the sequestration, W. J. Wood, accountant, Perth, issued the following judgment :—" In respect that the acknowledgment of the loan is neither dated nor stamped, and that no information is supplied as to the alleged loan by the claimant, who is, the trustee understands, related to the bankrupt,—the trustee rejects the same."

The claimant appealed to the Sheriff, and on 28th May 1897 the Sheriff-substitute (Grahame) pronounced this interlocutor :—" Finds that said document not being an agreement or bond, or other document requiring to be stamped, but being a mere acknowledgment of debt, is, though unstamped, to be received as an item of evidence, which entitles the appellant to obtain an opportunity of adducing further evidence in support of her alleged debt: Therefore recalls said deliverance of the respondent, and remits to him to take such further evidence as the appellant may wish to adduce in support of her said claim: Finds the respondent liable in £3, 3s. of expenses, and decerns."*

* "NOTE.—The proper course to be taken by the trustee in regard to the case in question appears to me to be to receive the document of alleged debt which the appellant has produced with her claim as being in itself a valid item of evidence, and to allow her an opportunity for adducing such further proof as she may offer in support of her claim. The document in question appears to me to be a mere acknowledgment of debt, which requires no stamp. In the case of *Welsh's Trustees v. Forbes*, 18th March 1885, 12 R. 851, a document very similar to the one in question was, no doubt, dealt with under the judgment of a majority of the Judges of the Second Division of the Court of Session as being an agreement, and was accordingly stamped before it was given effect to; but in the judgment given in that case there were decided differences of opinion on the part of the Judges as to the actual legal character of the document—Lord Rutherford Clark holding that it should be dealt with as a receipt, while Lord Young held that it was a mere acknowledgment of debt, and the Lord Justice-Clerk and Lord Craig-hill being of opinion that it was an agreement or bond. The judgment pronounced by the Court in giving effect to the document before them, which was an unstamped document in the following terms :—" Received from Thomas Welsh, Esquire, on loan, £400.—R. Thomson Forbes, 10th November 1881," cannot, I think, be held to have authoritatively determined

No. 195. The trustee appealed to the Court of Session, and argued ;—The document required a stamp, and could not be considered. It was a promissory-note.¹ When no date of payment was stated payment on demand was implied.² Section 10 of the Bills of Exchange Act applied to promissory-notes as well as bills, as clearly appeared from section 89 (1) of that Act. Absence of date did not invalidate a bill.³ A document of similar character had been held a promissory-note.⁴ At least the document was a promissory-note in the meaning of the Stamp Act, 1891.⁵ If not a promissory-note, it was a receipt under the Stamp Act, section 10 (1).⁶ *Welsh's Trustees*⁶ proceeded on the Stamp Act, 1870, but this was really in the same terms as the Act of 1891. Or the document was an agreement or bond in terms of the Stamp Act, 1891, first schedule, *voce* Agreement, and was not admissible without a 6d. stamp, and a penalty of £10.

Counsel for the respondent was not called on.

LORD YOUNG.—I think we can only deal with this case in so far as it has been decided upon by the trustee. The trustee rejected the claim on the ground "that the acknowledgment of the loan is neither dated nor stamped,

what the legal character of the document was. The judgment of the Court did not give any express finding as to the character of the document, but was merely to the effect 'that counsel for the pursuer having stated they were willing to treat the document as an agreement, and the stamp-duty of sixpence and the penalty of £10, together with the sum of £1, having been consigned in the hands of the Clerk of Court in terms of the statute, the Court repelled the defences.' Lord Young, while concurring in the judgment of the Court, said,—'If this document had contained an obligation to pay, it would have been a bond and would have required a bond stamp. My opinion is that it requires no stamp, that it is a mere acknowledgment of debt, which may be conclusive or not according to circumstances.' Lord Young's opinion appears to me to apply equally to the document in the present case, and in recalling the deliverance of the respondent I have proceeded upon the ground that that learned Judge's opinion sets forth the true character of such a document as the one now in question, and the effect which the defender is therefore entitled to claim for it as an item of evidence in support of the claim which she makes for a ranking on the bankrupt's estate."

¹ Bills of Exchange Act, 1882, sec. 83 (1).

² Bills of Exchange Act, 1882, sec. 10 (1) (b).

³ Bills of Exchange Act, 1882, sec. 3 (4) (a).

⁴ *Vallance v. Forbes*, June 27, 1879, 6 R. 1099.

⁵ The Stamp Act, 1891 (54 and 55 Vict. cap. 39), enacts as follow, sec. 33 (1) :—"For the purposes of this Act, the expression 'promissory-note' includes any document or writing (except a bank-note) containing a promise to pay any sum of money." Section 101 (1) "For the purposes of this Act, the expression 'receipt' includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory-note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid. . . ." First schedule,—“Agreement, or any memorandum of an agreement, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument—6d."

⁶ *Welsh's Trustees v. Forbes*, March 18, 1885, 12 R. 851, *per* Lord Rutherford Clark, p. 860.

and that no information is supplied as to the alleged loan by the claimant, who is, the trustee understands, related to the bankrupt." The Sheriff-substitute recalled that deliverance, and found that said document, not being an agreement or bond, or other document requiring to be stamped, but being a mere acknowledgment of debt, is, though unstamped, to be received as an item of evidence, which entitles the appellant to an opportunity of adducing further evidence in support of her alleged debt. The argument against the Sheriff-substitute's finding and in support of the trustee's deliverance is, that the document produced is either a promissory-note, a receipt, or an agreement, or bond. I am of opinion that it is not a promissory-note. I am also of opinion that it is not a receipt, or an agreement, or a bond. Of course I mean that it is none of these things within the meaning of the Stamp Act. I am further of opinion that it does not require any stamp. What its force may be as establishing a debt against the bankrupt's estate I do not know. I have not to form any judgment or express any opinion on that point. It may or it may not establish the claimant's claim of debt in whole or in part. All I can give an opinion upon is that it ought not to be rejected because it has not a promissory-note, or a receipt, or an agreement, or bond stamp upon it. I think the Sheriff-substitute's interlocutor should be adhered to. It decides nothing more than that this document is to be received as an item of evidence in support of the claim. I say nothing for or against the contention that it is sufficient to establish the claim. We cannot be called upon to decide that question, for it has not been decided by the trustee. I therefore suggest that we should refuse the appeal, with expenses.

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LORD TRAYNER.—I agree. I think the grounds on which the trustee proceeded in rejecting this claim are untenable. If it be the case, as the trustee understands, that the claimant and the bankrupt are conjunct and confident, that will afford a good reason for the trustee exercising his right to call for further evidence or explanation before admitting this claim to a ranking. But it is not a ground for rejecting the claim *de plano*.

LORD MONCREIFF.—I am of the same opinion. I think this document is neither a promissory-note, nor a receipt, nor an agreement, within the meaning of the Stamp Act. It is plainly only a jotting or note shewing the state of account between the parties, written a long time after the loan was made. It may or may not of itself be conclusive evidence of the subsistence of a debt, but I agree that that is a matter which the trustee must decide for himself. All we decide is that the writing is competent evidence of loan, and should be received and considered though unstamped. I think we should sustain the judgment of the Sheriff-substitute, and remit the case to the trustee.

The LORD JUSTICE-CLERK was absent.

THE COURT pronounced the following interlocutor:—"Dismiss the appeal, and affirm the interlocutor appealed against: Find the appellant liable in expenses, and remit the same to the Auditor," &c.

CARMICHAEL & MILLER, W.S.—W. B. RAINNIE, S.S.O.—Agents.

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July 15, 1897.
Brown's
Trustees v.
Hay.

MRS ALICE CATHERINE BROWN AND OTHERS (Brown's Trustees),
Pursuers (Respondents).—*Sol.-Gen. Dickson—Salvesen.*
JAMES HAY, Defender (Reclaimer).—*Jameson—John Wilson.*

Process—Summons—Action by separate pursuers for lump sum of damages—Amendment—Competency.—A's testamentary trustees, and B, a member of a dissolved firm, who had acted as A's law-agents, brought an action against C, who had been employed by A as an accountant, concluding for delivery of documents belonging to the trust-estate and for payment "to the pursuers" of £100 as damages. The pursuers alleged that C had been employed by A to audit the accounts of his business, and had also been employed to wind up the affairs of B's firm; that in these capacities he had obtained possession of documents having reference to the business carried on sometime by A and afterwards by his trustees, and that in breach of his duty he had communicated information so obtained to third parties, to the damage of the pursuers.

The defender objected that the action was incompetent, being at the instance of separate pursuers for payment of a lump sum of damages.

Held (aff. judgment of Lord Stormonth-Darling) that it was competent to amend the summons by concluding for payment to the pursuers, A's trustees, instead of to the pursuers generally.

Opinion by the Lord President that the conclusion for damages as originally framed was not incompetent, in respect that the condescendence shewed that the sole claim made was based on alleged injury to the trustees, and that there was no combination of heterogeneous claims to found a demand for payment of one sum to the pursuers generally.

Opinion by Lord McLaren that the discretion of the Lord Ordinary in allowing amendments of the record was not intended to be subject to review, except on the ground that he had exceeded his power under the statute.

1st Division.
Ld Stormonth-
Darling.

THIS was an action at the instance of Mrs Brown, Ralph Compton Cameron, and others, the trustees under the trust-disposition and settlement of William Brown, of Dunkinty, and Ralph Compton Cameron, one of the trustees as an individual, against James Hay, accountant in Elgin. The conclusions of the action were (1) for delivery to the pursuers of all documents or copies of documents, having reference to the business of distillers sometime carried on by the deceased William Brown, and now by the pursuers at Linkwood Glenlivet Distillery, Elgin, including all extracts, excerpts, or copies made from the books or papers of the business by the defender between 1880 and 1893, during which period the defender audited the books and accounts of the distillery; (2) for interdict against the defender communicating to third parties without the pursuers' consent or to their prejudice, any information relating to the affairs of the distillery, obtained by him while acting as auditor; and (3) for payment "to the pursuers" of £500 as damages.

The pursuers averred;—(Cond. 2) The defender was cashier for over twenty years of the late firm of Cameron & Allan, solicitors, Elgin, of which the pursuer Mr R. C. Cameron was a partner. The business was carried on until 1895, when it was wound up by mutual consent of the surviving partners. The defender was appointed to wind up the business of the firm. (Cond. 3) " . . . From about 1880 until 1893 the defender was employed by Mr Brown through said firm of Cameron & Allan, to make up and audit the accounts of the distillery." (Cond. 4) "While acting as auditor of said distillery, the defender had full access to all the books and documents belonging to the distillery and relating to its affairs, and he thereby obtained

information on private and confidential matters connected with the business of the distillery. As liquidator of the dissolved firm of Cameron & Allan the defender also obtained possession of numerous documents and papers belonging to the said firm as clients thereof. Amongst said papers the pursuers believe and aver were some which were prepared in connection with the business of the Linkwood Glenlivet Distillery, belonging to them, and which had come into the possession of Cameron & Allan as agents for the late Mr Brown. It was the duty of the defender not to use said information except for the purposes of his employment, and to refrain from communicating to third parties any information with regard to the business of said distillery which he had acquired while acting as auditor of its books and accounts, or which had come to his knowledge as liquidator of said firm of Cameron & Allan." (Cond. 5) In breach of his duty the defender made copies or extracts of the books, accounts, and documents, relating to the distillery business, which he retained when his duties as auditor terminated. (Cond. 6) Further, in breach of his duty the defender had maliciously used these copies and excerpts so as to communicate to third parties the information therein contained.

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The pursuers further averred that they had been put to great trouble and expense on account of his disclosures.

The defender denied that he had made any communications to third parties in breach of his duty.

The defender pleaded;—(2) The action is incompetent as laid. (3) The pursuers' averments are irrelevant.

After the record had been closed the pursuers lodged a minute craving the Lord Ordinary to allow them to amend the summons by inserting after the word "pursuers" in the third conclusion of the summons the words "the trustees foresaid," and to make certain corresponding alterations on their averments and pleas in law.

On 1st July 1897 the Lord Ordinary (Stormonth-Darling) allowed the pursuers to amend the summons in terms of the minute of amendment, and before answer allowed the parties a proof of their averments.

The defender reclaimed, and argued;—(1) The conclusion for payment of damages was incompetent, being at the instance of separate pursuers with separate grounds of action for payment of a lump sum of damages.¹ (2) The amendment on the summons proposed by the pursuers should not have been allowed. Its effect was to substitute a new pursuer, the trustees, for the joint pursuers at whose instance the action had originally been brought. It thus enlarged the scope of the summons, because by substituting a several claim for a joint one, it thus increased the damages due to the trustees, while it left Cameron in a position to raise another action. The amendment therefore was a contravention of the Court of Session Act.² Further, assuming the competency of the amendment, the question whether it should be allowed was for the discretion of the Court,³ and, in the circumstances, this amendment should not be allowed. [The LORD

¹ Gibson v. Macquean, Dec. 5, 1866, 5 Macph. 113, 39 Scot. Jur. 56; Mitchell v. Grierson, Jan. 13, 1894, 21 R. 367; Harkes v. Mowat, March 4, 1862, 24 D. 701, 34 Scot. Jur. 348; Smyth v. Muir, Nov. 13, 1891, 19 R. 81; Fischer & Co. v. Andersen, Jan. 15, 1896, 23 R. 395.

² 31 and 32 Vict. cap. 10, sec. 29; Turnbull v. Veitch, July 18, 1889, 16 R. 1079.

³ Taylor v. M'Dougall & Sons, July 15, 1885, 12 R. 1304.

No. 196. PRESIDENT referred to the cases of *Leny v. Magistrates of Dunfermline* and *Russell, Hope, & Co. v. Pillans*.¹ (3) The action was irrelevant.

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Argued for the pursuers;—(1) The action was competent in its original form, only one ground of damage being alleged. The defender had no interest to object to the original form of the summons, his only interest being to get a good discharge from the claim, and that he could get, because all the parties having a possible claim against him were present. (2) The Court would be slow to interfere with the Lord Ordinary's discretion in allowing an amendment. Further, the amendment in this case had been rightly allowed. It made no change in the amount claimed, and introduced no new pursuer. It was competent, and must be allowed. (3) The action was relevant.

LORD PRESIDENT.—It is said first by the reclamer that this summons as it stood was incompetent; and he goes on to say that this amendment was outside the provisions of the section of the Court of Session Act. I think both these propositions are wrong.

In the first place, the action must not be regarded as solely an action for the recovery of money, because the leading conclusion is for delivery of documents. I will take in the first place Brown's trustees' case. It is said by Brown's trustees,—“Under the contract which our truster entered into with you, the defender, certain papers were put into your possession. Now, contrary to the contract, which we are in right of, you retained these documents, and, what is worse, are making a bad use of them; and we ask that you be ordered to give them back.”

Now, supposing the trustees, from some legal scruple, which may be unfounded in reason, chose to associate with themselves in their summons for the recovery of these writs their law-agent, I do not see anything incompetent in their asking that delivery be made to them and their nominees, in place of solely delivery to themselves; and therefore it seems to me it cannot be maintained that, in any view, the summons was incompetent, because the objection is really untenable as applied, at all events, to the first conclusion. If the action had been incompetent as to the petitory conclusion the proper result would have been, not the dismissal of the whole action, but the dismissal of the petitory conclusion. But as regards that conclusion, I am not at all satisfied that the action was incompetent; indeed, I think it was competent enough. It is to be observed that there is not here any combination of heterogeneous claims to found a demand for payment of one sum indiscriminately to all the parties. You are to look at the ground of action to ascertain what the claim is, not only from the conclusions of the summons, but from the summons and the condescendence together, and you will consider what is the claim really made. As I take it, when the claim is scrutinised it is a claim for damage which has been done to the trustees, and the position of Mr Cameron really comes on examination to be this: that he has for some reason or other been put in the instance so as to obviate any objection that might be taken as to the rather confused circumstances in

¹ *Leny v. Magistrates of Dunfermline*, March 20, 1894, 21 R. 749; *Russell, Hope, & Co. v. Pillans*, Dec. 7, 1895, 23 R. 256.

which the papers were at one time or another in the hands of the de- No. 196.
fender.

But then I go on to say that I think if it should turn out that the summons was, on the face of it, incompetent owing to an error, the claim of damage, let us say, not being in express terms limited to persons who had suffered the damage, and supposing that that rendered the summons incompetent, yet, if it appeared to be, in the words of the statute, "an error or defect," I think,—and I see the Judges of the other Division have so held,—that the action can be made competent under the powers of the Court of Session Act; and therefore I think the Lord Ordinary has acted quite rightly. As I read the summons, the second claim submitted on record is a claim for injury to the trustees. That has been erroneously stated in the summons as yielding a money payment to all the pursuers instead of to the primary and proper pursuers. I think the Lord Ordinary was quite right in allowing that to be corrected.

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When we turn to the question of relevancy, some of the same considerations arise. It is quite a mistake to suppose that the claim of damages is founded on this defender having, when in the employment of the legal firm, committed a wrong against the pursuers, because the leading averments of the condescendence, as I have already pointed out, set out the contract between the truster and defender, and the retaining of the papers as really a violation of the contract which they are now in right of. It is quite true that a more dubious part of the case is introduced by the statement that the defender was employed by Messrs Cameron & Allan as their liquidator, and that that afforded him free access to Brown's trustees' papers, and that he misused these papers which he had access to. It may or may not be that that is a good ground of action as adding more damages to the claim; but this is not the proper time to dissociate things which in statements are much interwoven. I have no doubt the Judge who tries the case will have his attention called to the difference in quality of these averments, and will be able to dissociate them, if, in his opinion, one should be good and the other bad, but on that question I pronounce no opinion all.

I think the case should go to trial, and I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM concurred.

LORD M'LAREN.—I concur in all that your Lordship has said, both as to the propriety of the amendment which the Lord Ordinary has allowed, and as to the relevancy. I will only add that I think there are strong reasons for considering that the power of amendment given to the Judge, or the Court under the Court of Session Act, is—I will not say a discretionary power—but a power to be exercised according to the personal judgment of the Judge or Court before whom the question may arise. My reason for saying so is partly this, that the power is to be exercised at any stage of the case; and in another part of the Act it is provided that, even in the course of a jury trial, the record and issues may be amended so as to enable the Court and jury to decide the true question in dispute. Now, it can hardly be supposed that a power which is to be exercised by a Judge in the progress of a

No. 196. trial is one that was intended to be subject to review on the question whether there was a proper case for the application of the statutory power. As review is not excluded, we must hold that if a legal question should arise, a question involving construction of the statutory power, that may be taken to review as has been done in this case. But, in my judgment, there is here no case of construction of the statute, but only a question whether the Lord Ordinary rightly applied the power given in the statute for the purpose of removing a difficulty in the statement of the case or making the pursuer's case more clear. Even if I differed from the Lord Ordinary, which I do not, I should not be prepared to interfere with his judgment in such a matter.

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LORD KINNEAR concurred.

THE COURT adhered.

JOHN C. BRODIE & SONS, W.S.—ROBERT STEWART, S.S.C.—Agents.

No. 197. DUNCAN STEWART, Pursuer (Respondent).—*W. Campbell—Abel*.
JULY 15, 1897. RODERICK FORBES AND ANOTHER, Defenders (Reclaimers).—*F. T. Cooper—Welsh*.
Stewart v. Forbes.

Cautioner—Suspension—Caution for expenses—Personal liability of cautioner in suspension—Trust.—The complainer in a suspension of a charge upon a bill having died, his widow, one of his trustees, was at her own request sisted as complainer in his place as his "trustee," and found caution, her cautioner becoming bound "that she shall, as trustee foresaid, pay" the sum in the bill "in full in the event of there being a sufficiency of trust funds, or rateably along with the other creditors" of the truster "in the event of his estate proving insufficient to pay his creditors in full," and also "that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses in case of wrongous suspending." The Court ultimately repelled the reasons of suspension, and found the complainer liable in expenses "as trustee."

In an action by the charger against the cautioner, *held (diss. Lord Young, aff. judgment of Lord Low)* that whatever the liability of the complainer might be, the cautioner was liable to the charger in payment of the whole expenses.

2D DIVISION.
Lord Low.

ON 6th April 1896 Duncan Stewart, shipmaster, Leith, with consent of Wallace & Pennell, Writers to the Signet, for their interest, raised an action against Roderick Forbes, solicitor, Edinburgh, and Janet Cairns Welsh or Daily, widow of John Cameron Daily, shipmaster, Leith, concluding for decree against Forbes for the sum of £64, 14s. 8d., being the amount of expenses decerned for in a suspension in which Forbes was cautioner.

The action arose in the following circumstances:—

Daily, Mrs Daily's husband, having been charged to pay the sum of £100 and interest due under a bill drawn by the pursuer Stewart, and accepted by Daily, brought a suspension of the charge, and the note was passed on caution.

Daily died on 27th July 1895, leaving a trust-disposition and settlement under which Mrs Daily and others were appointed trustees.

Thereafter by interlocutor dated 6th September 1895 Mrs Daily was at her own request sisted as complainer in the suspension, "as

trustee of the deceased John Cameron Daily," and appointed to find No. 197. caution "as trustee foresaid."

In pursuance of this interlocutor Forbes, the present defender, ^{July 15, 1897.} became cautioner for Mrs Daily. ^{Stewart v. Forbes.}

The bond of caution, which was dated 21st September 1895, was in the following terms:—

"I, Roderick Forbes, solicitor, 22 Castle Street, Edinburgh, bind and oblige myself, and my heirs, executors, and successors, as cautioners and surety acted in the books of Council and Session for Mrs Janet Cairns Welsh or Daily, residing in Gladstone Place, Leith, widow of John Cameron Daily, sometime of No. 24 Bernard Street, Leith, now deceased, trustee acting under the trust-disposition and settlement of the said John Cameron Daily, that she shall, as trustee foresaid, pay to Duncan Stewart, designed in the note of suspension after mentioned as shipmaster, Gladstone Place, Leith, but presently resident abroad, and Messieurs Wallace & Pennell, Writers to the Signet, Leith, his agents, for any interest they may have,—respondents, or to any other person to whom she shall be ordained to make payment, of the sum of £100 sterling, and the legal interest thereof since due and till paid, contained in and due by a bill dated the 9th day of January 1895 years, drawn by the said Duncan Stewart upon and accepted by the said John Cameron Daily, and payable four months after date, in full in the event of there being a sufficiency of trust-funds, or rateably along with the other creditors of the said John Cameron Daily in the event of the estate proving insufficient to pay his creditors in full; but declaring that this limitation of the obligation shall be without prejudice to any preference which the respondents may have already secured in a note of suspension between the said parties presented on the 4th day of July 1895 years, and that in case it shall be found by the Lords of Council and Session that she ought so to do, after discussing the passed note of suspension, and also that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses in case of wrongous suspending.—Consenting to the registration hereof in the books of Council and Session that letters of horning and all other execution may pass upon a decret to be interponed hereto in common form," &c.

On 26th November 1895 the Lord Ordinary (Low) pronounced the following interlocutor in the suspension:—"Repels the reasons of suspension: Finds the letters and charge orderly proceeded, and decerns: Finds the complainer, Mrs Janet Cairns Welsh or Daily, as trustee of John Cameron Daily, her husband, the original complainer, liable to the respondents in expenses: Allows an account of said expenses to be given in, and remits the same when lodged to the Auditor of Court to tax and report."

On 7th January 1896 the following further interlocutor was pronounced in the suspension:—"The Lord Ordinary approves of the Auditor's report on the respondents' account of: expenses, No. 34 of process, and decerns against the complainer for £64, 14s. 8d. sterling, the taxed amount thereof."

The present action was then brought.

The pursuers set forth the foregoing facts, and averred that payment of the expenses decerned for in the suspension had been demanded from Mrs Daily and Forbes, but had been refused.

The pursuers pleaded;—(1) The defender Roderick Forbes being bound, in terms of his bond of caution, to make payment to the pur-

No. 197. suer of the sum sued for, decree should be pronounced therefor, with expenses.
 July 15, 1897. The defenders pleaded, *inter alia*;—(2) The decerniture for expenses being against the defender Mrs Daily in her capacity of trustee only, the pursuer is not entitled to a personal decree, either against her or her cautioner.

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On 19th March 1897 the Lord Ordinary (Low) pronounced this interlocutor:—"Repels the defences, and decerns against the defenders, conform to the conclusions of the summons: Finds the pursuer entitled to expenses; allows an account," &c.*

The defenders reclaimed, and argued;—Forbes, as cautioner, was bound for Mrs Daily "as trustee" only, and as trustee she was not personally liable for the expenses of the suspension, the decerniture against her being "as trustee."¹ A cautioner could not be liable for a larger sum than his principal, otherwise he would be liable without a right of relief *quoad* the excess.²

Argued for the pursuer;—(1) Mrs Daily was personally liable for the expenses. She was a trustee, not a judicial factor, and the rule laid down in *Craig v. Hogg*¹ was confined to judicial factors, who were officers of Court, whereas testamentary trustees and executors were, at common law, liable to the full extent of their author's debts. (2) A cautioner might be liable for more than his principal, *e.g.*, cautioners for minors acting without their curators.³ Cautioners in

* "OPINION.—The interlocutor in the suspension finds Mrs Daily, as trustee of John Cameron Daily, 'her husband, the original complainer, liable to the respondent in expenses.' I am inclined to think that the words which I have quoted are only descriptive and explanatory of how Mrs Daily became liable in expenses in a suspension which was brought by her husband, John Cameron Daily.

"Assuming, however, that the rule laid down in the case of *Craig v. Hogg* (24 R. p. 6) applies, and that the words in the interlocutor 'as trustee' limit Mrs Daily's liability to the extent of the trust-estate, I do not think that it forms a good defence to the cautioner.

"In the bond of caution there is a distinction between the obligation to pay the principal sum contained in the bill which was under suspension, and interest thereon, and the obligation undertaken for the expenses and damages in case of wrongous suspending. The obligation in regard to the principal sum is that Mrs Daily 'shall, as trustee foresaid, pay to Duncan Stewart, designed in the note of suspension as shipmaster, Gladstone Place, Leith, but presently resident abroad, the sum of £100 sterling, and the legal interest thereof since due and till paid, . . . in full in the event of there being a sufficiency of trust funds, or rateably along with the other creditors of the said John Cameron Daily in the event of his estate proving insufficient to pay his creditors in full.' The obligation as regards the principal sum, therefore, is simply that the estate shall be forthcoming.

"But as regards expenses and damages it is different. The cautioner binds himself 'that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses in case of wrongous suspending.'

"There is no limitation of liability there. The cautioner binds himself to see the sum which shall be modified as expenses paid. That sum is the amount of the account as taxed. I shall therefore give decree in terms of the conclusions of the summons."

¹ *Craig v. Hogg*, Oct. 17, 1896, *supra*, p. 6.

² *Ersk. Inst.* iii. 3, 64; *Jackson v. M'Iver*, July 6, 1875, 2 R. 882.

³ *Stair*, i. 17, 10; *Ersk. Inst.* iii. 3, 64.

suspension were also in this position. Many of the ordinary rules in regard to cautioners did not apply to them.¹ The Court made it a condition of execution being sisted that caution should be found for the very purpose of having someone liable absolutely in expenses in the event of suspension being refused. The charger did not desire a cautioner; he stood on his decree, but the Court, in suspending execution *ad interim*, insisted on caution being found in order to secure the charger in his expenses if he should ultimately be successful. (3) In any view, the cautioner was bound here on the terms of his bond. He bound himself for expenses *simpliciter*.

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At advising,—

LORD JUSTICE-CLERK.—This action is raised for the purpose of obtaining decree for the amount of the expenses found due in a suspension in which the defender was the cautioner. The suspension was originally raised by one John Cameron Daily now deceased, and the note was passed on caution. He had not found caution at the time of his death, and his widow, who was by his trust-disposition and settlement appointed a trustee and executrix on his estate, sisted herself, and the defender was accepted as her cautioner. By the bond of caution the obligation as regards the principal sum is, that Mrs Daily shall, “as trustee foresaid,” pay to the respondents the sum contained in and due by the bill; and then there is a declaration saving any preference which the respondents may have secured. As regards the expenses, the obligation is, “that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses.”

In a suspension the complainer undertakes to find caution, if the Court think it right not to allow the suspension to be proceeded with unless caution be found—that is, caution that the intending charger shall not be in a worse position than he is at the time of the finding of the caution by not being able at once to charge upon his decree. Here the complainer who was sisted was in the position of trustee, and therefore, as regards the principal, not liable except in so far as there might be funds available in the executry estate to meet the claim. This is accordingly duly set forth in the passage I have read. It simply binds the cautioner to make the amount of the existing estate forthcoming, if the decree under which it is claimed is successfully maintained against the suspension.

But the conditions as regards expenses in the suspension seem to me to be different. The cautioner does not merely undertake that if there was estate in the hands of the suspender to meet both principal and expenses, that the expenses shall be paid, but his undertaking is expressed in language absolute and unrestricted. He undertakes that “payment shall be made” of these expenses, as modified by the Court, in case of wrongous suspending. That he should undertake to make good these expenses is a condition of the suspension being allowed to proceed. And unless that means that he shall pay them, if decerned for, so that the respondent in the suspension shall not be a loser by its being allowed to proceed, the language is certainly very badly chosen to express any other idea. If a respondent is to be kept from

¹ Ersk. iii. 3, 72; Simpson v. Fleming, Feb. 3, 1860, 22 D. 679, per Lord Wood at pp. 682-3, 32 Scot. Jur. 256.

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suffering by a wrongous suspension, by caution taken for his protection, I think that can only be done by two things being guarded against by caution, (1) the diminution of that estate on which he has a right to charge, pending the suspension proceedings; and (2) security given to him that he shall be paid the expenses he is put to by the suspension. These are the conditions on which the complainer is allowed to proceed with the suspension. Therefore I am of opinion that whatever may be the liability of the principal here, who was found liable in expenses *qua* trustee, the cautioner who signed this obligation that payment should be made of the expenses which the Court should modify is bound when called on to make the payment. The respondent in the suspension is not required to discuss the principal first. He is entitled to sue the cautioner, leaving him to find relief, if he can, from his principal. It may be that the cautioner may not be able to obtain full relief against the principal. As to that I express no opinion,—whether the words “as trustee” mean that the suspender is liable, and has relief against the estate, or whether it means that she is only liable to the extent of the estate in her hands for the expenses. Even if it be so, I still would hold that this cautioner, having offered his obligation that the modified expenses would be paid, must be decerned to pay them. The respondent in the suspension is not interested in the question who shall ultimately suffer the loss of these expenses. He holds his obligation binding this defender to pay them, and is entitled to a decree against him in terms of the obligation. In decerning against him, we are only decerning that he shall do that which he undertook to do, and on which undertaking alone the person for whom he intervened was allowed to proceed with the suspension, which has been unsuccessful. I am therefore in favour of affirming the Lord Ordinary’s interlocutor.

LORD YOUNG.—I am of opinion that this case is ruled by the decision of seven Judges in the case of *Craig v. Hogg*.¹ In that case it was decided by a majority of five Judges to two that where a judicial factor or trustee is found liable in expenses as judicial factor or trustee, that signifies that he is only liable as judicial factor or trustee to do his duty as such in administering the factorial or trust-estate. That that was decided is, I think, clear from a reference to the opinions of the Judges.

The Judges were all of opinion, and expressed their opinion, that there was no difference between the case of a judicial factor and the case of a trustee.

I stated my opinion very distinctly in that case to the effect that a judicial factor or trustee ought not to be found liable personally in expenses unless there is something in the conduct of the judicial factor or trustee to warrant such a finding—some failure to do his duty as judicial factor or trustee. Some of the Judges expressed an opinion that the general rule was for personal liability. My opinion to the contrary was concurred in by Lord Adam and Lord Kinnear. But all the Judges who were in the majority in that case were of opinion, and expressed themselves clearly to the effect, that whether the general rule is for personal liability or not, the question of

¹ *Supra*, p. 6.

liability in that particular case should be determined in favour of the judicial factor, and that when a judicial factor or trustee is found liable "as judicial factor or as trustee" such a finding negated personal liability and inferred liability only as judicial factor or trustee.

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That case was of importance, not only on the general question of liability in such cases, but also as regards the proper mode of expressing an interlocutor with reference to the question of the personal liability of a judicial factor or trustee for expenses, and it was decided that where the intention is to find a trustee or judicial factor personally liable in expenses, the proper course is to find him in terms personally liable in expenses, and where the intention is to limit his liability to the extent of merely making the factorial or trust-estate forthcoming, the proper course is to find him liable as judicial factor or trustee, and that when he is so found liable, personal liability is negated.

The grounds of my opinion will be found on page 18 of the report, where I am reported to have said,—“I stated in the outset of these observations that the qualifying and limiting words ‘as judicial factor’ in the decree against the complainer are, in my opinion, inconsistent with the personal liability which the respondent contends for, and this opinion, if sound, is enough for the decision of the case.”

Lord Adam concurred in my opinion in terms, and so did Lord Kinnear. Lord McLaren thought that the general rule was for personal liability, but that there was no personal liability where the finding was for liability as judicial factor or trustee. He says,—“The view which I take on the second question would (if I were sitting alone) make it unnecessary to consider the first. I think that the question whether a trustee or judicial factor is to be made liable in expenses individually, or only in his representative capacity, is a question that ought always to be decided in the original action. If the decree is simply against the ‘pursuer’ or the ‘defender,’ I should understand this as meaning that the individual decerned against must pay the expenses, reserving his claim to be indemnified out of the trust-estate, a claim which of course cannot be determined one way or the other in an action to which beneficiaries are not parties. In the present action, the interlocutor in the original action, which is the warrant of the decree, ordains Mr Craig, ‘as judicial factor of Archibald Rodan Hogg,’ to make payment to the pursuer of £159, 6s. 8d. with interest, and also finds the defender, ‘as judicial factor foresaid,’ liable in expenses to the pursuer. It is not disputed that the decerniture for principal and interest due under the account sued for is a decerniture against Mr Craig in his representative capacity; and it follows, in my opinion, that an award of expenses, qualified in identical terms, must be read subject to the same limitation.

“In so reading the decree we are not, as I conceive, laying down new law. So long ago as 1842 the meaning of an obligation undertaken by obligants ‘as trustees’ was determined by the House of Lords. I refer to the case of *Gordon v. Campbell*.¹”

Lord Moncreiff expressed himself to the same effect. He says,—“I agree with those of your Lordships who hold that it does not” (i.e., that

¹ 1 Bell's App. 428.

No. 197. the decree in that case, according to its terms, did not impose personal liability), because the complainer was found liable in expenses, 'as judicial factor' and not as an individual. These are limiting words; their natural and legal signification and effect is to restrict the decree to one against the party in a representative capacity."

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Therefore I infer that the five Judges who constituted the majority in *Craig v. Hogg*¹ were of opinion that where you have these limiting and qualifying words you have no personal liability.

I must therefore express some surprise at the first sentences of the Lord Ordinary's opinion. He says,—“The interlocutor in the suspension finds Mrs Daily, as trustee of John Cameron Daily, ‘her husband, the original complainer, liable to the respondent in expenses.’ I am inclined to think that the words which I have quoted are only descriptive and explanatory of how Mrs Daily became liable in expenses in a suspension which was brought by her husband, John Cameron Daily. Assuming, however, that the rule laid down in the case of *Craig v. Hogg*¹ applies, and that the words in the interlocutor ‘as trustee,’ limit Mrs Daily's liability to the extent of the trust-estate,” and so on. I cannot think it doubtful that *Craig v. Hogg*¹ applies, and the Lord Ordinary suggests nothing to the contrary which was not overruled in the case of *Craig v. Hogg*.¹ The decree against Mrs Daily finds her, “as trustee of the said John Cameron Daily, her husband, the original suspender, liable to the respondent in expenses.” That may, no doubt, be a serious liability. She must do her duty in recovering payment of these expenses out of the trust-estate. Now, Mrs Daily has a cautioner, and this action is against him for payment of the expenses so decreed for as her cautioner. The pursuer's first plea in law is as follows:—“The defender Roderick Forbes being bound, in terms of his bond of caution, to make payment to the pursuer of the sum sued for, decree should be pronounced therefor, with expenses.” It is not contended that he is liable except as her cautioner, and in terms of his bond of caution. The question is whether this imposes a liability on him which is not upon his principal and never was. She was not found liable in expenses. She was found liable in expenses “as trustee.” And it is her liability which he as cautioner is bound to discharge. I am bound to say I differ entirely from your Lordships and the Lord Ordinary. There is no liability upon the defender except as cautioner for Mrs Daily. The bond of caution begins as follows:—“I, Roderick Forbes, solicitor, 22 Castle Street, Edinburgh, bind and oblige myself, and my heirs, executors, and successors, as cautioners and surety, acted in the books of Council and Session, for Mrs Janet Cairns Welsh or Daily, residing in Gladstone Place, Leith, widow of John Cameron Daily, sometime of No. 24 Bernard Street, Leith, now deceased, trustee acting under the trust-disposition and settlement of the said John Cameron Daily, that she shall as trustee foresaid pay,” and so on. That is the introduction to the bond of caution, and these are the only words of obligation in the bond. These words are the ordinary words of style. He also binds himself that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses in case of wrongous suspending, but this expression must be read along with the introductory

words, which, as I have said, are the only words of obligation in the bond by No. 197. which the cautioner is only bound as cautioner for Mrs Daily "as trustee."

I know of no case in which a cautioner is liable for more than his principal except upon some special ground. We were referred very properly to state-^{July 15, 1897.}ments from Erskine's Institutes, iii. 3, 64, and Stair's Institutions, i. 17, 10, to the effect that cautioners for minors acting without their curators and married women may be found personally liable although they have no relief against their principals. These are on the statement of them emphatically exceptional cases. The cautioner in such cases is found liable for his gross indiscretion and indeed impropriety of conduct in becoming liable for a minor acting without his curators, or for a married woman. This case is entirely different. ^{Stewart v. Forbes.}

Now, by this decree which your Lordships propose to pronounce we either make Mrs Daily liable by making the cautioner liable with relief against her according to the ordinary rule of law, and so impose upon her a liability which the Lord Ordinary in his original decree declined to impose—when I say declined I am assuming of course that the words "as trustee" have the limiting and qualifying effect which the majority of the Court in the case of *Craig v. Hogg*¹ were of opinion that they had—or we have an example of a case which has never to my knowledge occurred before of a cautioner being found liable for more than his principal without any relief against his principal, and without any fault or indiscretion on his part, as in the case of the cautioner for a minor acting without his curator, or a married woman. I cannot assent to that. I think that the cautioner is liable only in so far as his principal is liable. I think therefore that the cautioner here is bound to implement the decree only in so far as Mrs Daily is bound.

There are some exceptional words introduced into the bond with a view to protecting any preference which the respondents might have already secured. They were introduced for no other purpose. All the rest is in the ordinary words of style.

I am therefore of opinion that the opinion of the Lord Ordinary is wrong, and that his interlocutor ought to be reversed. I regard this case as of importance because it arises on the case of *Craig v. Hogg*.¹

LORD TRAYNER.—In the interlocutor under review the Lord Ordinary assumes the rule laid down by the majority of the Court in the case of *Craig v. Hogg*,¹ but thinks it does not form a good defence to the present defender. I agree with the Lord Ordinary. I leave aside the considerations which arise from the difference between a cautioner in a suspension and an ordinary cautioner who intervenes at the request of a creditor to guarantee the debtor's debt. These considerations are by no means immaterial in themselves, but in my view do not need to be taken into account here. I think the cautioner's obligation here is to see paid whatever expenses shall be found due "in case of wrongous suspending." The reasons of suspension were repelled, and therefore there was "wrongous suspending" in the sense of the bond of caution.

I cannot take the view that the cautioner's obligation before us is limited to the extent of the suspender's liability for expenses. His liability for the prin-

No. 197. cipal sum is so limited. He undertakes as cautioner that the suspender shall "as trustee foresaid" make a certain payment which the bond of caution defines. But the bond does not bind the cautioner merely to pay the expenses which the suspender "as trustee foresaid" shall be decreed to pay. He guarantees substantively that "payment shall be made" of the expenses found due in respect of wrongous suspending. He is not asked now to do more.

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To limit the cautioner's obligation as he contends for, would make the caution not a benefit but an injury to the charging creditor. For if the executor makes payment of the expenses out of the estate under her charge (which she must do if she has estate enough to do it) she just diminishes the fund out of which the charging creditor is to operate payment of the principal sum due to him. In a word, it would be giving the charger decree for expenses against his opponent, and allowing the opponent to pay them out of the charger's money.

LORD MONCREIFF was absent.

THE COURT adhered.

WALLACE & PENNELL, S.S.C.—WELSH & FORBES, S.S.C.—Agents.

No. 198. JOHN LIDDLE CROMBIE (Peter Bell's Executor), First Party.—
Macfarlane—Graham Stewart.
July 15, 1897. DAVID BORTHWICK (Mrs Bell's Executor), Second Party.—
Bell's *Macfarlane—Graham Stewart.*
Executor v. EUPHEMIA BORTHWICK AND OTHERS, Third Parties.—*C. J. Guthrie—*
Borthwick. *Gunn.*
DAVID BORTHWICK AND OTHERS, Fourth Parties.—*Macfarlane—*
Graham Stewart.

Succession—Substitution in moveables—Evacuation—Fee or Liferent—Repugnancy.—By general disposition and settlement a testator disposed to his wife his whole means and estate, heritable and moveable, which should belong to him at the time of his death, "and in the event of the said" wife "predeceasing me, or should I predecease her and she fail to exercise the power of disposal given her by this deed, then I direct my executor after mentioned to realise the whole of my estate, heritable and moveable, above conveyed," and to pay legacies specified to certain persons named. The testator then nominated an executor. The testator was survived by his wife.

On the testator's death the executor named in the deed took out confirmation and obtained possession of the whole estate left by the husband, which consisted entirely of moveable property. The widow died within six months after her husband's death intestate, and without having done anything towards disposing of the husband's estate, which remained entirely in possession of the executor.

In a competition between the legatees named in the husband's settlement and the wife's next of kin, *held (dub. Lord Trayner)* that on the death of the testator his wife became absolute owner of his whole estate, and that it passed on her death to her next of kin—*diss. Lord Moncreiff*, on the ground that, on a sound construction of the husband's settlement, the wife became fief of his estate, with a substitution in favour of the legatees named, which substitution had not been evacuated.

2D DIVISION.

PETER BELL, gardener, North Berwick, died on 2d November 1895, leaving a general disposition and settlement dated 28th February 1873, and three codicils thereto dated respectively 9th February 1882, 11th March 1887, and 24th November 1894.

The general disposition and settlement was in the following terms: No. 198.

—"I, Peter Bell, gardener, residing in North Berwick, for the love and favour which I have and bear to Elizabeth Borthwick or Bell, my wife, and for other good causes and considerations, do hereby give, grant, assign, and dispose to and in favour of the said Elizabeth Borthwick or Bell my whole means and estate, heritable and moveable, real and personal, wherever situated or addebted, which shall belong or be addebted to me at the time of my death, with the whole vouchers and instructions of the said moveable and personal estate, and particularly, without prejudice, the effects and sums of money which may be contained in any inventory made up and subscribed by me as relative to these presents, and which shall be as sufficient to exclude the necessity of confirmation as if every particular thereof were herein inserted. And in the event of the said Elizabeth Borthwick or Bell predeceasing me, or should I predecease her and she fail to exercise the power of disposal given her by this deed, then I direct my executor after mentioned to realise the whole of my estate, heritable and moveable, above conveyed (power of sale and disposal, either by public roup or private bargain, being hereby given to him), and to pay the following legacies to the persons after named, viz."—(Then followed legacies of various sums of money)—"And I hereby nominate and appoint John Trotter, druggist, East Linton, whom failing by death or declinature to act, John Liddle Crombie, Doctor of Medicine, North Berwick, to be my sole executor. . . .—In witness whereof," &c.

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By the codicils the testator revoked certain of the pecuniary legacies and added others, the added legacies being in the form of directions to "my executor above named, in the event of the also herein above designed Elizabeth Borthwick or Bell predeceasing me, or should I predecease her and she fail to exercise the power of disposal given her by the said deed, to pay to," &c.

The testator's widow, Mrs Elizabeth Borthwick or Bell, survived her husband, and died intestate on 22d April 1896.

On her death the question arose whether the legatees of pecuniary legacies under Mr Bell's settlement were entitled to their legacies, and a special case was presented for the determination of this question.

Dr Crombie, Mr Bell's executor-nominate, was the first party; David Borthwick, Mrs Bell's executor-dative, was the second party; Miss Euphemia Borthwick and others, the pecuniary legatees under Mr Bell's settlement, were the third parties; and David Borthwick and others, Mrs Bell's next of kin, were the fourth parties.

The case stated (in addition to the facts already narrated):—"The first party, as executor of the said Peter Bell, duly entered upon the possession and administration of the said executry estate. . . . The said Elizabeth Borthwick or Bell did not execute any deed, or exercise any power of disposal of the estate of the said Peter Bell. At the time of her death the said estate was still in possession of the executor, the first party hereto, and had not been wound up, nor any part thereof paid to her, and no discharge given to said executor."

The total amount of the pecuniary legacies bequeathed by Mr Bell was £645. The case contained no information as to whether the estate left by him exceeded that sum, but counsel for the fourth parties stated at the hearing (in answer to the Court) that they believed that there would be a small excess in the event of a favour-

No. 198. able realisation of the investments. It was admitted by the parties at the hearing that the whole estate left by Mr Borthwick was moveable, but there was no information, either in the case or otherwise, as to the precise character of the investments.

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The third parties, as legatees under the settlement of Mr Bell, maintained that as Mrs Bell did not dispose in any way of the testator's estate, which remained in the hands of his executor, they were entitled to their respective legacies out of his estate; or otherwise, that the legacies were burdens upon the succession of Mrs Bell, and payable by her executor.

The fourth parties, as next of kin of Mrs Bell, maintained that by the settlement of Mr Bell the estate thereby conveyed passed to his widow absolutely and without qualification, and being vested in her, now formed part of her estate, which was in intestacy and divisible among her next of kin, free and disencumbered of the legacies.

The following were the question of law:—"1. Are the third parties, being the legatees under the said settlement and codicils of the late Peter Bell, entitled to payment of their respective legacies therein mentioned? 2. If the first question be answered in the affirmative, are said legacies payable out of Peter Bell's or Mrs Bell's estate?"

Argued for the fourth parties;—The third parties put their case alternatively—either on the ground that the pecuniary legacies were burdens on the gift of the whole estate to the widow, or on the ground that the legacies were given in substitution to the gift to the widow, which substitution had not been evacuated by the widow. (1) The first of these grounds was plainly untenable. The settlement began with a direct and absolute gift of the fee of the testator's whole estate, expressed in terms which were free from ambiguity. There was no conveyance in trust for the widow, nor was she trustee for the legatees or anyone else. On the death of the testator she became vested with the right to immediate possession of the estate to dispose of as she pleased. The legacies, if construed as burdens on such an unqualified gift, were clearly repugnant to that gift, and as such were ineffectual.¹ (2) The alternative ground taken by the third parties—that the legacies were given in substitution to the gift to the widow—was also untenable. If the legacies had been in the form of direct gifts to the legatees, conditional on the widow dying without disposing of the estate, the case would perhaps have been more favourable for the third parties; but looking to the scheme of the settlement as it was actually expressed, it was inconsistent with the idea of a substitution, which was not to be presumed in the case of moveables, but must be established in the clearest terms. Under the settlement, if anyone took as substitute, it was the testator's executor, not the legatees, who, if they took under the settlement at all, could do so only through the executor. Now, the notion of the executor taking as substitute under the testament of the deceased was very anomalous, for a substitution implied that the institute was vested in the fee of the subject, and an executor was entitled to recover only what remained part of the estate of the deceased. Again, if the

¹ Douglas' Trustees v. Kay's Trustees, Dec. 2, 1879, 7 R. 295; Clouston's Trustees v. Bulloch, July 5, 1889, 16 R. 937; Duthie's Trustees v. Forlong, July 17, 1889, 16 R. 1002; Simson's Trustees v. Brown, March 11, 1890, 17 R. 581.

executor was entitled to recover any of the estate undisposed of by No. 198. the widow, he was entitled and bound (looking to the instructions left by the testator) to recover the whole of such estate. If, then, that estate exceeded the total amount of the legacies—and it seemed probable that the total estate left by Mr Bell would on realisation exceed to a small extent the aggregate amount of the legacies—what was the executor to do with the surplus? The widow's representatives plainly had no right to it, nor had the legatees, whose legacies *ex hypothesi* were fully satisfied. There remained only intestacy. But the Court would be slow to construe a testamentary deed in such a way as to produce partial intestacy. In short, it was impossible to spell an effectual substitution out of the settlement. The case of *Mickel's Judicial Factor*¹ shewed that under a destination like the present the widow became fiar of the whole estate, and that no one representing the husband could recover any part of it. [LORD TRAYNER.—But in *Mickel's* case the estate had been reduced into possession by the widow.] *Mickel's* case was at all events an authority on the construction of a settlement like the present. It was true that at the date of the widow's death the estate here was *de facto* in possession of the executor, and in this circumstance lay the real strength of the case for the third parties. Looking, however, to the terms of the testator's instructions to his executor, it was clear that the executor's duties commenced only on the death of the widow, and in confirming and taking possession of the estate on the death of the testator, the executor had really acted *ultra vires*. His possession truly was the possession of the widow, to whom he ought to have transferred the estate at the earliest opportunity, and the circumstance that he had not done so would not prejudice her rights, in accordance with the rule *quod fieri debet infectum valet*. The construction of a testamentary deed ought not to depend on accidental events.² If, then, the estate was regarded as having been in the possession of the widow at the time of her death, the substitution, assuming that there was a substitution, had been evacuated.

Argued for the third parties;—That the testator intended the legatees named in his settlement to take, in the event of his widow dying without disposing of his estate, was certain. It might be that he had so expressed himself as to make it impossible to give effect to that intention, but the Court would be very slow to allow technicalities or inaccuracy or confusion of expression to defeat an obvious testamentary intention. One view of the case for the third parties was that the legacies were burdens on the gift to the widow,³ but probably the more satisfactory ground was that the legatees took as substitutes.⁴ If the legacies had been in favour of the legatees directly the case would have been a clear case of substitution; the difficulty arose from the blunder of interposing the executor as the person to take in the first instance. But that came to no more than the

¹ *Mickel's Judicial Factor v. Oliphant*, Dec. 7, 1892, 20 R. 172.

² *Buchanan's Trustees v. Dalziel's Trustees*, Feb. 28, 1868, 6 Macph. 536, per Lord Deas, p. 540, 40 Scot. Jur. 273.

³ *Murray v. Macfarlane's Trustees*, July 17, 1895, 22 R. 927.

⁴ *Buchanan's Trustees v. Dalziel's Trustees*, Feb. 28, 1868, 6 Macph. 536, 40 Scot. Jur. 273; *Pursell v. Elder*, June 13, 1865, 3 Macph. (H. L.) 59, 37 Scot. Jur. 394, 4 Macq. 992; *Massy v. Scott's Trustees*, Dec. 5, 1872, 11 Macph. 173, 45 Scot. Jur. 127; *M'Clymont's Executor v. Osborne*, Feb. 16, 1895, 22 R. 411.

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No. 198. appointment of a person to see to the interest of the legatees; there was nothing illegal in making such an appointment, and it was natural that the person named as executor should fulfil this additional duty. The broad fact remained that the beneficial substitutes were the legatees. If, then, the case was one of substitution, had the substitution been evacuated? The widow had not left any deed of evacuation, nor had she disposed of the estate, but it was said that the estate having come into her possession the substitution had thereby been evacuated. Now, the fourth parties did not suggest that the widow had ever had actual possession of the estate. What they maintained was that she had had constructive possession through the executor, whose possession was, they maintained, her possession. Assuming, but without admitting, that that was so, it was not sufficient to establish the case for the fourth parties. What they had to shew was that the estate of the husband had been, before the death of the widow, immixed with her estate, so that the husband's estate no longer existed as a separate subject, capable of identification as the subject of the substitution. In that view it was immaterial what the purpose was for which the executor held the estate, or what his title to possess might be; his possession as a fact was sufficient to identify the husband's estate, and so to exclude evacuation. Even if the widow had herself obtained actual possession, that would have been immaterial, provided that the husband's estate was, at her death, capable of being identified.

At advising,—

LORD YOUNG.—Peter Bell, by his will and codicils, directed his executor, in a specified event, to realise his whole estate, heritable and moveable, which he had conveyed to his wife, and to pay certain legacies.

The questions submitted to us are, 1st, Whether, in the circumstances stated in the case, these legacies are payable, and if so, 2d, Whether they are payable out of the estate of the testator or that of his widow.

The circumstances are these: Mr Bell's will consists of a conditional direction to his executor, which follows an absolute gift and disposition to his wife of his whole estate, heritable and moveable. In the first and leading part of the deed the testator does not express his will or intention, leaving it to be executed by an executor or trustee, but, as Lord Lyndhurst, I think, quaintly expresses it, is "his own conveyance," that is to say, he himself directly makes the gift and conveyance. The condition of the will, or direction to his executor, which follows, is the event of his donee predeceasing him, or failing "to exercise the power of disposal given her by this deed." There is no "power of disposal" given by the deed, and the power meant is no doubt just the power of disposal possessed by every absolute owner.

Bell, the disponent and testator, died in November 1895, and his widow the donee, died in April 1896, intestate. It is not stated what the estate of Bell at his death consisted of, but it is stated that at the widow's death his estate, whatever it consisted of, "was still in possession of the executor, the first party hereto, and had not been wound up, nor any part thereof paid to her."

On these facts it seems clear that the event (or one of the events) occurred on which the testator directed his executor to realise and sell the whole

estate, heritable and moveable, which he had gifted and conveyed to his wife, and pay certain legacies with the proceeds. She survived him, but died without having disposed of the property, and the only question is whether or not the direction is valid and operative by the law of Scotland. I am of opinion that it is not.

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I think it is clear that on Mr Bell's death the conveyance to Mrs Bell took effect, and that she was thereafter absolute owner of the whole estate, heritable and moveable, which it comprehends. She was certainly not a trustee, and there is no conveyance to another of anything, heritable or moveable, in trust or otherwise.

The expression of will which follows the conveyance consists, as I have pointed out, of a direction to an executor-nominate, and is expressly conditioned on one or other of two events, viz., that the donee of his whole estate either predeceased him, or surviving him eventually died without having disposed of that estate. The second event—that which happened—has alone to be considered. I have already noticed that “the power of disposal” referred to must of necessity be that which accompanies ownership under an absolute conveyance, for there was no other. Now, the estate which the executor is directed to realise and sell is “the whole of my estate, heritable and moveable, above conveyed” (not to his executor or any other in trust, but to his wife beneficially), and that only in the event of the donee having become the owner of it by the disposition, and continued so for any length of time, but dying at last without having exercised her power of ownership by disposing of it. It seems clear therefore that if the donee survived the disponent, the executor was not directed or authorised to realise or interfere with the estate, or any part of it, so long as the donee lived. The universal donee required no aid from the executor-nominate to recover the estate, and I am satisfied that it was not contemplated that the executor should be required, or I think entitled, to interfere in any way while she lived. Mr Bell seems to have thought of saving to his widow even the delay and cost of confirmation by having an inventory made of his estate given to her by the disposition. But whether or not the assistance of the executor-nominate was thought useful, or even necessary, and whether it was taken or not, cannot, I think, affect the quality of the widow's right by the conveyance. From the moment of her husband's death, the whole estate he died possessed of was hers, and subject to her debts and deeds, exactly as it had been his and subject to his debts and deeds. Nor was her estate a “trust-estate,” meaning thereby a beneficial interest in property held in trust, i.e., standing on a trust title, which is the proper meaning of the term. There was here no trust in anyone—certainly not during the widow's survivance—unless, indeed, it should be held that the direction to the executor in the event of her death without disposing of the property (necessarily assumed to be hers and so at her disposal) to realise and sell the whole of it, whether heritable or moveable, constituted him a trustee from the first. It was stated, I think, that Mr Bell died landless, but had he at his death owned land of any extent or value, it would certainly have been carried by the conveyance to his wife, and if the direction to the executor which I am dealing with was valid and operative, and made him trustee, it would have applied to land as well as money

No. 198. and goods, and whether these were inventoried to avoid confirmation or not.

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Assuming that Mr Bell's executor-nominate duly and properly, with the assent, and probably at the request, of the widow, entered upon the possession and administration of his executry estate, the question is for whom did he hold it, and to whom was he bound to account for it. I have in what I have already said expressed my opinion on that question. While the widow lived he could not have refused her demand to account for and pay to her everything he had realised, and she having died either without demanding her own, or without having her demand satisfied, it follows, I think, very clearly, that the familiar rule of law which puts her executor in her place applies and must have effect. Her executor must realise her estate, pay her debts, her deathbed and funeral expenses, and account to her legal representative for the balance, if any, that remains. If we could hold that the third parties, as legatees of Mr Bell, have a claim not on his estate but on that of his widow, we may of course order her executor, who is a party to the case, to satisfy their claim. But I will not waste time by dwelling on this view, which is presented by the second question.

I have, I hope and think, said enough to shew why I must reject the argument for the third parties to the effect that there is here what was represented to be a substitution to the widow in the property heritable and moveable conveyed to her, or a simple destination which she might have defeated had she pleased, but which, as she did nothing to alter it, must have effect to the exclusion of her legal heirs.

LORD TRAYNER.—I have found this case attended with a good deal of difficulty. I am unable to divest myself of the impression that the testator's intention was that the legacies now claimed by the third parties should be paid to them if his wife during her survivance did not use or otherwise dispose of his estate. That he gave his wife, in the event of her survivance a right to the whole of his estate is clear. But what is not so clear is whether the testator's gift to his wife was not conditional, to this extent at least, that whatever part of the estate she did not dispose of (either by use, gifts to others, *mortis causa* settlement or otherwise) should go according to the directions in his own settlement. In construing a testamentary writing the first consideration is the intention of the testator, if that intention can be ascertained from the writing under construction; and if so ascertained it should receive effect. Following that rule, with the impression I have formed as to what the testator intended, I would not be indisposed to sustain the contention for the third parties. But on the other hand, it may be that the intention of the testator as indicated by his will, or fairly inferrible from its terms, has not been given effect to by him in the deed he has executed, in which case the terms of the deed must be followed, and the inference as to intention disregarded. It is certainly maintainable that that is what has happened here. The conveyance to Mrs Bell of the whole estate is absolute, and vested in her by survivance. The legacies are bequeathed only in the event of Mrs Bell not exercising the "right of disposal given to her by this deed." But there was more than a right of disposal conferred on her, there was a right of absolute property, and if this

had been clearly recognised by the testator the deed might have been otherwise expressed, but how that would or might have altered the terms of the deed we cannot conjecture. Further, it is plain that the testator intended to dispose of his whole estate by the provisions expressed in his deed, for there is no clause disposing of residue, and I cannot suppose that he intended his estate (after payment of the legacies) to be disposed of as intestate succession, which it must be if the legacies do not amount to the sum of the whole estate.

On the whole I do not dissent from the course which your Lordships propose to follow, although I adopt that course not without considerable hesitation.

LORD MONCREIFF.—Substitution in moveables is recognised in the law of Scotland. It is not a favourite and it is not readily presumed, and the substitution if effectually created will be evacuated either by any clearly expressed intention of the institute to evacuate it, as by assigning or spending the money, or by its becoming immixed with his own funds, or by his disposing of it by will. But if not evacuated, a substitution must receive effect.

The first question in this case is whether substitution is intended. The deed is in some respects a bungled deed, but the testator's intention, expressed no less than four times, I think is clear, though the machinery would, in circumstances which have not occurred (that is, in the event of the funds having been paid over to Mrs Bell), have been inappropriate and unworkable. The widow is to have an absolute right to the whole estate, in this sense, that she may dispose of it gratuitously or onerously during her life or by will. She is not a mere liferenter, as Lord Stair says (iii., 5, 51),—"The nature and intent of such clauses is not to constitute the first person as a naked liferenter, but that they are understood as if they were thus expressed: 'With power to the first person to alter and dispose at pleasure during his life.'"

But if she does not do so, and the funds are extant at the date of her death, so much of them as is required shall be taken to satisfy the legacies mentioned in Peter Bell's settlements and codicils. The will provides no trust or other machinery to protect the interests of the substitutes, but this does not prevent an effectual substitution. If indeed the funds had once passed into the possession of Mrs Bell there might have been grounds for maintaining, though this is by no means clear on the authorities, that the substitution was *ipso facto* evacuated.—*Buchanan's Trustees v. Dalziel's Trustees*.¹ But in the present case the funds were not paid over to Mrs Bell. She survived her husband, and therefore right to the money was fully vested in her. But she died within six months of her husband, and therefore before the executor was legally bound to make payment to her. She died intestate without having assigned her rights, and apparently no creditors are claiming as in her right. The funds are still in the hands of Mr Bell's executor. Therefore there is no practical difficulty in the way of giving effect to the truster's intention.

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¹ 6 Macph. 536, per Lord Deas, p. 540.

No. 198. I know of no case in which a substitution being well created, and the funds not having been paid over to the institute, the substitution has not received effect on the institute dying without evacuating the substitution.
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 On these grounds I am of opinion that the third parties are entitled to payment of their respective legacies out of the moveable (the only) estate in the executor's hands.

LORD JUSTICE-CLERK.—I admit that my opinion has wavered, but ultimately I have reached the conclusion at which Lord Young has arrived.

THE COURT answered the first question in the negative, and found it unnecessary to answer the second question.

JOHN MACKAY, S.S.C.—JOHN DOBIE, Solicitor—Agents.

No. 199. **JOHN SCOTT TAIT** (Buttercase & Geddie's Trustee), Pursuer and Nominal Raiser (Reclaiming).—*Johnston—Cook.*
 July 16, 1897. Buttercase & Geddie's Trustee v. Geddie.
JAMES GEDDIE, Real Raiser and Defender (Respondent).—*D. Dundas—W. Campbell.*

Lease—Irritancy—Exercise of option to declare lease ipso facto null and void in event of tenant executing trust-deed—Damages for breach of contract.
 —The lease of a farm in favour of A and B jointly and their respective heirs, excluding subtenants and assignees, contained a clause declaring that if the estates of the tenants, or either of them, were sequestrated, or conveyed in trust for behoof of their creditors, the lease should, in the option of the landlord, be *ipso facto* null and void.

Before the end of the lease the estates of A were sequestrated. B continued solvent and offered to go on with the lease. The landlord declined to agree to this, and claimed damages for loss through diminution of rent in consequence of the premature termination of the lease.

In a question as to the validity of the landlord's claim, *held* (1) (*following Young v. Gerard*, 6 D. 347) that, assuming A to have abandoned the lease, such abandonment did not terminate B's tenancy; (2) that the lease must be held to have been terminated by the landlord in the exercise of his option, and therefore (in accordance with *Walker's Trustees v. Manson*, 13 R. 1198, and *Bidoulac v. Sinclair's Trustee*, 17 R. 144) that the landlord was not entitled to damages for breach of contract.

Bankruptcy—Voluntary Trust-deed—Liability of trustee for payment of invalid claim.—*Held* that a trustee for behoof of creditors who had in good faith, but against the protest of the truster, and so precipitately that the latter had no opportunity of interdicting him, paid a claim which was afterwards held to be invalid, was liable to make good the sum so paid away by him.

Expenses—Personal liability of trustee for behoof of creditors—Payment of invalid claim.—In an action of multiplepoinding raised in name of a trustee, a claimant objected to the condescendence of the fund *in medio*, in so far as the trustee took credit for a payment he had made to C, on the ground that C had no valid claim. The trustee maintained that C had a valid claim. The Court sustained the objection. *Held* that the trustee was personally liable in expenses to the objector, and that he was not entitled to charge his own expenses against the objector's share of the fund *in medio*, reserving to the pursuer all right of relief competent to him against other persons.

1ST DIVISION. IN 1893 Mr Charles B. Balfour, of Newton Don, let to Thomas
 LdStormonth-Darling. Buttercase and James Geddie, "jointly, and their respective heirs," but expressly excluding subtenants and assignees, the farm of Lochty

for a period of thirty years, from Whitsunday 1893, at a yearly rent of £108. No. 199.

The lease, *inter alia*, provided "that if at any time during the currency hereof the tenants or either of them shall have become notour bankrupt, or should their estate and effects, or any portions thereof, have become sequestrated or conveyed in trust for behoof of their creditors or attached by their legal diligence, then this lease shall, in the option of the landlord, become *ipso facto* null and void, and the landlord shall be entitled to apply to the Sheriff of the county, or any competent authority, for a warrant of summary ejection. . . ."

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Geddie's
Trustees v.
Geddie.

On 1st April 1895 Buttercase and Geddie, who, as a firm, carried on business as maltsters on an adjoining feu, executed a trust-deed as a firm and as individuals in favour of John Scott Tait, C.A., Edinburgh, as trustee for behoof of their creditors.

By the trust-deed the trustee was empowered, *inter alia*, "either to compound, transact, and agree, or to submit and refer any questions or differences that might arise between him and any other person or persons touching the execution of the said trust-deed, whether with relation to the debts due by the said Thomas Buttercase and James Geddie, as sole partners foresaids, or as individuals, or any other matter, or in relation to the premises in any manner of way."

Mr Tait accepted office under the trust-deed, and administered and realised the estates. He intimated to Mr Balfour that he did not intend to take up the lease of Lochty Farm.

On 2d July 1895 Messrs Strathern & Blair, W.S., agents for Mr Balfour, lodged a claim with Mr Tait against Buttercase & Geddie. The claim amounted to £1061, 15s., and represented the capitalised sum of the difference between the rent payable under the lease to Buttercase & Geddie and the rent at which it was estimated the farm would let at the date when the claim was lodged.

On 5th July 1895 the estates of Mr Buttercase were sequestrated, and Mr Tait was appointed trustee thereon. Mr Geddie continued solvent.

Before dealing with the landlord's claim, and after paying the whole other claims which had been admitted, Mr Tait had in his hands, as trustee under the trust-deed, a reversion of about £800.

On 22d August 1895 Mr Tait issued a deliverance sustaining the landlord's claim to the extent of £384, 15s. 5d., as the value of the landlord's claim at the date of the trust-deed, and on 23d August he paid that sum to the landlord's agents.

On 3d September Mr Geddie raised an action of multiplepounding in the name of Mr Tait, as pursuer and nominal raiser, the fund *in medio* being the balance of the realised assets of Buttercase & Geddie.

Mr Tait having lodged a condescendence of the fund *in medio*, in which, *inter alia*, he took credit for the sum of £384, 15s. 5d., which he had paid in settlement of the landlord's claim, Mr Geddie lodged, *inter alia* (objection 1), an objection to the condescendence, in so far as Mr Tait took credit for this sum.

Mr Geddie pleaded;—1. The trustee is not entitled to credit for the said payment of £384, 15s. 5d., in respect that (1) the claim at the instance of the landlord was wholly unfounded, the objector being able and willing to perform the tenant's part of the contract of lease; . . . and (3) the said payment was wrongfully made by the trustee, in breach of his duty as trustee.

Mr Tait lodged answers to these objections, and pleaded;—1. The objections are irrelevant. 2. The objection to the payment of the sum

No. 199. of £384, 15s. 5d. to Mr Balfour should be repelled, in respect that (1) the claim at Mr Balfour's instance was well founded to the extent to which it was sustained by the trustee; and (2) the said claim was paid by the trustee *in bona fide* on the advice of counsel, and in exercise of the power conferred upon the trustee by the trust-deed to compound, transact, and agree or submit and refer questions or differences.

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A proof was allowed before answer.

It appeared from the proof that before the landlord's claim for damages was formally lodged with the trustee the opinion of counsel had been taken by the landlord and the trustee as to its validity, and that counsel had advised that if it could be proved that the lease was held for the firm, the trustee was bound to rank the landlord for the damages caused by the failure of the firm to carry on the lease.*

Before the landlord intimated a claim for damages, Mr Geddie was willing to give up the lease, and when it was first advanced he wrote a letter direct to the landlord begging him not to press it. But when his appeal was refused he consistently maintained the position that he was ready and willing to carry on the lease. The position into which the lease had been brought by the execution of the trust-deed was subject of much negotiation between the landlord's agents, Messrs Strathern & Blair, Mr Tait, the trustee, and Mr Thomas White, Mr Geddie's agent. The landlord's agents declined to accept Mr Geddie as tenant.

On 10th August Mr White wrote to Mr Tait, objecting to the landlord's claim being paid unless it were established in a Court of law, and proposed an action of multiplepoining.

On 21st August Mr White had a meeting with Mr Tait, at which Mr White again suggested an action of multiplepoining. Mr Tait said, "Why do you not interpel me from dealing with the landlord's claim?" At this meeting a letter to Messrs Strathern & Blair was adjusted in the following terms:—"Edinburgh, 21st August 1895.—Dear Sirs,—As agent of Mr Geddie, I hereby intimate that he is prepared to adopt the lease of the Lochty Farm, granted by Mr Charles B. Balfour, of Balgonie, in favour of Mr Buttercase and him as individuals, and I shall be obliged by your letting me know, before Friday at noon, whether your client is prepared to accept Mr Geddie's obligation in full of the whole obligations in the lease. . . ." The letter was signed by Mr White, and sent to Messrs Strathern & Blair on the same day by Mr White, who intimated to Mr Tait that he had sent it.

No answer was sent to Mr White, but Mr Murray, clerk to Messrs Strathern & Blair, called the following day and told Mr Tait that they had no intention of replying to it. Thereupon the trustee prepared his deliverance, admitting the landlord's claim to the extent of £384, 15s. 5d. The deliverance was accepted by the landlord's agents on the 23d August, and on the same day the trustee gave them a cheque for the sum admitted.

On 16th February 1897 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"Sustains objection 1; repels objection 2; finds the pursuer and nominal raiser liable to the objector James Geddie in the expenses connected with the said objections to

* Counsel added,—"I have not had submitted to me any statement of the actings of the landlord and the trustee with respect to the lease, but I assume that the landlord did not exercise the power of annulling the lease given by the contract in the event of the execution of a trust-deed by the tenant, and that the landlord therefore stands very much in the position of the landlord in *Bidoulac's* case, 17 R. 144."

the condescendence of the fund to the extent of five-sixths of the No. 199.
taxed amount thereof. . . .”*

Mr Tait reclaimed.

The arguments of the parties sufficiently appear from the opinion of the Lord Ordinary.¹

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* “OPINION.— . . . My opinion is that the claim of damages was bad in law. Such a claim can only be made in respect of abandonment of the lease by the tenant. If a landlord either exercises his option to bring the lease to an end, or accepts a renunciation by the tenant without reserving his right to damages, his claim is barred (*Walker's Trustees v. Manson*, 13 R. 1198). The claim only holds where the abandonment is the voluntary act of the tenant, as in *Bidoulac v. Sinclair's Trustees*, 17 R. 144.

“Now, where was the abandonment in this case? The mere execution of the trust-deed in April 1895 did not constitute abandonment. The lease was not thereby assigned, because it was not assignable without the landlord's consent, and the landlord never consented. Neither did the sequestration of Buttercase constitute abandonment, for according to the well-known *dictum* of Mr Bell (Com. 1, 76), ‘Bankruptcy does not of itself annul a lease. The tenant, though bankrupt, may still continue in the possession, provided he pay the rent regularly and perform the other stipulations of the contract. All that the landlord is entitled to do, in case of his tenant's failure to pay the rent, is to have recourse to the hypothec and the proceedings prescribed in the Act of Sederunt, 1756.’ If, therefore, both Buttercase and Geddie had desired to carry on the farm, the landlord could not have prevented them except by exercising his option under the lease. But even if the action of the trustee is to be taken as a practical abandonment on the part of Buttercase, it does not follow that Geddie, the solvent joint tenant, was thereby ousted from possession. That is, so far as I can judge, precisely the point that was decided in the case of *Young v. Gerard*, 6 D. 347. The lease there was in favour of two joint tenants and their respective heirs and successors, with an exclusion of assignees and sub-tenants, and an option to the landlord to bring the lease to an end in case of bankruptcy, just as here. One of the tenants died; the other became bankrupt and executed a renunciation of the lease. The representatives of the deceased tenant claimed to remain in possession of the subjects, and the landlord attempted to remove them, pleading, *inter alia*, that the lease being a joint lease in which he was entitled to have two solvent tenants, it came to an end by the bankruptcy of either tenant. But the Inner-House, affirming Lord Wood, rejected that plea, and held that the right of the solvent tenant was not irritated by the bankruptcy and renunciation of the other.

“There is one other argument which I ought to notice. It was said that the lease, though taken in favour of two persons jointly without mention of any partnership, was truly a partnership asset. . . . But I am at a loss to see how that could enlarge or affect the rights of the landlord. His rights were defined by the written contract. If the lease had been taken to the firm, or to the partners as trustees for the firm, the dissolution of the firm by the bankruptcy of one of the partners would have brought the lease to an end without any action on the part of the landlord, though it by no means follows that in such a case the landlord would be entitled to claim damages for abandonment. But that is on the principle that when the firm is dissolved there is no longer a tenant. When the tenants are individuals they remain tenants notwithstanding the dissolution of the firm. . . .

“I look in vain for any evidence of abandonment by Geddie, who must, I think, be held to have been turned out by the landlord. If so, no damages were due, and objection 1 must be sustained. . . .”

¹ The following authorities were referred to:—*Young v. Gerard*, Dec. 23,

No. 199. At advising,—

July 16, 1897. **LORD KINNEAR.**—The Lord Ordinary has sustained the first objection of Buttercase & Geddie's Trustees v. Geddie.

LORD KINNEAR.—The Lord Ordinary has sustained the first objection of Mr Geddie to the fund *in medio*, and the facts upon which that objection arises are very simple. [His Lordship here stated the facts, and proceeded]—It is in these circumstances that the objection is stated to Mr Tait taking credit for the sum paid by him to Mr Balfour in respect of future rents. The arrears of bygone rent were paid in full, and that was perfectly right. The only question is, whether the trustee is entitled to credit for the sum paid for future claims.

That raises two questions, first, whether Mr Balfour had a good claim for the sum in question; and, secondly, whether, if he had not, Mr Tait is liable to make good the amount.

In considering the first question, I do not think it necessary to inquire whether the lease was or was not an asset of the firm. As between landlord and tenant, it was a lease in favour of two joint tenants and their respective heirs and successors, and not of a firm, or the trustees of a firm. That is the position with which we start.

Nor do I think it necessary to inquire whether the lease was renounced by Mr Buttercase, or by anybody on his behalf, in such circumstances as would have given the landlord a claim of damages against him if he had been sole tenant. I think it follows from the decision in *Young*¹ that the renunciation of Buttercase or his abandonment of the lease could not determine the right of his co-tenant, Geddie; and if Geddie was still entitled to possession of the farm, and was ready to perform the tenant's part of the contract of lease, the renunciation of Buttercase, assuming it to have been finally and completely made, could found no claim of damages against Geddie, and no claim which could prejudice his interest in the surplus of the trust-estate.

On the other hand, if Geddie himself had failed or refused to perform his contract, it may be assumed that the renunciation of both tenants would afford a sufficient ground for the landlord's claim of damages. The question therefore is, whether it was the act of the landlord or of Geddie which put an end to the lease. It is to be kept in view that the lease contained a clause providing that if the tenants, or either of them, should become notour bankrupt, or if their estates should be sequestrated or conveyed in trust for behoof of their creditors, the lease should, in the option of the landlord, be *ipso facto* null and void. Now, the event occurred upon which the landlord was entitled to irritate the lease, and therefore it could only be carried on as a lease between him and Geddie if Geddie was prepared to perform his part of the contract, and if the landlord chose to waive his right to put the lease to an end.

There was a great deal of negotiation between the agents of the various parties and a great deal of discussion as to the position into which the lease had been brought in consequence of the trust-deed; and the result of the whole matter was that though Mr Geddie was at one time desirous of re-

1843, 6 D. 347, 16 Scot. Jur. 184; *Walker's Trustees v. Manson*, July 17, 1886, 13 R. 1198; *Bidoulac v. Sinclair's Trustee*, Nov. 29, 1889, 17 R. 144; *Mackenzie's Trustees v. Sutherland*, Jan. 10, 1895, 22 R. 223, at p. 236; *Forshaw v. Higginson*, 8 M. and G. 827.

¹ 6 D. 347.

nouncing the lease, and actually proposed to do so, the landlord did not accept that proposal, and long before the termination of the negotiations Mr Geddie, or his agent on his behalf, had assumed the perfectly distinct position that he was not going to renounce, but, on the contrary, was going to carry on the lease. Mr Strathern, on the other hand, made it clear enough that he had considered the question whether Mr Geddie would be a desirable tenant for the farm or not, and that he was not prepared to advise his client to accept Mr Geddie as sole tenant.

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Now, it must be borne in mind that the landlord was in a position to say, "I will bring the lease to an end." He refused his consent, without which Geddie could not have gone on, and therefore it appears to me quite clear that he exercised his right to determine the lease. If the question had been open, I should have been disposed to think that a landlord cannot reject in so peremptory a way the application of a tenant to continue in the lease, and at the same time bring an action of damages against his tenant for refusing to perform the obligations of the lease. But the law is quite clearly settled by the case of *Walker's Trustees*,¹ which is confirmed by the manner in which the question was treated in the subsequent case of *Sinclair's Trustee*.² I take it therefore to be settled law that if the landlord himself puts an end to a lease by exercising a right reserved in the contract, he cannot claim damages for the loss he has sustained by its premature termination, because he is not entitled to damages for loss resulting from his own act and not from the failure of the tenant.

If that be so, the trustee here has paid money belonging to the trusters to a person who had no claim to it whatever, and the second question arises, whether in accounting with his trusters he is entitled to take credit for the money so paid. I think he is not, and I am of opinion with the Lord Ordinary that the claim cannot be stated as a good claim so as to reduce Mr Geddie's share of the surplus of the trust-estate. I agree with the Lord Ordinary that there is no room for questioning the good faith and honesty of the trustee, and the Court must always be alive to the hardship of enforcing against an honest trustee a claim which must result in his becoming personally liable to make good money which he has paid away in good faith. But then his trust was to pay to the true creditors of Buttercase & Geddie and no others, and if he has paid the trusters' money to a person not entitled to receive it, it is no answer to say that he was under an error in law; and that appears to me to be the only answer that can be made with any plausibility. It is true that the trust gave him power to compromise and to transact claims, and it was argued that he was protected by that provision. But it seems to me quite plain that there was no element of transaction or compromise about this matter at all. No doubt the trustee reduced the amount of the claim very considerably. But that was not by way of compromise or transaction, and if the landlord had not been content to accept Mr Tait's deliverance upon that subject there was nothing—no transaction—to prevent him from enforcing his demand to the fullest extent. It was simply a reduction of Mr Balfour's estimate of damages. The whole contention that the deliverance of the trustee was a compromise, and is there-

¹ 13 R. 1198.

² 17 R. 144.

No. 199. fore defensible, is I think made an end of by his own evidence. "I admitted the claim," he says, "and proceeded to adjust it."

July 16, 1897. Is the trustee then entitled to take credit for the payment on any other ground? I think there might be circumstances in which a trustee might well be in a position to claim as against persons interested in the trust that payment of a claim in error was justifiable on the ground either of some concession made by them or of some failure or neglect on their part to bring before him the true nature of the objection to the claim erroneously paid. But it is quite out of the question to suggest that we have such a state of matters here. The trustee knew perfectly well that Mr Geddie and his agent objected to the validity of the landlord's claim, and they not only objected, but they pressed upon him that it should be tried judicially. Mr Tait did not think the process suggested an expedient or desirable kind of action to bring, but that is of very little consequence. The material point is that Mr Geddie desired that the validity of the landlord's claim should be determined in a Court of law. I think, therefore, that in view of his knowledge of that fact, Mr Tait's action was precipitate. He received Mr White's letter on the 21st. On the 22d he was informed by Mr Balfour's agent that Mr Balfour would not accept Mr Geddie. On the same day he proceeded to decide the matter by sustaining Mr Balfour's claim, and on the 23d he gave effect to his decision by paying the money. Unless, therefore, he can shew that the landlord's claim was good in law he is not entitled to take credit for that payment. In the ordinary course of business, I should have thought the proper thing to do was to intimate to Mr Geddie's agent that he had sustained the claim to a certain extent, and that within a certain time he proposed to make payment unless interpellated. Instead of doing that he decides on the 22d, and pays the money on the 23d, without giving time to Mr Geddie to interpose. I think that by so doing he took upon himself the risk of being unable to establish the validity of the claim. I fail to see that there is any very great hardship inflicted upon a trustee by requiring that if he pays away the trust money in such circumstances as to make it impossible that the objections of the parties interested, whom he knows to object, should be determined, he must be held to have taken the responsibility of a final decision upon himself, and must stand or fall according as he can justify that decision or not.

I agree with the Lord Ordinary in attaching no weight to the evidence as to a supposed agreement between Mr Tait and the objector not to issue any deliverance, and generally, I am of opinion, upon the ground I have stated, that his Lordship has disposed rightly of this objection.

On the whole matter I am of opinion that we should adhere to his Lordship's interlocutor.

The LORD PRESIDENT and LORD ADAM concurred.

On the matter of expenses counsel for Mr Geddie moved that the trustee should be found personally liable in expenses.

The trustee argued that he was entitled to expenses, and that in any view there was no ground for holding him personally liable. The validity of the landlord's claim being disputed by Mr Geddie, the trustee was entitled to have a judicial decision on it, and it was of no

consequence that the action in which the question was decided was No. 199. between the trustee and Mr Geddie.

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LORD KINNEAR.—It is perfectly true that by the course proceedings have taken Mr Tait if found liable in expenses in the terms proposed by Mr Campbell will have an expense thrown on him which in ordinary circumstances he would not have been called upon to bear, because he would not have been required to pay the expenses of the litigation required to determine the question between the landlord and tenant. But that unfortunately is due to his own precipitate action. If he was only a stakeholder, and if before paying the money he had taken care to see that the rights of parties were judicially determined, he would not have incurred any expense, because the landlord must either have given up his claim, or paid his opponent's costs if he litigated unsuccessfully. But then it is just part of the error which we have found in the course of procedure that the trustee is forced to take up Mr Balfour's claim, and he cannot maintain it except under the ordinary condition of paying expenses if he fails.

The LORD PRESIDENT and LORD ADAM concurred.

LORD M'LAREN was absent.

THE COURT adhered, "with this variation, that they find the pursuer and nominal raiser personally liable to the objector James Geddie in the expenses found due to the said objector by the said interlocutor: Find the pursuer and nominal raiser personally liable to the said objector in expenses since the date of the said interlocutor . . . Find that the pursuer and nominal raiser is not entitled to charge his own expenses against the objector's share of the fund *in medio*, reserving to the pursuer and nominal raiser all right of relief competent to him with reference to the said expenses, and the expenses hereinbefore decerned for other than against the objector and his share of the fund *in medio*."

GRAHAM, JOHNSTON, & FLEMING, W.S.—THOMAS WHITE, S.S.C.—Agents.

JOHN NEILSON AND OTHERS (Walter Montgomerie Neilson's Trustees), No. 200.

First Parties.—*Jameson—Younger.*

MRS MARION NEILSON OR HENDERSON AND ANOTHER, Second Parties.

—*Johnston—C. K. Mackenzie.*

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JOHN NEILSON AND OTHERS (Mr and Mrs Henderson's Marriage-Contract Trustees), Third Parties.—*W. C. Smith—Ramsay.*

Marriage-Contract—Conveyance of whole means and estate—Life Interest.
—H., who was entitled under her father's settlement to a liferent which had vested in her, conveyed to trustees, by antenuptial marriage-contract, "All and Sundry the whole means and estate, heritable and moveable, real and personal, wherever situated, now belonging to her, or to which she may succeed or acquire right" during her marriage, excepting therefrom certain specified sums which did not include the liferent.

The trust purposes included payment to H. of the free yearly income of the estate thus conveyed, and to her husband in the event of his surviving her.

In a question with her marriage-contract trustees, *held* that H.'s liferent did not fall within the conveyance of her whole means and estate in her

No. 200. marriage-contract, and therefore that she was entitled to direct payment thereof from her father's testamentary trustees.

July 17, 1897. *Neilson's Trustees v. Boyd's Trustees v. Boyd*, July 13, 1877, 4 R. 1082, and *Young's Trustees*, May 22, 1885, 12 R. 968, *followed*.

1st Division. WALTER MONTGOMERIE NEILSON died in 1889, leaving a trust-disposition and settlement whereby he directed his trustees to convey the residue of his estate to the extent of two-thirds to his son, and to hold and pay and apply the remaining third for behoof of his daughter in liferent, and any children to be born of her in fee.

By the trust-disposition and settlement it was declared that "all liferents hereby conferred shall be purely alimentary, and shall not be assignable by the liferenter."

In 1896, Marion Neilson, the testator's only daughter, executed an antenuptial marriage-contract whereby she conveyed to trustees for certain purposes,—“All and Sundry the whole means and estate, heritable and moveable, real and personal, wherever situated, now belonging to her, or to which she may succeed or acquire right during the subsistence of the said intended marriage, but excepting from this conveyance first the sum of £1000 of her share of the estate held by the trustees under the contract of marriage between her parents after mentioned; and, secondly, all legacies, bequests, and acquisitions of specific articles, or sums of money or securities not exceeding in value on any one occasion £500, that may hereafter be left or given to or acquired by her, and all jewels, personal ornaments, and effects, furniture, pictures, and household effects, all which shall belong to her separately, exclusive of her husband.”

Among these purposes were the following:—(Second) payment to Marion Neilson during her lifetime, for her inalienable alimentary use only, of the free yearly income or revenue of the trust-estate; and (third) payment to her husband, Wilfrid Henderson, in the event of his surviving her, for his inalienable alimentary use only, of the free yearly income.

Power was given to the trustees to adjust accounts, and to receive and discharge “any balance of past income or accumulations of income to which” Marion Neilson, “was entitled under her father's trust-disposition and settlement.”

Mrs Henderson's share of accumulations of income of her father's residue amounted to about £15,000.

A question having arisen with regard to the effect of the marriage-contract conveyance on Mrs Henderson's rights under her father's settlement, this special case was presented by Mr Neilson's testamentary trustees, first parties, Mrs Henderson and her husband, second parties, and Mr and Mrs Henderson's marriage-contract trustees, third parties.

The second parties maintained that Mrs Henderson's liferent under her father's settlement was payable to herself, and not to her marriage-contract trustees.

The third parties maintained that they, as in Mrs Henderson's right under her marriage-contract, were entitled to payment of the liferent for marriage-contract purposes.

The following question, *inter alia*, was submitted for the opinion and judgment of the Court:—“(2) If the said liferent has vested in Mrs Henderson, is the said liferent payable to her or to her marriage-contract trustees?”

Argued for the second parties;—The liferent provided to Mrs

Henderson under her father's settlement had not been conveyed by her marriage-contract; for, in the first place, the testator had declared that none of the liferents conferred by him should be assignable; and, in the second place, apart from that explicit declaration, there was a legal presumption that a conveyance to trustees in a marriage-contract carried capital only.¹ The third parties contended that the decision in *Boyd's Trustees*¹ was based upon that in *Mainwaring's Settlement*,² which the English Courts had ceased to regard as authoritative. But though *Mainwaring*² might be impugned, in so far as it was decided upon the ground of the testator's intention, it was unassailable as regarded the crucial test which it proposed, namely, whether the property in dispute would "fit the trusts of the settlement." If that test were applied here, it was conclusive; for the second and third purposes of the marriage-contract trust were unintelligible and unworkable if they had any application to Mrs Henderson's liferent under her father's settlement.

Argued for the third parties,—The third parties were entitled to payment of the liferent for the purposes of the marriage-contract. The present case did not fall within the principle of *Boyd's Trustees*¹ and *Young's Trustees*,¹ for these cases only dealt with *acquirenda*. Here Mrs Henderson had already a vested interest in the liferent when she entered into the marriage-contract. The authority of *Mainwaring*² had been seriously questioned, if not overruled, in two subsequent English cases.³ The ground of intention on which *Boyd's Trustees*¹ had been partly decided had also been expressly repudiated, not only in *Scholfield*,³ but also in a recent Scottish case,⁴ which was in complete harmony with previous decisions,⁵ and ruled the present case.

At advising,—

LORD M'LAREN.—The deceased Walter Montgomerie Neilson left his fortune, consisting of heritable estate and moveable investments, amounting as at the date of the case to £430,000, to trustees for distribution. He was survived by a son and a married daughter, Mrs Henderson. One-third of the residue was left to Mrs Henderson and her children in trust, the leading direction being that the trustees should hold and apply this share of residue for behoof of the testator's daughter in liferent, and any children to be born of her equally among them and their issue *per stirpes* in fee.

Mrs Henderson by her antenuptial contract of marriage assigned to trustees "the whole means and estate, heritable and moveable, real and personal, wherever situated, now belonging to her or to which she may succeed or acquire right during the subsistence of the said intended marriage." The second question in the case is, whether Mrs Henderson's "liferent" (which I take to mean the income accruing to her term by term) is payable to her

¹ *Boyd's Trustees v. Boyd*, July 13, 1877, 4 R. 1082; *Young's Trustees, &c.*, May 22, 1885, 12 R. 968, *cf.* 22 S. L. R.; 2 Bell's Lectures on Conveyancing, 910.

² 1866, L. R., 2 Eq. 487.

³ *In re Allnut*, 1882, 22 Ch. D. 275; *Scholfield v. Spooner*, 1884, 26 Ch. D. 94.

⁴ *Simson's Trustees v. Brown*, March 11, 1890, 17 R. 581.

⁵ *Douglas's Trustees v. Kay's Trustees*, Dec. 2, 1879, 7 R. 295, *per* Lord President Inglis, at p. 300; *Newlands v. Miller*, July 14, 1882, 9 R. 1104.

No. 200. or to her marriage trustees? Now, the purposes of the marriage trust are in the first place the payment of the "income" of the estate conveyed to her for life, and to her husband in the event of his survivance, and then the distribution of the "fee or capital" of the estate amongst the children of the marriage. If Mrs Henderson's income accruing under her father's trust is payable to her marriage trustees, it would be their duty to capitalise it and to pay her only the income of the accumulated fund. This seems perfectly clear on the terms of the marriage trust, though it is extremely improbable that anything of the kind was intended.

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The case of *Boyd's Trustees*¹ is a direct authority on the question raised. It was there held by the Second Division of the Court that a general conveyance of wife's estate will not (unless the context necessitates such a construction) include the income of settled estate payable to her by trustees. This decision was approved by the First Division of the Court in the case of *Young's Trustees*,² and I am of opinion that we should follow it, the question in the present case being identical. In a certain sense, no doubt, an annuity payable by trustees is estate, but in another and very familiar use of the word "estate" it means an estate in fee, either land or invested money-capable of being immediately transferred, and the question is in which sense is the word here used. The expression is, "estate heritable and moveable, real and personal," words which certainly apply to a capital fund, but do not necessarily or invariably include income derived from a trust. The rule established in *Boyd's*¹ case recommends itself as expressing in the great majority of cases the probable intention of the parties, while the opposite construction is not only improbable but would be altogether unsuited to the usual purposes of a marriage trust. The rule is not to be taken in an absolute sense; if the parties make it clear that income is to be paid to trustees for the purpose of being accumulated in such a case, their intention will receive effect. Or again, if a marriage-contract sets forth that income falling under the trust is to be paid over to the spouses, I should take this to be an indication that the general conveyance was meant to include life interests. There is also the case where a wife has a proper *liferent* estate in land, a *liferent* estate in her own name. As to this I give no opinion; it is not directly ruled by the case of *Boyd's Trustees*,¹ on which my opinion is founded.

LORD ADAM.—I agree with Lord M'Laren. I think that this case is entirely ruled by *Boyd*¹ and *Young*.²

LORD KINNEAR and the LORD PRESIDENT concurred.

THE COURT found and declared, in answer to the second question, that the *liferent* was not payable to Mrs Henderson's marriage-contract trustees.

WEBSTER, WILL, & RITCHIE, S.S.C.—BELL & BANNERMAN, W.S.—
WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

JAMES JOHN YOUNG DALGARNO AND OTHERS (Brown's Trustees),

No. 201.

Pursuers (Respondents).—*Salvesen.*ALEXANDER MILNE, Defender (Appellant).—*W. Brown.*July 17, 1897.
Brown's
Trustees v.
Milne.

Process—Reponing—Sheriff—Decree by default—Failure to lodge defences and accounts—Sheriff Court Act, 1853 (16 and 17 Vict. cap. 80), sec. 6—Sheriff Court Act, 1876 (39 and 40 Vict. cap. 70), sec. 20.—In an action raised in the Sheriff Court by trustees against the law-agent to the trust, concluding for an accounting, and failing this, for payment of £500, the defender lodged no defences, but put in a minute craving the Court to sist proceedings in order to give him time to lodge his accounts, which he alleged would shew a debit balance against the trust. The Sheriff-substitute granted a sist for ten days, and at the end of that period, the defender having failed to lodge defences or produce his accounts, the Sheriff-substitute decerned for the sum sued for. On appeal the Sheriff, in respect of no appearance being made for the defender, dismissed the appeal. The defender having appealed to the Court of Session, and moved to be reponed, the Court (*dub. Lord Adam*), in respect that the sum sued for, and for which the Sheriff-substitute had granted decree, was a random sum, *recalled* the Sheriff-substitute's interlocutor, and *remitted* to the Sheriff to consider the defender's application to be reponed, and in the event of sufficient cause being shewn, and of his lodging accounts within eight days, to allow defences to be lodged within two days.

THIS was an action raised in the Sheriff Court of Aberdeen on 29th March 1897 by the trustees under the trust-disposition of Mrs Margaret Brown and others against Alexander Milne, the law-agent of the trust. The action concluded for decree, ordaining the defender to produce an account of his intromissions with the trust funds, and failing his producing such account for payment of £500.

The pursuers averred that on 2d February 1897 the defender had written to the trustees undertaking to have the final accounts of the trust completed and in the hands of the trustees within fourteen days.

The defender lodged no defences, but put in the following minute:—

"The defender has in course of preparation the trust accounts, and expects to have them ready for production to the Court in the course of next week. The transactions extend over a considerable period of time, are numerous, and somewhat involved, and the labour of producing them is pretty considerable.

"The accounts will shew a debit balance against the trust-estate. . . .

"In respect of this minute the defender craves the Court to sist the process for a period of fourteen days to allow of the production of the accounts; or, alternatively, to pronounce an order for production of the accounts within the time specified."

On 12th May 1897 the Sheriff-substitute (Robertson) sisted the cause for ten days to allow the defender's accounts to be produced.

On 26th May 1897 the Sheriff-substitute, on the motion of the pursuer's agent, in respect of defender's failure to lodge defences or produce the accounts in question, decerned against the defender for payment of £500, in terms of the second alternative conclusion of the prayer of the petition.*

* The Sheriff Courts Act, 1853 (16 and 17 Vict. cap. 80), sec. 6, enacts,—"Where any condescendence or defences, or revised condescendence or revised defences, or other paper, shall not be given in within the periods

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The defender appealed to the Sheriff (Crawford), who, on 15th June 1897, "in respect of no appearance for or by the defender and appellant at this diet," on the motion of the pursuers, dismissed the appeal, and affirmed the Sheriff-substitute's interlocutor.*

The defender appealed to the First Division.

The pursuers objected to the competency of the appeal, and argued;—The appeal was taken not for the purpose of review but with the object of having the appellant reponed. As an application for this latter purpose it was not worthy of consideration. The defender had deliberately neglected to comply with the forms of procedure and the order of the Sheriff-substitute. He had failed (1) to lodge defences, (2) to produce his accounts within the time allowed by the Sheriff-substitute, although he had obtained the sist for that purpose; (3) to appear in support of his appeal. His neglect necessarily led to the interlocutors of the Sheriff-substitute† and Sheriff,* and no reason had been given by him to justify this Court in interfering.¹ He had now had six months to produce his accounts since the first demand made upon him, and had not done so yet, although in his minute he only craved a delay of fourteen days.

Argued for the defender;—Owing to the complicated nature of the accounts it was natural that the defender should not be in a position to lodge his defences in time, or to produce the accounts at once. As regarded the failure to lodge formal defences, the minute was equivalent to defences. The defender had certainly been remiss, but it was for the Court to consider whether his neglect had been such as to deserve the great penalty which the Sheriff-substitute's decree imposed upon him. In the circumstances he should be reponed.

LORD PRESIDENT.—If this gentleman had desired to be reponed, his natural and proper course would have been to apply to the Sheriff, and the prevailing opinion, with which I am loth to differ, seems to be that we had better relegate matters to their proper condition, in which they should have been placed by the action of the appellant. I am accordingly disposed to concur in the view that we should recall the interlocutor of the Sheriff-substitute, and remit to the Sheriff to consider any motion to be reponed that may be made by the appellant within eight days, provided he produces his accounts within that period.

LORD ADAM.—My feeling would have rather been to refuse the appeal, but I agree in the more moderate course which has been proposed.

prescribed or allowed by this Act, the Sheriff shall dismiss the action or decern in terms of the summons, as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received on payment of such sum in name of expenses as he shall think just."

* The Sheriff Courts Act, 1876 (39 and 40 Vict. c. 70), sec. 20, enacts,—"Where in any defended action one of the parties fails to appear by himself or his agent at diet of proof, diet of debate, or other diet in the cause, it shall be in the power of the Sheriff to proceed in his absence, and unless a sufficient reason appear to the contrary he shall, whether a motion to that effect is made or not, pronounce decree as libelled, or of absolvitor (as the case may require), with expenses."

† See *supra*, p. 1139, note.

¹ *McGibbon v. Thomson*, July 14, 1877, 4 R. 1085.

LORD M'LAREN.—I concur. It was the duty of the appellant to have produced his accounts along with the note of appeal, or at all events before the case was moved in Single Bills, and he would then have been in a stronger position in asking to be reponed. If the session had not been near an end, we should probably have allowed him a few days to give in an account, but that being impossible, I think we should follow the course proposed.

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LORD KINNEAR.—I think that in the general case a defender, against whom a decree by default has been pronounced by the Sheriff-substitute, has ample opportunity to be reponed against it by appealing to the Sheriff. If he appeals and does not appear to support his application to be reponed, I should in the general case have held that the matter was concluded against him here, and that the Court ought not to be asked to interfere at so late a period by giving the party a further opportunity for shewing that he may be restored against the consequences of his own default, when a sufficient opportunity has already been afforded to him, which—as his counsel admitted in the present case—has been neglected without any reasonable excuse. But I am much moved by the consideration which I understand has influenced your Lordships, that in this case, owing to the form of the action, decree is asked for payment by the defender of what may be described as a random sum, so that it may turn out that the penalty for failing to observe the orders of the Sheriff may be a more severe one than it would, if the whole circumstances were known to the Court, be reasonable to inflict. On that ground, I am disposed to concur in the view that we should give the defender another chance by allowing him to go back to the Sheriff, to satisfy him if he can by producing his accounts that he may be heard upon the merits.

LORD M'LAREN.—I should like to add that I concur in all that Lord Kinnear has said, and that we are entitled, for the reason that the decree is for an arbitrary sum, which the pursuer might state at any amount he pleased, to consider the case as one requiring exceptional treatment.

THE COURT pronounced the following interlocutor:—"Recall the Sheriff-substitute's interlocutor: Remit to the Sheriff-principal to pronounce decree in terms of the said interlocutor of the Sheriff-substitute, unless within eight days sufficient cause is shewn to the contrary, and accounts are produced by the defender, and in the event of sufficient cause being shewn and accounts produced, to allow defences to be lodged within two days, and to remit to the Sheriff-substitute to proceed, and decern: Find the pursuers entitled to expenses incurred by them, both in the Sheriff Court and in this Court," &c.

ALEXANDER MORISON, S.S.C.—HENRY & SCOTT, W.S.—Agents.

No. 202. ALEXANDER CAMPBELL, Complainer (Respondent).—*D. Dunulas—
Craigie.*

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JOHN BREMNER, Respondent (Reclaimers).—*Salvesen—
A. S. D. Thomson.*

Superior and Vassal—Building Restrictions—Right of disponee of vassal to enforce restrictions against vassal—Deviation from restrictions.—By feu-contract dated in 1886 a portion of the lands of Holmhead was feued out by Stevenson to Bremner, under the restriction that one double villa and one single villa or three single villas should be erected on the ground, which villas “shall front the road or street forming the south-south-eastern boundary of the portion of ground hereby feued,” it being declared that no other buildings, except offices one storey high, should be erected on the ground feued, “which restrictions and prohibitions as to buildings are hereby created real liens, burdens, and servitudes upon and affecting the portion of ground above disposed in favour of the said” Stevenson “and his successors and the other feuars and disponees of other parts of the said lands of Holmhead, who shall be entitled to enforce the same against the said” Bremner “and his foreshaids and his or their disponees of any portion of ground above disposed.”

On part of the ground thus feued Bremner, in the same year, erected a house, which, with consent of the superior, faced west instead of south-south-east, as stipulated in the feu-contract.

This portion of the ground, with the house thereon, was subsequently disposed to Campbell, the disposition bearing that it was granted under burden of the restrictions in the feu-contract, “in so far as still subsisting and applicable thereto.”

Thereafter, by minute of agreement between the superior and Bremner, dated and recorded August 1895, the superior discharged the portion of the ground still belonging to Bremner of the restrictions above narrated, and Bremner proceeded to erect on the ground a continuous row of three houses facing west.

Campbell thereupon brought an action against Bremner for interdict against the erection of the houses, on the ground that they were in contravention of the feu-contract, in respect that they were a continuous row of houses.

The complainer ultimately admitted that if one or other of the two outmost houses had been separated from the middle house by a clear space of at least six inches, he would have had no legitimate objection to the houses.

The Court (*rev. judgment of Lord Kyllachy*) refused to grant interdict, on the ground, *per* Lord Justice-Clerk, that the complainer had no title to enforce the restriction, and *per* Lord Young and Lord Trayner that he had no interest to do so.

2D DIVISION.
Ld. Kyllachy.

By feu-contract entered into between John Wilson Stevenson, house factor in Glasgow, and John Bremner, measurer there, dated 7th and recorded in the Register of Sasines 14th May 1886, Stevenson disposed to Bremner all and whole the portion of ground therein described, extending to 5050 square yards or thereby, part of the lands of Holmhead, in the parish of Cathcart and county of Renfrew, and that always with and under “the real liens and burdens, conditions, provisions, irritancies, and reservations following, *videlicet* :—The said John Bremner shall erect on the said portion of ground, and have completed and ready for occupation by the term of Whitsunday 1887 one double villa of the value of not less than £1200 sterling, and not later than the term of Whitsunday 1888, one single villa of the value

of not less than £600 sterling, or, in the option of the said John Bremner, three or more single villas, each of the value of not less than £600 sterling, which villas shall be built upon sites and according to plans and specifications to be first submitted to and approved of by the said James Wilson Stevenson, and shall front the road or street forming the south-south-eastern boundary of the portion of ground hereby feued: . . . And it is hereby expressly provided and declared that no buildings other than those hereby prescribed shall, in all time coming, be set down on the said portion of ground, excepting washing-houses, coal cellars or office houses for the use of the said villas, which shall be erected behind or to the back of the said villas only, and shall not be more than one storey in height, . . . which restrictions and prohibitions as to buildings are hereby created real liens and burdens and servitudes upon and affecting the portion of ground above disposed in favour of the said James Wilson Stevenson and his successors, and the other feuars and disponees of other parts of the said lands of Holmhead, who shall be entitled to enforce the same against the said John Bremner and his foresaids, and his or their disponees, of any part of the portion of ground above disposed. . . .”

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On a part of the ground thus feued Bremner, with the consent of the superior, in 1886, erected a house across the end of the road above described as forming the south-south-eastern boundary of the ground, thus making the road a *cul-de-sac*. This road was about 200 feet long, branching eastwards from the Glasgow and Ayr turnpike road. As appeared from the description of the subjects in the feu-contract, it formed part only of the south-south-eastern boundary of the ground feued, the south-south-eastern boundary of the remainder (including the *solum* on which Bremner's house was built) being a part of the lands of Holmhead which had been feued out to another person. Bremner's house had its frontage to the branch road and thus faced westwards, instead of to the south, towards which it would have faced had it been built along the branch road and fronting towards it.

By disposition, dated 25th, and recorded 28th February 1889, Bremner conveyed to Samuel Hannah all and whole that plot or area of ground containing 2156 square yards or thereby, part of the above 5050 square yards, and including the house built by Bremner in 1886; and by disposition, dated 12th and 19th, and recorded the 20th May 1893, Hannah conveyed this 2156 yards to Alexander Campbell. Both dispositions were granted under the burdens as contained in the feu-contract of 1886, “so far as still subsisting and applicable thereto.”

By disposition, dated 15th, 16th, 17th, and 18th July, and recorded 13th August 1895, the trustee on the sequestrated estate of Stevenson, the superior, conveyed the superiority of the 5050 yards to Andrew Paul, writer, Glasgow, under exception of the 2156 yards belonging to Campbell, and of 608 yards belonging to David Lindsay.

By minute of agreement between Paul and Bremner, dated 12th, and recorded 13th August 1895, on the narrative that Paul was immediate lawful superior, and Campbell, proprietor of the *dominium utile* of the lands therein mentioned, being the lands of which Paul had acquired the superiority under the disposition last mentioned, it was, *inter alia*, agreed as follows:—“Further, the said Andrew Paul hereby discharges the stipulation in the said feu-contract entered into between the said James Wilson Stevenson and the said John Bremner,”

No. 202. dated 7th, and recorded 14th May 1886, "in regard to the value of the cottages or lodgings to be erected on the said ground, and as to the portion thereof, and hereby grants special permission to erect lodgings of the value of not less than £450, and, in the option of the said John Bremner, to front the same to the said road leading to the said turnpike road, or to the said road or street forming the southern boundary hereof, and known as Windsor Villas, or to both."

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In February 1896 Campbell, the proprietor of the 2156 square yards disposed by Bremner in 1889, and of the house built thereon by Bremner in 1886, presented a note of suspension and interdict, praying to have Bremner interdicted from erecting three houses on the portion of the 5050 square yards still belonging to him (being the portion which was the subject of the minute of agreement above referred to), on the ground that the houses were disconform to the restrictions in the feu-contract.

The grounds of disconformity averred on record were (1) that the three houses instead of having their frontage to the branch road, *i.e.* to the south, faced the Glasgow and Ayr Road, *i.e.*, faced west; and (2) that the three houses instead of being separate or semi-detached houses formed a continuous row.

The complainer pleaded, *inter alia*;—(1) On a sound construction of said feu-contract, the complainer is entitled to have the conditions therein as to the erection of villas enforced, and the respondent being in the course of erecting buildings on part of the ground contained in said feu-contract of a nature, value, and with a frontage disconform to the conditions set forth in said deed, to the prejudice of the complainer, the complainer is entitled to suspension and interdict, as craved.

The respondent pleaded, *inter alia*;—(1) No title to sue. (6) The note should be refused because—(1) The superior has approved of and sanctioned the sites and plans of the said villas; (2) the frontage of complainer's house being a deviation from the contract, he is barred from objecting to the respondent's fronting his villas in the same direction; (3) the provision as to frontage having been abandoned by all parties interested, both before and since the complainer acquired his property, he cannot enforce it; and (4) the provisions in the feu-contract as to villas are not created real liens and burdens in favour of the complainer, and he has no title to found thereupon.

The complainer ultimately abandoned his first ground of objection to the respondent's houses. He admitted that as his own house (that built in 1886) fronted to the west he could not object to the respondent's houses fronting in the same direction.

With respect to the other ground of objection, it appeared that two of the respondent's houses were finished and had a mutual gable, and the complainer admitted that to these two houses *per se* he could take no objection in respect that they were semi-detached houses, and so were not prohibited by the feu-contract. The third house was to the south of the other two, and was practically finished at the date of the present proceedings. Its north wall, which was very thin, was attached to the south wall of the middle house by iron straps, and thus formed a continuous row with the other two. At the hearing in the Inner-House the complainer admitted that if the third or southmost house had been six inches apart from the middle house, he would have had no ground of objection to the houses, but he maintained that as actually erected they were struck at by the prohibitions of the feu-contract.

On 28th April 1897 the Lord Ordinary (Kyllachy) pronounced No. 202. this interlocutor:—"Finds that the complainer and respondent are proprietors of coterminous portions of ground feued out by the same feu-contract, and both subject to the conditions and restrictions expressed in the said feu-contract: Finds that in these circumstances the complainer has a good and sufficient title to enforce against the respondent the said conditions and restrictions: Finds that upon the just construction of the said feu-contract the feuars are restricted to the erection, on the ground feued, of houses which are either double villas or single villas—that is to say, houses either semi-detached or wholly detached, as distinguished from houses (three or more) forming a continuous row: Finds that the respondent, having erected a double villa on the ground belonging to him, has recently erected, or is in course of erecting, a third house which is not a double villa or single villa in the sense of the feu-contract, but is so placed and attached with reference to the existing double villa as to convert the block into a continuous row of three houses: Finds that this erection is in contravention of the feu-contract and of the complainer's rights: . . . continues the cause, and grants leave to reclaim."

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The respondent reclaimed, and argued;—(1) The complainer had no title to enforce the restrictions in the feu-contract. The right to enforce the restrictions was not conferred on the disponees of parts of the lands feued, who were servient owners only, but on the superior and on feuars from him of other parts of the lands of Holmhead, and division of a servient tenement could not make one of the parts of the divided tenement into a dominant tenement as regarded the other.¹ To imply a *jus quæsitum* in a feuar to enforce restrictions there must have been either feuing in accordance with a common plan and general restrictions applicable to a considerable area.² Here neither condition was fulfilled. (2) The complainer had no interest to enforce the restrictions, and therefore was not entitled to have them enforced. The only objection to the houses now insisted in was that the south-most house was not at least six inches apart from the middle house. The complainer had no interest to enforce such an objection. (3) The restrictions had, with the consent of the superior, been abandoned.

Argued for the complainer;—(1) The complainer had a title to enforce the restrictions. The case of *Dalrymple v. Herdman*³ was a direct authority, and ruled the present. (2) The complainer had a sufficient interest to enforce the restrictions; and (3) these restrictions, so far as now sought to be enforced, had not been abandoned.

LORD JUSTICE-CLERK.—During the whole course of this argument I have been endeavouring to ascertain what the complainer hoped to gain by this action. We have now been told that all he has to complain of is that a certain house is built up against another house instead of being six inches away from it. Mr Craigie has frankly admitted that if the house in question was taken down and built up again six inches apart from the next

¹ *Johnstone v. MacRitchie*, March 15, 1893, 20 R. 539, *per* Lord Rutherford Clark, at p. 551.

² *Hislop v. MacRitchie's Trustees*, June 23, 1881, 8 R. (H. L.) 95, *per* Lord Watson, at p. 102; *Miller v. Carmichael*, July 19, 1888, 15 R. 991, *per* Lord Young, at p. 995.

³ *Dalrymple v. Herdman*, June 5, 1878, 5 R. 847.

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The history of the case is as follows:—By feu-contract, dated 7th May 1886, a portion of ground containing 5050 square yards was feued to John Bremner. In course of time he conveyed part of this ground to Mr Hannah, from whom Mr Campbell, the complainer, acquired it, and, as I understand, he now occupies it. In these circumstances, the complainer proposes to found on a building restriction contained in the original feu-contract. Now, I quite understand that if a superior feus out a piece of ground to a number of feuars subject to building restrictions applicable in common to them all, these restrictions can be enforced by one feuair against another if there is community of interest. If the complainer here were such a feuair he might have a right to enforce the restrictions in the original feu-contract. But this is not a case of that kind at all. This is the case of a person who has acquired a part of the ground originally feued from the original feuair under burden of certain restrictions contained in the feu-contract, and he now comes asking us to enforce these restrictions against the original feuair, his author. I think that he has no right to do so. The superior was undoubtedly entitled to discharge the restrictions imposed by the feu-contract. I think the interlocutor of the Lord Ordinary is not well founded, and should be set aside.

LORD YOUNG.—The complainer's case is most clearly expressed in his first plea in law—[His Lordship read the plea]. Now, what is alleged is that the respondent is in course of erecting three houses adjoining one another and pointing west, whereas he was only entitled to erect one or two. He might have erected a building of exactly similar dimensions to that complained of, or two such buildings, but it is said that he is not entitled to erect such a building if it is divided internally into three houses. The complainer says that would be to his prejudice. It is also said that these buildings have been erected in contravention of the complainer's rights in respect of their frontage, because it is prescribed by the feu-contract that the villas shall front the road or street forming the south-south-eastern boundary of the portion of ground thereby feued. That provision of the feu-contract is not insisted in now, but it is one of the provisions contained in the feu-contract, and it has been violated. That is a most material part of the condition as to building. The villas are to front towards the south-south-east. But that condition was violated, and it was violated as long ago as 1886, and by the erection, with the consent and approbation of the superior, of the house now owned and occupied by the complainer. He knew that the conditions as to building contained in the feu-contract had been violated, and that this had been done with the consent of the superior. There is nothing to shew that any reasonable objection can be taken to this form of house if it fronts otherwise than to the south-south-east. We cannot sustain one condition when others contained in the same feu-contract have been departed from.

I further think there is a great deal to be said for the view that the complainer has no title to found on these restrictions at all.

Irrespective of that consideration, however, which would be sufficient for

the decision of the case, I am of opinion—and that also is sufficient for the decision of the case—that the complainer has suffered no prejudice. No. 202.

I think the grounds of suspension are insufficient, and that we should recall the Lord Ordinary's interlocutor. July 17, 1897.
Campbell v. Bremner.

LORD TRAYNER.—I am of the same opinion. The complaint here is that the respondent is doing something in violation of the provisions of his title to the prejudice of the complainer, and that the complainer has an interest in having the violation complained of put a stop to.

The complainer's interest is of the most shadowy kind. We are told that the house in question is not a separate and distinct house. The only objection to it is that there is no space between it and the house next to it. It is admitted that if there had been a space of even six inches between the houses that would have been enough to avoid the complainer's present objection. The complainer's interest is therefore scarcely appreciable.

But that is not the only question. In some cases a feuar may have a title to enforce restrictions without being called upon to qualify any very substantial interest. I am of opinion that this case does not belong to that class.

The complainer derives his right from Mr Bremner under the disposition in his favour, which conveys to him a certain piece of ground, under the burdens contained in the original feu-contract, "so far as still subsisting and applicable thereto." But for what purpose are these burdens imposed upon him? Not to give him a community of interest with other feuars, which would entitle him to enforce these burdens against them, but so that he might be bound to observe the restrictions himself, and so relieve Bremner. But, further, the original feu-contract provides that the "restrictions and prohibitions as to buildings are hereby created real liens and burdens and servitudes upon and affecting the portion of ground above disposed, in favour of the said James Wilson Stevenson and his successors, and the other feuars and disponees of other parts of the said lands of Holmhead, who shall be entitled to enforce the same against the said John Bremner and his foressaids and his or their disponees of any part of the portion of ground above disposed." Now, in conferring this right upon "the feuars and disponees of other parts of the said lands of Holmhead," the feu-contract would seem to exclude any such right in a disponee of part of the portion of land feued to Bremner.

In such cases the presumption is in favour of liberty—that a proprietor may do as he chooses with his own property. I think the complainer's title to enforce these restrictions is more than doubtful, and it is practically admitted that he has no interest.

LORD MONCREIFF was absent.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor reclaimed against: Repel the reasons of suspension and interdict, and refuse the note of suspension and interdict, and decern: Find the complainer liable in expenses, and remit the same to the Auditor to tax, and to report."

SIMPSON & MARWICK, W.S.—J. STEWART GELLATLY, S.S.C.—Agents.

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LORD YOUNG.—The complainer's case is most clearly expressed in his first plea in law—[His Lordship read the plea]. Now, what is alleged is that the respondent is in course of erecting three houses adjoining one another and pointing west, whereas he was only entitled to erect one or two. He might have erected a building of exactly similar dimensions to that complained of, or two such buildings, but it is said that he is not entitled to erect such a building if it is divided internally into three houses. The complainer says that would be to his prejudice. It is also said that these buildings have been erected in contravention of the complainer's rights in respect of their frontage, because it is prescribed by the feu-contract that the villas shall front the road or street forming the south-south-eastern boundary of the portion of ground thereby feued. That provision of the feu-contract is not insisted in now, but it is one of the provisions contained in the feu-contract, and it has been violated. That is a most material part of the condition as to building. The villas are to front towards the south-south-east. But that condition was violated, and it was violated as long ago as 1886, and by the erection, with the consent and approbation of the superior, of the house now owned and occupied by the complainer. He knew that the conditions as to building contained in the feu-contract had been violated, and that this had been done with the consent of the superior. There is nothing to shew that any reasonable objection can be taken to this form of house if it fronts otherwise than to the south-south-east. We cannot sustain one condition when others contained in the same feu-contract have been departed from.

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Irrespective of that consideration, however, which would be sufficient for

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The complainer's interest is of the most shadowy kind. We are told that the house in question is not a separate and distinct house. The only objection to it is that there is no space between it and the house next to it. It is admitted that if there had been a space of even six inches between the houses that would have been enough to avoid the complainer's present objection. The complainer's interest is therefore scarcely appreciable.

But that is not the only question. In some cases a feuar may have a title to enforce restrictions without being called upon to qualify any very substantial interest. I am of opinion that this case does not belong to that class.

The complainer derives his right from Mr Bremner under the disposition in his favour, which conveys to him a certain piece of ground, under the burdens contained in the original feu-contract, "so far as still subsisting and applicable thereto." But for what purpose are these burdens imposed upon him? Not to give him a community of interest with other feuars, which would entitle him to enforce these burdens against them, but so that he might be bound to observe the restrictions himself, and so relieve Bremner. But, further, the original feu-contract provides that the "restrictions and prohibitions as to buildings are hereby created real liens and burdens and servitudes upon and affecting the portion of ground above disposed, in favour of the said James Wilson Stevenson and his successors, and the other feuars and disponees of other parts of the said lands of Holmhead, who shall be entitled to enforce the same against the said John Bremner and his foresaids and his or their disponees of any part of the portion of ground above disposed." Now, in conferring this right upon "the feuars and disponees of other parts of the said lands of Holmhead," the feu-contract would seem to exclude any such right in a disponee of part of the portion of land feued to Bremner.

In such cases the presumption is in favour of liberty—that a proprietor may do as he chooses with his own property. I think the complainer's title to enforce these restrictions is more than doubtful, and it is practically admitted that he has no interest.

LORD MONCREIFF was absent.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor reclaimed against: Repel the reasons of suspension and interdict, and refuse the note of suspension and interdict, and decern: Find the complainer liable in expenses, and remit the same to the Auditor to tax, and to report."

SIMPSON & MARWICK, W.S.—J. STEWART GELLATLY, S.S.C.—Agents.

No. 203.

THE PARK YARD COMPANY, LIMITED, AND OTHERS, Pursuers
(Respondents).—*C. J. Guthrie—Burnet.*July 17, 1897.
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Limited, v.
North British
Railway Co.THE NORTH BRITISH RAILWAY COMPANY AND OTHERS, Defenders
(Reclaimers).—*D.-F. Asher—Cooper.*

Servitude—Tramway—Agreement—Personal or Real—Right of singular successor of proprietor to demand removal of tramway.—Terms of an agreement between the proprietor of the estate of W., feuers of parts of that estate, and a railway company, providing for the construction, by the railway company, of a tramway through the lands of W., including the portions feued out, which was held not to be intended to bind, and not binding on, singular successors of the feuers.

Road—Public right of way—Title to sue—Railway Company.—Held by Lord Low (Ordinary) that a railway company had no title to sue a declarator of right of way in the public interest.

1st Division.
Lord Low.

THIS was an action at the instance of the Park Yard Company, Limited, George Smellie, and Edward John Hill, proprietors of feus on the estate of Whiteinch, against the North British Railway Company and others, for declarator that the pursuers, as proprietors of subjects, were entitled to hold the same for their respective interests therein, free of any burden or servitude alleged by the defenders, and in particular of the right claimed by the North British Railway Company to maintain and use a tramway upon the *solum* thereof. The pursuers also concluded for decree ordaining the North British Railway Company to remove the tramway so far as constructed on the *solum* of the subjects belonging to the pursuers.

The defenders, the North British Railway Company, founded upon two agreements, the first of which provided for the construction, and the second for the working of the tramway, which the pursuers sought to have removed from their lands.

The first of these agreements, dated 10th May 1872, and subsequent dates down to 23d May 1873, was concluded between Archibald Smith of Jordanhill, of the first part, the North British Railway Company, of the second part, the Whiteinch Railway Company, Limited, of the third part, and James Gray Lawrie and others, of the fourth part. The agreement proceeded on the narrative that the first party was proprietor of the unfeued portions, and superior of the feued-out portions of the lands of Whiteinch; that the fourth parties were proprietors of the *dominium utile* of portions of the lands of Whiteinch, fronting South Street; that the third parties proposed to lay down, upon part of the lands of Scotstoun, which marched with Whiteinch, and also upon part of Whiteinch, a railway and tramway to communicate with the railway of the second party at Stobcross and to terminate on the lands of Whiteinch; that certain of the second, third, and fourth parties had entered into an agreement, dated 16th May 1872 and subsequent dates, for the working of the railway and tramway; and that the first party, having been assured that the construction and use of the tramway would be for the benefit not only of his present but of his future feuers, had, along with the whole other parties for their respective rights and interests, agreed to the construction of the tramway on the following conditions:—“(First) That the said first party shall allow the third party to construct and lay, at their own expense, a tramway on the lands of Whiteinch, and that from the western boundary of the said lands eastward along unfeued ground till it reaches the western extremity of South Street,

and thence, with consent of said first party and fourth parties, along South Street to the eastern extremity of the ground belonging to said Barclay, Curle, & Company" [one of the fourth parties]
 "and in the option of the first party and his successors, and when required by them, to continue the said tramway from the last mentioned point eastwards to the eastern march of the said lands of Whiteinch; but under this express provision and condition that at any time, without assigning any reason, it shall be competent for the said first party or his factor to call upon the third party or their successors, by requisition in writing, to flit the said tramway so far as lying to the west of the east side of Hill Street, Whiteinch, and to deviate the same so as to connect the said tramway on the said grounds of Scotstoun with the said tramway in said South Street to the east of said Hill Street, on a site to be provided by the first party, and to which deviation the third party shall be bound to obtain such consent of the first party's present feuars in Hill Street, as he, the first party or his foresaid, may think necessary, but the said first party shall be bound to stipulate with his future feuars along said Hill Street and South Street for power to form the said tramway without their consent, and which requisition the third party bind and oblige themselves and their successors to implement and fulfil."

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The second article contained stipulations as to the manner in which the tramway should be laid, and the streets through which it passed causewayed, and provided that the work when completed "shall be kept by the said second party and their successors in thorough good order and condition, and so as not to interfere with the ordinary traffic of the public on said streets, and to the satisfaction of the first party or his factor." In the fourth place, it was provided "that the said third party and their successors shall fence and enclose the said tramway where it passes through the first party's unfenced lands on both sides and shall also put hung gates at the east and west boundaries of the unfenced ground, and afterwards maintain and uphold said fences and gates in good order and repair so long as said ground is unfenced and said tramway exists, all to the satisfaction of the first party or his factor." The agreement further provided:—"(Seventh) That the said tramway, so far as upon the said lands of Whiteinch, shall be used solely for the conveyance of traffic to and from the works situated upon the said lands of Whiteinch and in the lands of Scotstoun, and it shall not be used for the conveyance of traffic to the east of the first party's said lands; neither shall it be connected with any tramway which may be made to the east of the said lands, without the consent in writing of the first party or his successors, and the first party shall have power to call upon the second and third party or their successors to form and make as many sidings as may be necessary or required to connect the unfenced lands of Whiteinch with said tramway, and in feuing his unfenced lands he shall also have power to confer upon his feuars right to have such accesses formed with said branch tramway all for traffic as above stated; and it is hereby specially agreed to that the said first party and his said future feuars shall be placed upon the same footing and shall have the like rights and privileges in all respects in regard to the conveyance of traffic to and from their works and ground, the rates thereof and the rates and passage of the traffic over the North British Railway Company's own lines, or those under

No. 203. their control by lease or otherwise, as if they had been parties to the said agreement of date the 16th May 1872, and subsequent dates: July 17, 1897. (Eighth) In the event of the said tramway ceasing to be used, the Park Yard Co., first party, or his successors, or their factor, without the consent of Limited, v. the fourth parties, or any of them; and also the fourth parties, with North British the consent of the first party, or his successors, or their factor, shall Railway Co. have full power, and the privilege of constructing said tramway is conferred on this express condition, to call upon the third party, or their successors, by written requisition . . . to lift and remove, within six months of the date of said notice, the said tramway and whole works connected therewith, so far as on the said lands of Whiteinch or streets thereon, or any part thereof, and to restore and leave the said lands and streets, and also the fences, in good order and condition, to the satisfaction of the first party or his successors or factor. (Ninth) Nothing herein or in the said agreement between the said second and third and certain of the said fourth parties before narrated shall be understood . . . as entitling the said Whiteinch Railway Company to transfer to the said North British Railway Company or any other party any right in reference to the said tramway either permanent or temporary except the right to lay and use the same through the property of the said first party and his feuars in the way and manner foresaid, and that only subject to the obligation . . . to deviate and remove the same in the events before referred to and subject to the whole other conditions herein contained as to the use thereof before mentioned: (Lastly) That the consent of the said first party and also of the [fourth] party to the formation of said branch tramway and the work and maintenance thereof, shall not be held as warranting their respective powers to confer the same, it being distinctly understood that no warrantice and no privilege in perpetuity, notwithstanding anything in the foresaid agreement to the contrary, is given by them respectively, but simply their respective consent thereto under the conditions foresaid, and of its removal as aforesaid; and the whole parties hereto consent to registration hereof for preservation and execution."

The agreement of 16th May 1872 and subsequent dates (referred to in the agreement above narrated) was entered into between the North British Railway Company, of the first part, the Whiteinch Railway Company, Limited, of the second part, and James Gray Lawrie and others, owners and occupiers of works at Whiteinch (being certain of the fourth parties to the preceding agreement), of the third part. It provided as follows:—First, That the proposed branch railway connecting with Stobcross Junction, of which the tramway through Whiteinch was to form part, should be constructed by the second parties; that, when so constructed, the first parties should enter upon and use the said branch for the conveyance of all traffic, and should "thereafter in perpetuity work and manage . . . the traffic upon and maintain the said branch railway," and that the said railway, so far as on the lands of Whiteinch, should be constructed and worked subject to the provisions of the agreement already narrated. Fourth, the third parties were to be bound to forward and receive and cause to be sent *via* the said railway and the railways of the first parties all their traffic, so far as under their control, and the first parties were to be bound to convey such traffic to its destination with due despatch. Articles 5, 6, and 7 related to the rates to be charged for the conveyance of traffic, and their division between

the first and second parties. The agreement further provided, eighth, No. 203. that it should be in the option of the first parties within four years, after its opening to purchase the branch railway on certain terms ;
 ninth, that notwithstanding said purchase the third parties should be bound to send, and the first parties to take, the said goods on the terms before mentioned ; and, tenth, that the agreement should be contingent on the second parties being able to make arrangements with the owners and occupiers of the lands, the road trustees, and other parties interested, for the acquisition of the lands required for the formation of the railway.

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In terms of the agreement first above mentioned, the tramway was constructed by the Whiteinch Company, and thereafter by disposition dated in January and February, and recorded in February 1881, the Whiteinch Company, with the consent of the third parties to the agreement second above mentioned, or their successors, disposed to trustees for behoof of the North British Railway Company, "All and Whole the undertaking of us, the said Whiteinch Railway Company, Limited, and particularly without prejudice to said generality : . . . *Septimo*, All and Whole all right, which we, the said Whiteinch Railway Company, Limited, have in and to the tramway constructed and laid by us on the lands of Whiteinch" under the agreement first above mentioned. The clause of warrandice was in the following terms :—"And we, the said Whiteinch Railway Company, Limited, grant warrandice, and the said consenters grant warrandice, from fact and deed only, excepting always therefrom the conveyance to said tramway, which we, the said granters hereof do not warrant in any way."

In 1890 the Park Yard Company, Limited, acquired the feu of James Gray Lawrie, who had been a party to the above agreements, and in 1895 George Smellie and Edward John Hill acquired the superiority of said feu as trustees for the Park Yard Company.

In 1896 the Park Yard Company and George Smellie, and Edward John Hill, brought this action against the North British Railway Company, the proprietor of the lands of Whiteinch and others.

The North British Railway Company averred that the pursuers, when they acquired the subjects described in the summons, were well aware of the existence of the tramway, and of the terms of the agreements under which it had been constructed, and was being worked.

The North British Railway Company pleaded ;—6. These defenders should be assolizied from the conclusions of the summons, so far as affecting them, in respect that— . . . (b) The land in question is burdened with a servitude in favour of these defenders, by which they are entitled to maintain and use the said tramway and land for purposes of passage and the conveyance of goods thereon. (c) The land in question is a public road or street. (d) The land in question is subject to a public right of way. . . . (f) These defenders, under the agreements founded on by them, are entitled to maintain and use the tramway as laid. 7. The tramway in question having been constructed and in use at and prior to the time of acquisition of their property by the pursuers, and the pursuers having been fully aware, when they purchased the property, of the said agreements and of these defenders' rights and interests in the said tramway, the pursuers are barred from insisting in the present action.

On 9th March 1897 the Lord Ordinary (Low) repelled the defences,

No. 203. and decreed against the defenders conform to the conclusions of the summons.*

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* "OPINION.— . . . The first question upon the merits is whether the North British Company have a right of servitude over the pursuer's lands, which entitles them to have a tramway upon these lands.

"The tramway was originally laid down in pursuance of an agreement called the construction agreement, entered into in May 1872. (His Lordship here referred to the terms of the agreement.)

"There is no obligation in the agreement to convey any land for the purpose of the tramway, nor is anything said in regard to the Whiteinch Company or the North British Company having any right in or to the lands. The contract appears to me to be a purely personal contract on the part of the superior and the feuars which would not transmit against a singular successor in the lands along with the lands. I do not think that it is possible to spell out of the contract the constitution of a right of servitude, and there is this insuperable difficulty that there is no dominant tenement. It was said that the dominant tenement was the part of the tramway passing through the lands of Scotstoun. That does not appear from the agreement, and further the tramway was not made at the time of the agreement, and I imagine that the Whiteinch Company had not even acquired the land on the Scotstoun estate upon which the tramway was to be constructed, because the company was not registered until after the date of the agreement.

"There was another agreement (referred to as the working agreement), which, although it was executed of a later date than the construction agreement, appears to have been arranged at the same time. (After referring to the terms of this agreement, his Lordship continued)—

"That was a purely working agreement, and could not enlarge the right which the North British Company and the Whiteinch Company had acquired under the construction agreement.

"I think that the working agreement also shews that it was intended that the Whiteinch Company should acquire the lands required for the formation of the tramway, because section 10 provides,—'This agreement shall be contingent on the second parties being able to make arrangements with the owners and occupiers of the lands, the road trustees, and others interested, for the acquisition of the lands required for the formation of the said railway.'

"That section, however, may refer to the acquisition of lands on the Scotstoun estate, but if so, it confirms what I have already indicated, that when the construction agreement was made there was no subject which could be the dominant tenement in the alleged servitude.

"The tramway was constructed by the Whiteinch Company, and subsequently the undertaking of that company was acquired by the North British Company, in terms of an agreement dated 12th September 1878, to which the feuars, who had been parties to the working agreement, were parties.

"The North British Company founded strongly upon the first clause of that agreement, which is quoted in their answer to the fifth article of the condescendence. The part of the clause upon which they found is that in which the feuars (including James Gray Lawrie) declare that from the 1st October 1878 they shall 'cease to have any right of ownership in the' undertaking. Now, it is not stated what interest these parties had in the undertaking of the Whiteinch Company, but to give up any right of ownership which they might have in the undertaking was a very different thing from giving up the right of ownership to land upon which part of the tramway had been constructed. It is impossible, in my opinion, to read the agreement of 1878 as amounting to a conveyance to the Whiteinch Company of the land in question in this case.

"The agreement of 1878 was followed in 1881 by a conveyance to the

The defenders, the North British Railway Company, reclaimed.

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In the course of the debate in the Inner-House the pursuers were allowed to amend the summons by inserting in the declaratory conclusion,—“without prejudice to any public right of way that may be established along the said mentioned boundary.”

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Argued for the reclaimers, the North British Railway Company;—The agreement for the construction of the tramway constituted a servitude over the lands of the fourth parties in favour of the two railway companies, the dominant tenement being the railway through the neighbouring estate, which connected with the tramway. The agreement conferred upon the two companies a right intended to be permanent. This appeared from, *inter alia*, the stipulation requiring the consent of the superior to the removal of the tramway, the careful provisions as to the manner in which it should be laid, and the stipulation that the first party might require sidings to be made to connect the tramway with his unfeued lands. The provision that removal of the tramway might be demanded if it ceased to be used implied that it was to be permanent so long as used. The last clause did not derogate from the right previously given, the words against perpetuity having been inserted to save the provision that removal of the tramway might be required if it ceased to be used. The meaning of the last clause was merely that the fourth parties' consent should not bind them further than they were bound by the preceding clauses of the deed. Further,

North British Company by the Whiteinch Company of their undertaking, with consent of the feuers, who were parties to that agreement.

“By the conveyance the Whiteinch Company disposed to the North British Company a number of plots of land to which they had acquired right, and the right also which they had acquired to cross certain public roads. The conveyance of the tramway, in so far as it was upon the lands of Whiteinch, ran thus,—‘All and Whole all right which we, the Whiteinch Railway Company, Limited, have in and to the tramway constructed and laid by us on the lands of Whiteinch, under and in terms of’ the construction agreement.

“The warrandice clause was in the following terms:—‘And we, the said Whiteinch Railway Company, Limited, grant warrandice, and the said consenters grant warrandice, from fact and deed only, excepting always therefrom the conveyance to said tramway, which the granters hereof do not warrant in any way.’

“I think therefore that this conveyance of the undertaking clearly recognises that the Whiteinch Company had no title to the land upon which the tramway, in so far as it passed through the Whiteinch estate, was laid.

“The North British Company further state that the land upon which the tramway is laid is a public right of way.

“I do not think that that is a relevant defence. The railway company appear to me to have neither interest nor title to maintain it.

“Assuming that the public have, by prescriptive use, acquired a right of way over the line traversed by the tramway, that would not, in my opinion, aid the railway company. The fact that the pursuers' lands were burdened with a public right of way would not disentitle them to have it declared that the lands were not also burdened with a servitude or other right on the part of the railway company, entitling them to have a tramway. I therefore do not think that the railway company have any interest in the question of public right of way.

“Further, I think they have no title to raise the question. It is not the function of a railway company, and they have not the power, to sue a declarator of right of way in the public interest. . . .”

No. 203. the construction agreement was to be read along with the working agreement, and the tenor of the latter agreement supported the view that the right conferred was intended to be permanent. The fact that the working agreement contained certain personal contracts, such as those dealing with the rates to be charged, did not derogate from its effect in other respects. A servitude could be constituted by grant followed by possession, although the deed conferring the right did not enter the Register of Sasines.¹ A positive servitude, which was not one of the ordinary predial servitudes, *e.g.*, a right to cut wood, might be thus conferred.² The servitude now claimed was not of an unprecedented character.³ Where two parties entered into an agreement *de futuro* involving large outlay, and prescribing no definite limit to the right conferred, the presumption was that the agreement was intended to be permanent.⁴ (2) At all events the agreement was good against singular successors, who had purchased in knowledge of it,⁵ and it was averred that the pursuers had so purchased. (3) In any event the servitude claimed was duly constituted by the recorded disposition granted to the defenders by the Whiteinch Company, with the consent of, *inter alios*, the pursuers' predecessor. Disposition and sasine was the best means of constituting a servitude,⁶ and a conveyance granted with consent of the true owner was effectual.⁷

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Argued for the pursuers;—(1) The agreements were not intended to impose a permanent obligation on the feuars. So far as they were concerned, there was no reference made to "successors," and the whole tenor of the two agreements, and in particular the last clause of the construction agreement, shewed that no perpetual obligation was intended to be created. (2) Even if a comparison of the different clauses of the two agreements should ultimately lead to the view that a permanent right was intended to be conferred, knowledge of agreements so ambiguous in their character would not bring a purchaser within the rule of the cases cited. (3) The disposition did not change the rights of parties under the agreements.

At advising,—

LORD PRESIDENT.—It was remarked by the reclaimers' counsel that the two agreements upon which they found are to be read together; and this is quite true. At the same time the construction agreement is that upon which the question between the parties really turns. My opinion is that, when read along with the working agreement, as well as in its own terms, it is not conceived as an agreement binding singular successors in the lands of the vassals, and was not intended to affect them. Three considerations at least lead to this conclusion.

¹ Cowan v. Stewart, May 24, 1872, 10 Macph. 735.

² Garden v. Earl of Aboyne, 1734, M. 14,517.

³ Addie v. Henderson and Dimmack, Nov. 10, 1863, 2 Macph. 41, 36 Scot. Jur. 18.

⁴ Llanelly Railway and Dock Co. v. London and North-Western Railway Co., 1875, L. R., 7 (H. L.) 556.

⁵ Petrie v. Forsyth, Dec. 16, 1874, 2 R. 214; Stoddart v. Dalzell, Dec. 16, 1876, 4 R. 236; Muirhead v. Glasgow Highland Society, Jan. 15, 1864, 2 Macph. 420, 36 Scot. Jur. 201; Kelvin-side Estate Co. v. Donaldson's Trustees, June 5, 1879, 6 R. 995.

⁶ Bell's Prin. sec. 990.

⁷ Ersk. ii. 3. 21; Buchan v. Cockburn, 1739, 1 Ross' Leading Cases, 33.

1. The first arises from the language of the deed. Where it is intended to impose an obligation which is to affect singular successors, it is reasonable to expect that the words of obligation should express this idea. In this deed, not merely is there an omission to bind the successors of the fourth parties, but that omission derives point from the fact that the deed expressly binds the successors of the reclaimers, and also expresses certain obligations in favour of the superior as prestable also to his successors. No. 203.

2. The reclaimers were constrained to allow in argument that certain important obligations in the agreement affecting the fourth parties are only personal, and were not intended to affect singular successors. I refer particularly to the clauses binding the feuars to send their traffic to the reclaimers, and the corresponding clauses giving them special rates. Now, it is extremely difficult to hold that, while this part of the agreement would not apply to singular successors, there should yet survive and affect them an obligation to keep the tramway on their lands. The proper way to test the question is to suppose that all the feus have been sold, and that none of the purchasers trade with the reclaimers. Then, as regards the continued existence of the tramway itself, both parties must be bound, if either. According to the reclaimers' argument, they would be bound to keep the tramway there, although they were getting no traffic, while the new feuars would be bound to submit to it, although it was doing no good to them or to the reclaimers. The true view, to my thinking, is that the two parts of the agreement are relative, and exist and cease together; and as it is admitted that one part does not apply to singular successors, neither does the rest.

3. The clause in the construction agreement titled "Lastly" strongly supports the same construction. (I agree with the reclaimers in thinking that the word "fourth" seems to have dropped out before the word "party"; but this does not much matter.) No warrandice, and no privilege in perpetuity, is given by the parties, but simply their respective consents to the formation of the tramway and its work and maintenance, and to its removal as provided in the agreement. On a full review of both agreements, I think that this is the intentional and deliberate restriction of the deeds to a personal agreement.

The argument to the contrary was plausible, but I think it is fallacious. The reason of the clause, it was said, was that, in the working agreement, the word "perpetuity" was used; and in framing the construction agreement the parties, adverting to this word, qualify it by pointing to the 8th article of the construction agreement as stating the condition under which the rule of perpetuity does not apply. Then it is said that the 8th article is inconsistent with the idea that one of the feuars could, of his own pleasure, remove the part of the tramway on his lands.

This last point is sound enough, but then it (and the whole argument) leave untouched the question, to whom does this system apply; and it then appears that "Lastly" simply negatives the word "perpetuity" as the true statement of the duration, and does nothing more, except leave the duration to be determined by the scope and terms of the agreement itself, which is declared not to contain any warrandice, but only the consent of the parties to the deed.

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No. 203. The construction which I place upon the deed itself supersedes the question of the effect of knowledge on the part of the purchaser, which was argued on the relevancy of the reclaimers' averments.

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An amendment of the record saved, and therefore removed from discussion, any claim the railway company may have to assert a public right of way. This being so, we have no occasion to consider whether the Lord Ordinary's opinion is tenable, that a railway company has no title to assert a public right of way.

I am for adhering.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

CLARK & MACDONALD, S.S.C.—JAMES WATSON, S.S.C.—Agents.

No. 204. ROBERT MACFIE, Pursuer (Respondent).—*D.-F. Asher—Craigie.*
CALLANDER AND OBAN RAILWAY COMPANY, Defenders (Reclaimers).—*Sol.-Gen. Dickson—Deas.*

July 17, 1897.*
Macfie v.
Callander and
Oban Railway
Co.

THE LORD ADVOCATE, Defender.—*Fleming.*

Railway—Superfluous Lands—Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 19), sec. 120.—A railway company which, under section 120 of the Lands Clauses Consolidation (Scotland) Act, 1845, was bound to sell its superfluous lands before 16th July 1892, had at that date two small plots close to its terminal station, and used them partly as a private means of access to the station buildings, but principally as ornamental garden ground, improving the amenity of the station and its public accesses. These plots were the only ground available for any extension of the station or railway buildings. Prior to 16th July 1892 the directors had considered offers to buy parts of these plots, but had declined these offers on the ground that the price offered was too small. Subsequent to that date the directors remitted to their secretary and solicitor to conclude a sale of part of one plot to the Post-office, but they informed the directors that they had no power to sell, and the sale was not completed. Thereafter leases for five years, terminable at one year's notice, were granted by the railway company of two portions of the lands.

In 1896 the owner of lands adjoining, from whom the plots in question had been acquired by the railway company under their compulsory powers, brought an action for declarator that these plots were superfluous lands within the meaning of the Lands Clauses Consolidation (Scotland) Act, 1845, and that they therefore had vested in him on 16th July 1892. The Court (*rev. judgment of Lord Low*) *assolized* the defenders, holding (1) that the actings of the directors did not bar the company from pleading that the lands were not superfluous; (2) that these actings were evidence, but not conclusive evidence, that the plots were superfluous; (3) that the question, whether the plots were superfluous, was to be determined by the circumstances as existing at 16th July 1892; and (4) that on the evidence as a whole the plots were not superfluous.

Observed that the question was, whether, if all the facts existing at the prescribed date had been known to a reasonably careful and skilful person, he would have said at that time, that the lands would by the ordinary development of the railway or neighbourhood be required to be actually applied to the purpose of the railway within a reasonable time, and that when pieces

of land are small and close to a station, and in a town, it was more easily to be believed that they would be required. No. 204.

London and South-Western Railway v. Blackmore, 1870, L. R., 4 E. and I. App. 610, commented on. July 17, 1897. Macfie v. Callander and Oban Railway Co.

By the Callander and Oban Railway Acts, 1865 to 1878, the Callander and Oban Railway Company was incorporated and authorised to make, *inter alia*, certain works, including the terminal station, in the town of Oban, and to take lands compulsorily for these purposes. 1ST DIVISION. Lord Low.

Among the lands thus taken in Oban were two plots of ground, designated in the action after mentioned as plots A and B, belonging to Mr Macfie of Airds.

The time limited for the completion of the works terminated on 16th July 1882.

On 11th March 1896 Mr Macfie raised an action against the Callander and Oban Railway Company, of which the leading conclusions were for declarator that the plots of ground marked A and B,—“ which plots are parts of the lands which were acquired by the defenders, the Callander and Oban Railway Company, for the purposes of their undertaking, as set forth in the Callander and Oban Railway Act, 1878—not having been required or used by the defenders the said Callander and Oban Railway Company for said purposes, and not being required for said purposes, have become superfluous lands within the meaning of section 120 of the Lands Clauses Consolidation (Scotland) Act, 1845: And (2) further ” for declarator that said plots of ground “ vested in and became the property of the pursuer as from and after 17th July 1892, or at least that they are now vested in and have become the property of the pursuer.” *

The Lord Advocate, as representing the Post-office (which had obtained a lease of part of plot A from the railway company), was also called as defender, but it is unnecessary to detail the conclusion so far as directed against his Lordship.

The pursuer pleaded;—(1) The plots of ground referred to in the summons not having been required or used by the defenders the Callander and Oban Railway Company for the purposes of their undertaking, and having thus become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation

* The Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. c. 19), provides,—“ And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows :—

“ 120. Within the prescribed period, or if no period be prescribed within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands in such manner as they may deem most advantageous, and apply the purchase-money arising from such sales to the purposes of the special Act; and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same.”

There was no “ prescribed period ” fixed by the Callander and Oban Railway Act, 1878, but the period for the completion of the works thereunder expired on 16th July 1882, and the ten years thereafter consequently expired on 16th July 1892.

No. 204. Act, 1845, the pursuer, as proprietor of the adjoining lands, is entitled to decree in terms of the first, second, and third conclusions of the summons.
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The Callander and Oban Railway Company pleaded, *inter alia* :—
 (5) The land being required by these defenders for the purpose of their undertaking, and having on that account been retained by them, is not superfluous land within the meaning of the statute. (6) The said lands not being superfluous lands within the meaning of the statute, the defender should be assoilized, with expenses.

A proof was led. It appeared from the evidence that the piece of ground of which plots A and B were parts had originally consisted of part of the bed of the sea and of the foreshore, and part of the bed and foreshore of the Black Lynn Burn, which had been acquired from the Board of Trade, and partly of rough ground immediately above the foreshore which had been acquired from the pursuer. By means of retaining walls the Callander and Oban Railway had levelled this up and had laid out on it an open space or place in front of the station suitable for omnibuses and other vehicles waiting the arrival of trains, and two roads as accesses to the town. There were left the two plots of which A measured 32 poles, and B 1 rood 19½ poles. These plots were fenced in, and were laid out with grass and shrubs as ornamental grounds. In addition, through plot A ran two roads, one of which served as access to the cellar under the station refreshment-room, and the other as access to the back part of the station.

Evidence was led that the station at Oban was barely sufficient for the traffic, especially in summer, and that it could not be extended except by using the plots; that the railway offices at Oban were very inconveniently situated, and that when the company could afford to provide new offices the natural place for them was on either of these plots, so as to be as near to the station as possible; and that the necessity for extension of the station would be enhanced by the increase of traffic arising from the opening up of new lines running into Oban.

It further appeared that on 19th October 1880 an offer was made to the Callander and Oban Railway Company on behalf of Mrs Campbell, the proprietrix of a hotel adjoining plot B, for the purchase of a part of that plot, and that the minute of the directors thereon was "Decline: Company does not desire to sell."

With reference to another offer by her for part of plot B, the directors, on 25th January 1887, minuted "Decline."

On 22d November 1889 the directors minuted "Read letter from D. M'Intosh, architect, Oban, dated 5th inst., inquiring as to what price the spare land at Argyle Square will be given, and report by the secretary thereon. The manager to inform Mrs Campbell that inquiries are being made for the vacant ground near the station, and ascertain whether, and for what quantity, she desires to acquire of it."

Further offers by Mrs Campbell, dated 19th September 1892, and 11th October 1892, were submitted, and the minute of the directors' meeting of 12th October 1892 bore,—"Decline. Price too low."

With regard to an offer by her of 19th August 1893, the directors instructed the preparation of a ground plan, and another offer, dated 19th September 1893, was submitted, but no action was taken thereon.

As regarded plot A, various proposals had been made to Mr Anderson, the manager and secretary of the Callander and Oban Railway,

by shopkeepers in Oban, to build railway offices with a range of No. 204. shops underneath, and plans were submitted to him.

In the autumn of 1892 Mr Anderson instructed an architect to prepare sketch plans for plot A, and these included a post-office, shops, and offices or dwelling-houses. These plans had apparently been submitted to the directors, but no action was taken on them.

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In August 1892 inquiries were made by the Post-office authorities as to the purchase of part of plot A, and after a lengthy correspondence and delay in getting the sanction of the Treasury, they intimated on 9th December 1894 that they were prepared to negotiate for its purchase. On 20th December 1894 the directors minuted,—“The price altogether being £2350, remit to Mr Anderson and Mr Neave (the company’s solicitor) to endeavour to come to an arrangement at the price named.”

On 27th February 1895 a formal offer was made on behalf of the Post-office for the purchase of the part of plot A. On 18th March 1895 Mr Neave informed the Solicitor to the Post-office that “as the ground is not superfluous land, there will be some difficulty in the company conveying the ground to the Post-office,” and on 27th March that “the company are not in a position to sell.” The proposed sale was accordingly not carried through.

On 3d December 1895 the directors resolved to let to Mrs Campbell part of plot B, and to the Post-office another part of the same plot, the lease in both cases to be for five years certain, and thereafter at one year’s notice. Both these leases were completed.

On 3d March 1897 the Lord Ordinary (Low) pronounced the following interlocutor:—“The Lord Ordinary having considered the cause, finds that the portion of the plot of ground marked A on the plan produced with the summons, which the directors of the Callander and Oban Railway Company agreed to sell to Her Majesty’s Post-master-General in the year 1895, and the plot of ground marked B on said plan, became superfluous lands within the meaning of section 120 of the Lands Clauses Consolidation (Scotland) Act, 1845, and vested in and became the property of the owner or owners of lands adjoining thereto from and after the 17th July 1892. . . .”

* “OPINION.—If the directors of the Callander and Oban Railway Company had not tried to sell the plots of land in question, but had all along dealt with them as if they were lands which the company required and intended to hold, I should have thought, although even then the question would have been attended with difficulty, that the pursuer could not succeed.

“The two plots of ground, which have been referred to as A and B, were parts of certain lands which the company, in the exercise of their compulsory powers, acquired from the pursuer. These lands lay between Argyle Place and Aird’s Place and the sea, and to a great extent, if not wholly, consisted of ground which had been roughly reclaimed from foreshore. The ground was bounded on the north by a stream called the Black Lynn. The company, at considerable expense, built a retaining-wall along the stream, and filled up the whole of the ground to one level. Across the centre of the ground they made a road leading from Argyle Square to the station. On each side of the road there was a triangular plot of ground—the plots in question—which they surrounded with walls and iron railings, and laid out with flowers and shrubs as ornamental ground. The two plots of ground together amount to very little over half an acre.

“There is no doubt that by so dealing with the plots of ground the com-

No. 204. The Callander and Oban Railway Company reclaimed, and argued; —The lands had been occupied and used by the railway during the whole of the ten years, and were thus not superfluous. The *onus* was on the pursuer to shew that they were superfluous.¹ Lands might become "superfluous" in four different ways.² The lands in question did not fall under any of the divisions. The pursuer's claim seemed to be that he could arrange the station and accesses so that part of the lands would not be required, and that he was thus entitled to that part. But in taking lands the railway officials were the sole judges of what was necessary for the undertaking, if acting *bona fide*,³ and in this case the evidence shewed that they took what they considered necessary for providing proper access to the station. The small parts not actually used for public access were used for private access and for enhancing the amenity of the station. Such a use had never been held insufficient to prevent the lands becoming superfluous. Cases where lands had been held superfluous were cases where, as in *May's* case,² the purpose for which they were taken was exhausted, or where there never was any use,⁴ or where no use was

pany made the approach to their station much more sightly and attractive than it would have been if the plots had been covered with buildings, or left in the rough state in which they were when the company acquired them. It was said, however, that such a use of the ground was not one of the purposes authorised by the company's Act, and that the plots are therefore in the same position as regards the present question as if they had lain waste. Now, there are no statutory limits or requirements as to the size or style of railway stations, and if a railway company thinks it advisable to spend money upon what is merely ornamental, that is a matter between them and their shareholders. Therefore I am not prepared to assent to the view that to lay out a small piece of ground as ornamental ground in front of an important station is necessarily so beyond the powers of a railway company that they are liable to forfeit the ground so laid out at the end of ten years if they cannot shew that they require it for strictly railway purposes. I think that is a question of circumstances. If a small piece of ornamental ground formed part of a scheme for making a station attractive and convenient, I think that the Court would be very slow to hold the ground to be superfluous. If, on the other hand, it appeared that the ground had been laid out merely as a temporary expedient to prevent unsightliness, until a good opportunity arose of disposing of it, or until it should be required for other purposes, I do not think that the fact that the company had expended money upon the ground would prevent it falling into the category of superfluous.

"In the present case, however, I think that there are strong grounds for believing that the two plots were never designed to be kept permanently as ornamental ground. Although small in extent, they are very valuable, being apparently worth from four to five thousand pounds. It is most unlikely that the directors of a railway company, which never seems to have

¹ Moon's Trustees v. North British Railway Co., Feb. 8, 1879, 6 R. 640; Hooper v. Bourne, 1880, L. R., 5 App. Cas. 1.

² Great Western Railway Co. v. May, 1874, L. R., 7 E. and I. App. 283, at p. 292.

³ Stockton and Darlington Railway Co. v. Brown, 1860, 9 Cl. H. L. Ca. 246; City of Glasgow Union Railway Co. v. Caledonian Railway Co., July 22, 1871, 9 Macph. (H. L.) 115, 43 Scot. Jur. 429.

⁴ Norton v. London and North-Western Railway Co., 1879, L. R., 13 Ch. Div. 268.

possible without further powers being obtained by the railway.¹ No. 204. Further, the position of the lands claimed affected the question. There was a presumption against treating them as superfluous if they were of small extent, or situated near a station or a populous and increasing town.² The 16th July 1892 was the *punctum temporis* at which it was to be found whether or not the lands were superfluous,³ and in this inquiry the Court might take into consideration as evidence facts occurring subsequently. But the mere fact of temporary leases of the lands was not enough.² On this question the Lord Ordinary was against the pursuer, and his view was amply borne out by the evidence, which shewed not only that there was actual possession and use by the railway at the date mentioned, but a reasonable probability of further use for extension of station buildings and railway offices. But he had held that the railway was barred by the actings of its directors subsequent to 16th July 1892 from pleading that the lands were not superfluous at that date. These actings merely amounted to entertaining proposals for a sale of part of plot A. The sale was never completed, and thus this case was very different from the cases

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been overburdened with funds, should have dedicated such valuable ground to such a use. The presumption seems to me to be that the directors laid out the plots as they did until the ground could be otherwise used or disposed of, and that view is, as I shall shew, entirely consistent with the actings of the directors.

"But (apart from the actings of the directors) there is a great deal to be said for the view that the plots are not superfluous, because there is a reasonable prospect of their being required for railway works.

"If an extension of the station is required, the company have no ground which could be made available except these two plots. It was said by several witnesses of great skill and experience that the station accommodation is ample, and that there is no prospect of any more being required. I think, however, that the balance of the evidence is, upon the whole, the other way. The traffic has largely increased, and is increasing; and the probability is, that owing to the opening of new lines it will continue to increase in the future.

"I think that a terminal station upon a line upon which the traffic is increasing, and upon which there is already a large passenger traffic in summer, cannot be regarded as well equipped when it has only one refreshment-room and one room for both left luggage and parcels, and no office—except a booking-office—for any official. I therefore think that the necessity for increased station accommodation is likely to arise, although within what period it is impossible to foretell; and, as I have said, the plots in question are the only ground available.

"Further, the defenders founded strongly on the fact that plot A is not wholly used as pleasure-ground. It is crossed by a road, one branch of which leads to the cellar under the refreshment-rooms and another branch to the back of the station. These accesses are of the nature of proper railway works, and accordingly the defenders contended that the plot of ground upon which they are placed could not be regarded as superfluous. It is plain, however, that the defenders would not have acquired the whole of plot A for the purpose of making an access to the cellar and the back

Stewart v. Highland Railway Co., March 8, 1889, 16 R. 580.

² Betts v. Great Eastern Railway Co., 1878, L. R., 3 Ex. Div. 182; Moon's Trustees and Hooper, *cit. supra*, p. 1160, note 1.

³ Great Western Railway Co. v. May, L. R., 7 Eng. and Ir. App. 283, at pp. 295-7.

No. 204. July 17, 1897. *Macfie v. Callander and Oban Railway Co.* relied on by the pursuer, where there was either actual sale or exposure in open market as "superfluous lands."¹ Even when there was a completed sale that was not conclusive, for the sale might be either a fraud or *ultra vires*.² Here there was no completed sale, nor any decision by the directors that the lands were superfluous, but merely a lease to the Post-office authorities, whom the railway were entitled to make special provision for as being large customers.³

Argued for the pursuer;—The theory of the Railway Acts was that railways took what they considered necessary for their purpose. But once the land was taken the right accrued to the person from whom it was taken to watch the use made of it. In this case the railway at their own hand chose the position of the station and the accesses thereto. These accesses and station were sufficient up to 16th July 1892, and the remainder was not required. Probable additional requirements in consequence of other lines being made did not affect the question, for these were not "the undertaking" for which the land was taken, and for which it might be held. There was no case to support the taking of ground for pure ornamentation and retaining it for that purpose alone. The question then was, was the conduct of the railway officials such as to shew a *bona fide* intention to

of the station. A road along the station wall would have been equally convenient; and I imagine that the road was placed where it is simply because the defenders had no particular use for plot A, and by taking the road round one side of it they were able to lay out the plot more tastefully. The strong point for the defenders in regard to plot A is, that it immediately adjoins the railway station, and is the ground upon which any extension of the station must be built.

"If, therefore, it had not been for the actings of the directors in regard to the ground (I refer to both plots), I should, upon the whole, have been of opinion it was not superfluous on account of the reasonable probability which appears to me to exist of its being required for the extension of the station.

"Unfortunately, however, the directors have dealt with the ground in a way which is inconsistent, in my judgment, with any other supposition than that, in their opinion, it was superfluous.

"The time limited by the company's special Act for the completion of their works expired in July 1882, and they had ten years from that date within which to sell superfluous lands. The question of disposing of the ground does not appear to have been brought prominently before the directors until about 1886. From that time forward, however, it was repeatedly the subject of consideration at board meetings.

"A great deal was said about reports which Mr Anderson, the secretary, made to the directors in regard to the value of the ground, and plans which he had prepared, shewing how it could be best utilised. Now I do not think that the fact that the directors discussed the question of disposing of the ground, and made inquiries as to its value, is in itself of much importance. The question whether lands are or are not superfluous must often be a delicate one for a railway company, and I think that it is quite reasonable

¹ *Moody v. Corbett*, 1886, L. R., 1 Q. B. 510, 1865, 34 L. J., Q. B. 166, at p. 172; *London and South-Western Railway Co. v. Blackmore*, 1870, L. R., 4 E. and L. App. 610.

² *Carington v. Wycombe Railway Co.*, 1868, L. R., 3 Ch. Ap. 377; *Hobbs v. Midland Railway Co.*, 1882, L. R., 20 Ch. Div. 418; *Beauchamp v. Great Western Railway Co.*, 1868, L. R., 3 Ch. Ap. 745; *Dunhill v. North-Eastern Railway Co.*, L. R. [1896], 1 Ch. 121.

³ *Betts v. Great Eastern Railway Co.*, L. R., 3 Excheq. Div. 182.

use the land for railway purposes within a reasonable¹ time? Here No. 204. it was not. Mr Anderson repeatedly submitted to his directors proposals to sell part of these lands, and these proposals were only declined because the price was too low. When a sufficient price was offered by the Post-office, the directors at once accepted the proposal so far as they could. *Blackmore's*² case was on all-fours. That decided that offering lands for sale acted as estoppel in cases where the neighbouring proprietor had right of pre-emption. This was a case where the right was of property, but the principle was the same. Both were rights of restraint on the possession of the railway.

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At advising,—

LORD PRESIDENT.—The pursuer's claim, as stated in the summons, is that, from 17th July 1892, the two pieces of ground in dispute vested in him; and the question at issue is whether, at that date, they were superfluous lands in the sense of the statutes. The summons purports to claim a declarator that, even if the lands did not become the property of the pur-

for the directors in considering it to ascertain what price they could get for the lands if they came to be of opinion that they could do without them and resolved to sell them.

"But, in this case, the directors went far beyond getting information as to the value of the lands and the chances of the market. They dealt with actual offers. They actually concluded a contract for the sale of a large part of plot A, and they only did not do so as regarded plot B because the price offered did not satisfy them; and there is no suggestion in the minutes or correspondence that they ever had any doubt as to their power to sell the ground, or as to the advisability of doing so, provided they could get a sufficient price.

"Plot B is separated from the Station Hotel only by the Black Lynn Burn, and Mrs Campbell, the proprietrix, was anxious to acquire that plot, chiefly because she wished to cover over the burn, which she considered to be prejudicial to the hotel. She accordingly made repeated offers to purchase the ground, and it is plain that her offers were refused for no other reason than that the directors did not consider the price which she offered high enough. Mr Brown, the only member of the Callander and Oban board who was examined, said that even if Mrs Campbell had offered a sufficient price, the directors would not have agreed to sell to her until they had consulted their engineer as to whether or not the ground was required for railway purposes. I think that Mr Brown's recollection must be at fault upon the point. In the first place, there is no indication in the minutes or the correspondence that the directors considered it to be necessary to consult anyone as to whether or not (apart from the question of price) it was prudent to sell the ground. On the contrary, the plain inference to be drawn from the documentary evidence is that the only thing which stood in the way of a sale to Mrs Campbell was the price. In the second place, when the Post-office authorities offered for a portion of plot A what the directors considered to be a sufficient price, an agreement of sale was concluded without the engineer or anyone else being called in to advise the directors.

"The Post-office authorities first opened negotiations for the acquisition of ground for a new post-office in July 1892. The matter was brought before the directors at a meeting held upon the 10th August 1892, and the minute bears that the secretary was authorised to state 'that a certain por-

¹ Great Western Railway Co. v. May, L. R., 7 Eng. and Ir. App. 283.

² London and South-Western Railway Co. v. Blackmore, L. R., 4 Eng. and Ir. App. 610.

No. 204. July 17, 1897. *Macfie v. Callander and Oban Railway Co.* suer at 17th July 1892, at least they are now vested in him, and have become his property. No plea is stated on record, or has been stated in argument, in support of any theory according to which the lands, if they were not vested in the pursuer at 17th July 1892, became vested in him at some later date. The sequel will shew that this observation is not unimportant. If the lands were superfluous at 17th July 1892, they vested in the pursuer; if at that date they were not superfluous, then the pursuer has no right to them.

It may be convenient to consider, first, the condition and actual uses of the ground in July 1892, apart from their potential uses and the uses which have been projected for them. But the history of the ground bears upon both subjects.

The terminus of the Callander and Oban line, at Oban, is situated close to the sea, and the land taken from the pursuer is the northmost or terminal part of the lands taken under their compulsory powers. The lands taken were not, however, ready to hand for the uses to which they have been

tion of the ground at Argyle Square can be sold, and the directors will consider proposals for its purchase.' That was a very plain indication of the directors' opinion that a portion, at all events, of the ground in question was superfluous, because it was only upon the assumption that it was superfluous that it could be sold. The Post-office authorities subsequently proposed that, instead of their purchasing a piece of ground, the company should build a post-office, which they (the postal authorities) should take on lease. That proposal was declined, but by letter of 7th September 1893 the secretary, Mr Anderson, intimated that the company 'are willing to sell land for this purpose.' Finally, in the end of 1894, the Post-office authorities offered a sum of £2350 for a portion of plot A. After some correspondence, that offer was in March 1895 approved of by the directors, and they remitted to the secretary and the solicitor 'to take the necessary steps for sale of ground.'

"The sale of the ground was not in fact carried out, because Mr Neave, the solicitor of the company, advised that they could not give a good title. Mr Neave was not examined as a witness, and the letters which he wrote upon the subject are very guarded; and the impression which they convey to my mind is, that they do not disclose his full reasons for advising that the company could not give a title. He simply says that the lands are not superfluous lands, and that therefore the company could not sell them. No doubt he noticed that the ten years during which it was competent for the company to sell superfluous lands had expired before the agreement with the Post-office was made.

"What then is the result, as regards the present question, of the directors having agreed to sell a portion of plot A to the Post-office, and negotiated for the sale of plot B?

"The directors are the proper persons, in the first instance, to decide whether lands are or are not superfluous, and they have the best means of judging as to what is required for the purposes of the railway. And when it is proved that they have deliberately acted in a way which shewed that their opinion was that the lands were not required, I think that the *onus* is shifted. It is then for the directors to shew that the lands never were superfluous, and to explain their previous actings and reconcile them with the position which they now take up.

"It seems to me that in a question with the Callander and Oban Railway Company, the decision of the House of Lords in the *London and South-Western Railway Company v. Blackmore* (4 E. & I. App. p. 610) is in

applied. They consisted of rough ground, with the tide, at least in the part now in question, coming through the stones. The company made up the ground, and used it, when so transformed, for their station. The land taken from the pursuer was accordingly used in part for the station buildings, and in part for the approaches to the station. In front of the station, there was formed an open place. Instead of making the eastern approach to the station as wide as this place, the company made it a good deal narrower, leaving on either side the pieces of ground now in dispute. Of these the one A is less than, and the other B is over, a quarter of an acre. A is directly contiguous to the station building, and B is separated from A by the breadth of the roadway. Both A and B were laid out as ornamental grounds, with accesses and broad footpaths. In the case of A, two of those footroads, forming what the pursuer's leading witness calls a very considerable part of the area, furnish access to the south-east portion of the station, and the wine or beer cellar of the refreshment-room. Those roads have been in use by the company for the purposes of the station since

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point. There a railway company had, during the currency of the ten years, sold certain lands. These lands not being in town, or building lands, or built upon, an adjoining proprietor had a right of pre-emption. In an action at the instance of the adjoining owner, the sale was set aside, and it was held that his right of pre-emption had arisen,—the contention of the company, that the sale being set aside they were entitled to continue to hold the lands until the expiry of the ten years, as if the sale had never been made, being repelled.

“Lord Westbury, after saying that the sale must be set aside, put the point thus:—‘But then the question arose, Were the directors to be remitted to their former position, and placed in a capacity to determine what to do with these lands as if they had never proceeded to deal with them as superfluous lands? That is a question which, at first sight, appeared to me to deserve much consideration; but undoubtedly in the cases referred to, it has been held, and I am by no means inclined to disagree with the decision, that the act of the directors in putting up the lands for sale stamps the lands absolutely with the character of superfluous lands, and that the directors are estopped from denying that they have that character under the Act of Parliament.’

“Now, if an attempted sale of lands during the currency of the ten years stamps them with the character of superfluous lands and at once gives rise to the right of pre-emption, an attempt to sell at the end of ten years, after the directors have had the full period allowed by statute to consider whether the lands are or are not required for the purposes of the special Act, must also do so.

“If the directors had been able to give any explanation of their actings in regard to the ground, which shewed that these actings were not inconsistent with the position which they now take up, I have no doubt that they would have done so. But no satisfactory explanation has been forthcoming. Mr Anderson, the secretary, who prepared numerous reports upon the subject, and conducted the correspondence, was not examined. I think, however, that it is plain from the documentary evidence that his opinion all along was that the ground was not required by the company and should be sold. Mr Bolton, the chairman of the company, was said to be too ill to attend the proof, but it was not said that he could not be examined on commission. The only individual who had anything to do with the proceedings who was examined was Mr Brown, and I do not consider that the explanations which he gives are satisfactory. He says, in the first place,

No. 204. the grounds were laid out. Accordingly, at 17th July 1892, the condition of matters was this—both areas formed ornamental grounds, and A was further used, to the extent of its roadways, for access to the station. Those were not, of course, principal accesses, or used for other than subordinate purposes, but they were in fact accesses.

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I now inquire what were the potential uses of those lands to the Railway Company; and, of course, I disregard what is imaginary, or conjectural, or remote. We are to put ourselves in the position of business men looking around them in July 1892, with a view not too sanguine and not too *borné*. Can we say “that, if all the facts existing on the last day of the ten years had been known to a reasonably skilful and careful person, he would have said, at that time, that the lands in question would, by the ordinary development of the railway or neighbourhood, be required to be actually applied to the purpose of the railway within a reasonable time”?¹

that the company were willing to sell to the Post-office, although they would not have sold to a private individual. I do not think that Mr Brown has any distinct recollection of what passed at the meetings, and the documentary evidence leads me to conclude that the directors would have sold as readily to a private person as to the Post-office if the former had offered as good a price. Further, a desire to favour the Post-office as being a branch of the public service is really beside the question, because the directors could not sell one foot of ground to the Post-office or anyone else unless it was ground which was not required for the purposes of the special Act,—that is to say, superfluous ground. Mr Brown says, in the next place, that the directors never applied their minds to the question whether plot B was ground which they ought to sell or not, because they never had an offer at a price which was worth considering. Now, unless the directors were prepared to sell to Mrs Campbell, if she offered them a sufficient price, they treated her in a way which it is impossible to justify. In the first place, they undoubtedly gave her to understand that the only reason for declining her offer was deficiency in the price. In the second place, at their meeting of 22d November 1889 they instructed the secretary ‘to inform Mrs Campbell that inquiries are being made for the vacant ground near the station, and ascertain whether, and for what quantity, she desires to acquire it.’ That was inviting her to offer for the ground. In the third place, they allowed Mrs Campbell’s agent, by arrangement with the secretary, to travel to Glasgow on three different occasions to have a personal interview with them on the subject. It seems to me to be impossible to believe that the directors would have acted in that way unless they had been prepared to sell the ground to Mrs Campbell, if she came up to their views of an adequate price.

“I have therefore come to the conclusion, although with regret, that so far as the Callander and Oban Company is concerned, the directors, by agreeing to sell part of plot A to the Post-office, stamped the portion which they so agreed to sell with the character of superfluous lands. In regard to plot B, although the actings of the directors are not perhaps so unequivocal as in regard to plot A, there are much stronger grounds (apart from the actings of the directors) for holding the former to be superfluous land than the latter. Practically the only use to which it has been suggested that plot B could be put, is that if the station was extended over plot A, it might be necessary to shift the road from Argyle Square on to plot B. If, therefore, plot A must be regarded as superfluous land, I think that it necessarily

¹ Hooper v. Bourne, 1880, L. R., 5 App. Cas. 1, Lord O’Hagan at p. 18, quoting Lord Justice Brett in same case, 1877, 3 Q. B. D. 258, at p. 282.

I do not think it necessary to elaborate this point, because the Lord Ordinary has indicated that, apart from the actings of the company themselves, he would hold that there was a reasonable probability of the ground being required for the extension of the station. In this opinion, I concur. But, as the effect to be given to the actings of the company may depend on the degree of strength of the evidence that the lands would, in reasonable probability, be needed for the active purposes of the company, I shall dwell on it for a moment.

It is obvious to remark, and has frequently been remarked, that, where pieces of land are small, and close to a station, and in a town, it is the more easily to be believed that they are "required." The patent facts about Oban, and about this railway, render these general considerations applicable with more, rather than less, than the average force. Further, it is proved that, if the station or its accesses were ever to be enlarged by a foot, this ground is the only resource which the company has to draw on; and it is directly available for those purposes. Should such needs arise, then, on the assumption of the pursuer's success, this land would have to be bought back again. That such needs are likely to arise requires but little enforcement. The existing establishment was originally planned in accordance with the limited financial ability of the company at the time, and is in several respects contracted; there is adequate evidence that, for goods and parcel traffic, for refreshment-rooms, and for offices, the present arrangements are already insufficient, if regard be had to present comfort, and the expansion of traffic.

Up to this point, what I have said is entirely in accordance with the opinion of the Lord Ordinary; and the next question is, why has the Lord Ordinary come to the conclusion that the greater part of these lands were superfluous at 17th July 1892? The answer to this question of fact must be, because, and only because, of the actings of the directors.

follows that plot B must also be so, and I can find no ground for distinguishing between different parts of plot B.

"In regard to the portion of plot A other than that which the directors agreed to sell to the Post-office, there is more difficulty. It is to be observed in the first place that the pursuer now recognises that he cannot claim the whole of plot A, and he has restricted his claim so as to leave a free entry from the north to the strip of ground, thirteen feet in width, running along the wall of the station to form an access to the cellar and the back of the station, in lieu of the roads which now run round plot A. Now, I do not think that it is proved that the directors ever contemplated selling the whole of plot A. On the contrary I think that there are indications that they did not do so. Thus the minute of the directors' meeting of 10th August 1892 (when the Post-office first approached them) runs thus:—'Mr Anderson authorised to state that a certain portion of the ground at Argyle Square can be sold.' Further, the directors never had any offer before them for the purchase of the remainder of plot A, and they never intimated to anyone that they were willing to sell that ground, and although plans were prepared shewing buildings covering the whole of plot A, these buildings included railway offices. Therefore, I am of opinion that the defenders are not estopped by their actings from pleading that the portion of plot A not included in the sale to the Post-office was not at the end of ten years superfluous, and as it is the only ground available for building an office, or a second refreshment-room, or a parcels office, and is quite suitable for these purposes, I think, for the reasons which I have already stated, that I am justified in holding that it was not as matter of fact superfluous. . . ."

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No. 204. I shall state briefly, and the matter admits of brevity, what I hold to be the facts as to the company's actings. Some of the propositions are negative; but these are not the least important.

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1. The directors never considered before, at, or after July 1892, of what use the lands in question were, or were likely to become, to the company.

2. The directors never came to any general resolution to sell "A" and "B," or either of them. They only considered certain proposals for the sale of certain parts of them.

3. In regard to "A," the directors did not, within the ten years, either resolve to sell, or consider any proposal for the sale of any part of "A."

The only step taken in the direction of selling any part of "A" was after the expiry of the ten years, to wit, in August 1892, when the secretary was authorised to state to the Post-office that a certain portion of "A" would be sold, the negotiations being continued till 1895, when the directors remitted to the secretary and solicitor to take the necessary steps for selling to the Post-office the ground specified in the Lord Ordinary's interlocutor. There was no concluded contract of sale, and the proposal was abandoned.

4. In regard to "B," the directors did, within the ten years, consider various proposals by Mrs Campbell for the sale to her of parts of "B." Those proposals were, in each instance, declined on the ground of the proposed price being too small.

5. No part of "B" was in fact ever sold; and none was let until 1895, when, after the falling through of the proposal for a sale of part of "A," a certain portion of "B" was let to the Post-office for five years, and another portion of "B" was let to Mrs Campbell for the same period.

6. The pursuer has proved as part of his case that in 1892 a plan was prepared at the instance of the company's officers for utilising part of "A" for offices for the company, provision being made in part of the building for shops, which might apparently be let.

It is manifest from what has now been stated that the conduct of the executive of the defenders, to a certain extent, supports the contention of the pursuer. The actings of the directors, and the absence from the witness-box of several of the officers of the company who took part in those proceedings, have furnished the pursuer's counsel with material for legitimate comment. But it is necessary to see precisely what is the legal result of this conduct. Do the actings of the directors constitute a bar against the company now asserting the lands not to have been superfluous at 17th July 1892? or do they merely constitute evidence, more or less cogent, that the lands were in fact superfluous? Those two things are essentially different; but they meet, and I think are in danger of being confused, in a metaphor much used in the discussion,—it is said that the company have stamped the lands as superfluous. (This phrase has come from an opinion of Lord Westbury's, in which it is used with precision as relative to estoppel.)

Now, it cannot be disputed that the fact, *e.g.*, that directors within the ten years resolved to sell, and only did not sell because the price was too small, is *prima facie* cogent evidence that the land so dealt with was not required for the company's purposes. The reason for the inference is that the duty of directors being only to sell what is not required, it is to be

presumed that, before resolving to sell, they had considered whether or not the land was required for the company's purposes, and had concluded that it was not. I say such a fact is cogent evidence, but it is not conclusive, and cannot possibly be so. Suppose that directors, tempted by a large price, resolved to sell the platform of a station, or a siding in daily use, the proper inference from the resolution would be, not that the lands were superfluous, but that the directors had not known, or had not attended to, the legal limitations on their power to dispose of the company's property. Again, suppose the case to be less gross than that of a platform or a siding—the case of land about which opinion might be divided as to whether it was or was not required—that the directors had resolved to sell, but that it appeared that they had so resolved in ignorance of the law which enables them to sell what is superfluous, but forbids them to sell what is required. In that case the cogency of the resolution to sell, as evidence of superfluity, is largely abated. It would merely come to this, that the directors thought that the money was more required by the company than the land. It would not prove that they thought that the company did not require the land. It is necessary here, and throughout the discussion, to beware of misusing the word “required.” The question is not whether it would not be possible to get on without the lands, or whether, by reconstructing your station, you might not so economise your ground as to leave this bit over.

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Now, as I have pointed out, in my summary of the evidence, the directors of the defenders' company did not consider the questions properly arising when a sale of the company's lands is proposed. Their proceedings shew clearly that they did not consider whether the land was or was not required, and shew also that they acted exactly in the same way after as during the ten years, although, after the ten years, they had no power to sell, the theory of the statutes being, that after the ten years all that remains in the company is “required.” In short, I think it is abundantly plain that they did not advert to the facts (and were never reminded or told) that directors can only sell land not required for the company's purposes, and that they cannot sell at all after the ten years. There is a very significant letter, dated 31st August 1893, from the secretary to the chairman, from which it appears that the law about superfluous lands was only unearthed after the ten years were out, and that on this occasion the wrong section was supposed to apply. All the testimony harmonises with this view, although, for reasons easily conjectured, it does not directly affirm it.

If, then, the actings of the directors be merely evidence on the question of fact, whether the lands were required or not, I hold that no legitimate inference can be drawn that the opinion of those persons was that the lands in question, if retained by the company, would not be required to be actually applied to the purpose of the railway within a reasonable time. If no such inference arises, then the conduct under consideration does not as evidence affect the question at issue. Even if, contrary to my opinion, an inference of opinion on the part of those persons that the lands were not required did arise, then I prefer the testimony of the very capable men who have given in the witness-box their opinions (and the reasons of those opinions) that the lands were required. And in regard to those parts of

No. 204. "A" which were and are actually used as accesses to the station, I prefer the facts to any opinions proved or inferred.

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There remains the question whether the actings of the directors bar the company from maintaining that the lands are not superfluous. The way in which the question arises can best be seen by taking "A" and "B" one by one, for the facts are different.

As regards "A," the Lord Ordinary proceeds solely on the abortive resolution to sell part of "A" to the Post-office in 1895. I think it quite clear, from several passages in his Lordship's opinion, that he treats the transaction as a bar, and not merely as evidence of superfluity. His theory leads to a very singular result, for he holds to be superfluous that part of "A" which was and is in actual use as an access to the station, while he allows the company to retain a large part of what was only used as ornamental ground, and his grounds for so distinguishing are that, as regards the latter, the company "are not estopped by their actings from pleading that the portion of 'A' not included in the sale to the Post-office was not at the end of the ten years superfluous," and that that ground is available for an office or a second refreshment-room. It is most remarkable that the pursuer has acquiesced in the Lord Ordinary's interlocutor. He is therefore acquiescent in the view that about one-half of "A" is not superfluous. Now, when an area of less than a quarter of an acre is reduced by one-half, and it appears that of the remaining fraction a large part is admittedly in use for access, the argument becomes pretty thin.

There seems to me to be at least two fatal objections to the theory of bar as regards "A." The one is that the resolution to sell was come to after the expiry of the ten years, and the other is that no sale was made.

1. The law, as I understand it, is that, at the end of the ten years, i.e. on 17th July 1892, the lands either vested or did not vest in the adjoining proprietor. If, at that date, the lands were not required by the company, they vested in the pursuer; if they were required, then they did not vest in him, and his interest in them for ever came to an end. Of course, on the question of fact, light may be got from the sequel of events, and therefore what was done in 1895 may throw light on the state of things in 1892. But the hypothesis of the present question is that, taking all evidence into account, the lands were "required" in 1892, and the argument is that the company are barred, in a question with the pursuer, from pleading the fact. To my thinking, that hypothesis involves that in 1895 the pursuer had no right which could be affected by anything which the company could do, and that the actings of the company could not revive a right which from 17th July 1892 was dead and done with. The argument would be exactly the same if the abortive resolution to sell had been in 1995 instead of 1895, only that in that case the unsoundness of the pursuer's plea would be more open and palpable.

2. The second point to which I call attention is, that the resolution to sell was departed from, and no sale took place. In his interlocutor, the Lord Ordinary uses the words "which the directors agreed to sell" to the Postmaster-General; but it must be observed that no contract of sale was concluded with the Postmaster-General, no acceptance of his offer having been sent. The fact was that the directors, having instructed their officers

to carry out the sale, were told by these officers that the sale could not go on, and it was no further proceeded with. No. 204.

Now, I cannot hold that the mere private fact that directors resolve to sell, although they immediately after abandon or rescind their resolution, can bar them from saying and proving that the lands were required. Suppose the directors were told by one of their local officials that they ought to sell the lands, and, too readily accepting his advice, remitted to their officers to carry out the sale, and then were told by return of post by the head engineer that this would never do, that they would require the lands next year, and the idea of sale is abandoned. The pursuer's contention involves that the ill-advised resolution is final in a question with the adjoining proprietor, although he never heard of it till after he claimed the lands. Such a theory seems to me entirely unsupported by principle.

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The Lord Ordinary seems to have been much influenced by the case of *London and South-Western Railway Company v. Blackmore*,¹ and indeed he has really decided the case in consequence of certain remarks of Lord Westbury in that case. Now, it has to be observed (1) that on the facts *Blackmore's*¹ case was the case of a sale, and not of a projected or contemplated sale; (2) that the claim was by a person having a right of pre-emption under what, in the English Act, is sec. 127 (and in the Scotch Act, sec. 121); (3) that it was the case of a sale within, and not after, the ten years; (4) while Lord Westbury speaks of the act of the directors in putting up the lands for sale as stamping the lands with the character of superfluous lands and estopping the directors, he says that this had been decided, and expresses his own personal opinion merely by saying that he is by no means inclined to disagree with the decision. We were told, and I suppose accurately, that the decisions referred to were *Lord Carington's*² case and *Lord Beauchamp's*³ case. If Lord Cairns's judgment in *Carington's*² case be referred to, it will be found that he rests his conclusion on the fact that the company had not still retained possession of the land, but had sold it to another. In *Lord Beauchamp's*³ case the judgment on this point is rested on the authority of *Rangeley v. Midland Railway Company*,⁴ and I am unable to find in the report of that decision anything which bears upon the present question. I am not prepared, therefore, upon the somewhat indirect and inconclusive authority which I have stated, to give effect to a plea which seems to me unsupported by the principles of our law of bar.

The case relating to "B" may be more briefly discussed. As already stated, what occurred within the ten years was merely the consideration and ultimate rejection of offers to purchase. As regards these, in my view they enter the question only as items of evidence, and the observations apply which have already been made in relation to "A." The leases given in 1895 to the Post-office and Mrs Campbell can hardly be regarded as inconsistent, by reason of their duration, with the view that ultimately, and at no distant time, the lands will be required for railway buildings. The temporary use in each case is appropriate to the general idea of railway

¹ L. R., 4 E and I. Ap. 610.

² L. R., 3 Ch. Ap. 745.

³ L. R., 3 Ch. Ap. 377.

⁴ L. R., 3 Ch. Ap. 306.

No. 204. interests being continuously furthered, for it cannot be doubted that the convenience of the Post-office is to a certain extent the convenience of the railway, while Mrs Campbell's possession of the rest of the area as garden ground ensures the continuance of the embellishment of the station.

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My opinion upon the whole matter is that the Lord Ordinary's interlocutor should be recalled, and the defenders assoilzied from the conclusions of the summons.

LORD ADAM and LORD KINNAR concurred.

LORD M'LAREN was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and assoilzied the defenders.

FINLAY & WILSON, S.S.C.—HOPE, TODD, & KIRK, W.S.—JOHN S. PITMAN, W.S.—Agents.

No. 205. MARY ANN CONNOLLY AND OTHERS, Pursuers.—*A. S. D. Thomson.*
THE BENT COLLIERY COMPANY, LIMITED, Defenders.—*Salvesen.*

July 20, 1897.
Connolly v.
Bent Colliery
Co., Limited.

Minor and Pupil—Discharge of debtors of pupils—Factor loco tutoris.—Pupil children, whose parents were dead, having become entitled to a sum in settlement of an action of damages, moved the Court to appoint a person to receive the money and discharge the debtors. The Court, on the objection of the debtors, *declined* to make the appointment craved, on the ground that the debtors were entitled to an effectual discharge, and that a factor loco tutoris was the proper person to grant such a discharge.

2D DIVISION.

IN February 1897 Mary Ann Connolly and others, the pupil children of James Connolly, miner, Bothwell, brought an action in the Sheriff Court at Glasgow against the Bent Colliery Company Limited, for damages on account of the death of their father, who was killed when in the employment of the defenders.

The pursuers (whose mother was dead and to whom a tutor ad litem had been appointed), appealed for jury trial.

The action having been settled extrajudicially, the pursuers lodged a note craving the Court to ordain the defenders to make payment of the sum agreed to be paid in settlement of the pursuers' claims to such person at Glasgow as the Court might appoint to receive the same, and to authorise such person to grant a discharge therefor to the defenders.

The defenders objected, on the ground that the course proposed was incompetent, and that the proper course was to obtain the appointment of a factor loco tutoris, which could be done in the Sheriff Court.¹

The Court refused the note, on the ground that the defenders being entitled to an effectual discharge a factor loco tutoris was the proper person to grant the discharge, Lord Young observing that the appointment craved was virtually the creation of a trust.

GEORGE INGLIS & ORR, S.S.C.—W. G. L. WINCHESTER, W.S.—Agents.

¹ *Authorities cited.*—Pratt v. KNOX, June 28, 1855, 17 D. 1006; Anderson v. Muirhead, June 4, 1884, 11 R. 870; Sharp v. Pathhead Spinning Co., Jan. 30, 1885, 12 R. 574.

HENRY THOMSON & COMPANY, Pursuers (Reclaimers).—*Balfour*
—*Salvesen*.

No. 206.

DANIEL DAILLY, Defender (Respondent).—*Jameson*—*Kennedy*.

July 20, 1897.*
Thomson &
Co. v. Dailly.

Reparation—Infringement of trade name—Measure of damages—Necessity for proving specific damage—Whether cost of detecting infringement an item of damage—Tender—Expenses.—Henry Thomson & Company, a firm of wholesale whisky merchants, brought an action against a public-house keeper for interdict against the defender selling whisky as of the pursuers' manufacture or blending which was not of their manufacture or blending, and for £500 as damages on account of such sales. The defender admitted that the pursuers were entitled to interdict, but he maintained that he was liable in nominal damages only, in respect that the pursuers had not proved special damage.

The defender deponed,—“I discouraged Henry Thomson's business as much as possible, for the simple reason that I had more profit by the other whiskies”; and the Court were of opinion that it was proved that he had fraudulently sold whisky which was not the pursuers' under the pursuers' name in order to discourage the sale of their whisky. There was no evidence that, after the defender's tenancy of his public-house commenced, the total sale of the pursuers' whisky had diminished in the town in which the public-house was situated.

Held (altering the judgment of Lord Pearson, Ordinary, who had awarded £10) that the fair inference was that the defender's fraudulent conduct had produced the result which it was intended to produce of substantially injuring the pursuers' trade, and that in the circumstances the damages fell to be assessed at £100.

Question, whether in estimating the amount of damages caused to a wholesale manufacturer by fraudulently retailing articles as of his manufacture which were not manufactured by him, the expenses incurred by him in detecting the fraud fell to be taken into account.

Question, whether the tender of a sum by the defender in an action of damages, accompanied by a declaration that the pursuers' case was unfounded and untrue, was a tender entitling the defender to expenses in the event of the tender being declined and the sum awarded as damages being less than the sum mentioned in the tender.

In February 1896 Henry Thomson & Company, wholesale Irish whisky merchants, Newry, Ireland, brought an action against Daniel Dailly junior, wine and spirit-merchant, 39 Lochee Road, Dundee, concluding for declarator that “the defender is not entitled to sell or offer for sale, by himself or others acting under or for him, as whisky manufactured or blended by the pursuers, whisky not manufactured or blended by or for the pursuers, or to supply, in implement of orders or requests for Henry Thomson's whisky or Henry Thomson & Company's whisky, or of similar orders or requests, whisky not manufactured or blended by or for the pursuers,” for interdict against the defender so selling such whisky, and for £500 as damages.

2D DIVISION.
Lord Pearson.

The pursuers averred ;—(Cond. 2) “The pursuers have recently become aware that the defender has been in the habit of wilfully and fraudulently, in his said shop, selling as the pursuers' whisky, in reply to orders or requests for that whisky, whisky or other liquor not manufactured or blended by them, and known by the defender not to

No. 206. be manufactured or blended by or for the pursuers, on the false pretence made by the defender, or by his shopman and servants, that such whisky or other liquor was whisky manufactured or blended by the pursuers. The whisky or other liquor sold by the defender was of a quality greatly inferior to the whisky manufactured or blended by the pursuers." The pursuers averred a number of instances of such sales, and then averred;—"The whole of said sales were made fraudulently by the defender or his servants, they well knowing that the whisky sold as the pursuers' was not their manufacture or blend."

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The pursuers further averred;—(Cond. 6) "By the defender's said wilful and illegal actings the pursuers have suffered loss, injury, and damage, which they estimate at the sum sued for, owing to an inferior whisky being supplied as their whisky to customers who ask for same. The pursuers not merely lose the profit which they would make upon the sales of such whisky, but the reputation of their whisky is seriously injured. The pursuers believe and aver that the said fraudulent sales have been very numerous and extensive."

The defender denied the pursuers' averments.

On 10th March 1896 *Kennedy*, for the defender, lodged a minute of tender in which he stated "that the defender, while affirming that he had never by himself or persons acting under or for him knowingly sold or offered for sale, or supplied as the pursuers' whisky, whisky which was not the pursuers', and absolutely disclaiming any intention or desire to do so, was anxious to avoid a protracted and expensive contest with the pursuers, especially as, having been in business only six years, he was not in a position to devote the necessary time and means to such contest, from which in no event would any advantage result to him, and therefore, solely with the view of preventing further litigation, but without prejudice to his pleas in law in the event of this tender not being accepted, offered and hereby offers to consent to decree being pronounced in terms of the conclusions for declarator and interdict, and tendered, and hereby tenders, the sum of fifty guineas, together with expenses of process to date, as the same may be taxed by the Auditor, in full of the remaining conclusions of the summons."

The pursuers did not accept this tender.

Thereafter, in July 1896, a proof was led.

At the hearing in the Inner-House counsel for the defender stated that he could not, on the evidence, resist the conclusion that the defender had on a number of occasions during the year 1895 sold whisky as Henry Thomson & Company's which was not Henry Thomson & Company's whisky, but he denied that the defender had so sold the whisky knowingly and fraudulently. Counsel for the defender further admitted that the pursuers were entitled to interdict. The dispute between the parties, therefore, in so far as it depended on the proof, ultimately came to be a question as to the amount of damages. The pursuers maintained that they were entitled to substantial damages, in respect that (as they contended) their averments in cond. 6 had been proved. The defender maintained the pursuers were entitled to nominal damages only, in respect that the pursuers had failed to prove special damage. The evidence on this question was to the following effect:—

The defender became tenant of the premises in the end of 1889 on the death of Mr Macfarlane, the former tenant. He took over from

the former tenant's representatives 2 dozen (4 gallons) of the pursuers' No. 206. whisky in bottles with the pursuers' label on them, and in December 1889, and again in May 1892, he bought two similar lots of 2 dozen each from the pursuers. These six dozen were the only whisky of the pursuers that the defender had during his tenancy down to the date of the action. The former tenant had been in the habit of getting from forty to sixty gallons of the pursuers' whisky each year. William Macfarlane, the former tenant's son, deponed that his father had a considerable country connection among farmers and others, who took their family supplies from his father, but, according to witness' observation, this connection seemed to have disappeared after the defender became tenant, and the business to have become a local one in a working-class district.

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The defender deponed;—" . . . I have kept Henry Thomson's whisky from the time I started business until this case arose, but there was very little demand for it. There was some little demand when I started business, but I discouraged Henry Thomson's business as much as possible, for the simple reason that I had more profit by the other whiskies. . . . Cross.—. . . It is the fact that under my discouragement the demand for Henry Thomson's whisky which existed at first got less. There was at no time a considerable demand for Thomson's whisky. It was worth discouraging, because I thought I could make more out of something else. (Q.) Did that not shew you that there were a good many customers of that business who liked Henry Thomson's whisky? (A.) Not a great many in that district; I would not say that there was a considerable number even. I did succeed in materially diminishing the demand for Henry Thomson's whisky, and I took what I thought the most effective means with that end in view. (Q.) Giving a bad article would be one way of discouraging it? (A.) I did not give a bad article. It would be a very difficult thing to say what would be the most effectual way to discourage the demand for a particular whisky. (Q.) There could be no more effectual mode of discouraging the demand for a good and well-known article than to give something else for it which was of bad quality? (A.) That would be one mode of doing it. (Q.) Have you any doubt that if a person who had been accustomed to get genuine Henry Thomson's whisky got a bad article, which was not Henry Thomson's, he would probably never come back to your shop for it again? (A.) I never knew any of them that could tell Henry Thomson's from another. Henry Thomson's whisky was asked for, and I needed to discourage the demand. (Q.) From your knowledge of the drink trade, have you any doubt that the most effective way of accomplishing your avowed object of discouraging the sale of Thomson's whisky would be to give a bad article of some other kind for it? (A.) It would be a mode, as I said before. I told my shopman that I wanted to discourage the sale of Henry Thomson's whisky, and I told him to try and discourage it as best he could. . . . I do not as a rule water the whisky when it is bought in bottle, but that might be done as an exception. . . . (Q.) I suppose you will have watered Henry Thomson's whisky like its neighbours? (A.) I could not say. It is possible that I may have watered Henry Thomson's whisky in bottle. (Q.) Was that when you were wanting to discourage the sale of it? (A.) I cannot say that that would be the reason of it; it would be to get a little more profit out of it."

No. 206. Mark M'Donald, the defender's assistant, deponed, *inter alia*,—
 July 20, 1897. "After I entered defender's employment he told me he always, in all
 Thomson & cases, recommended his own whisky as much as possible. He told
 Co. v. Dailly. me he discouraged the sale of Henry Thomson as much as he could, and he told me to discourage it. I did what I could to get people not to take it. I chaffed them, as a rule, out of it. I told them I would give them a better whisky—it would do them more good. If they were persistent in wanting it, they always got it; but if they were not very persistent, I put them past it. My employer's interest in putting them past it was that there was more profit off the one than off the other."

The defender exhibited one of the pursuers' showcards in his shop. The pursuers were an old established firm of Irish whisky-blenders. Their blend was well known in the market as Henry Thomson & Company's Old Irish Whisky. It was distinctive in flavour and colour, and remarkably constant in its special properties, even under chemical analysis; and, as a rule, experts could quite readily single it out from among other whiskies. There was a large sale for it in Scotland, the annual turnover being about £60,000, and the annual turnover in the Dundee district, which extended to Aberdeen, was from £15,000 to £20,000. There was no direct evidence of a falling off in the total sale of the pursuer's whisky in Dundee after the defender's tenancy began.

Robert Brown, Glasgow, the pursuers' agent for Scotland, deponed, *inter alia*,—"The effect of selling inferior whisky to customers who come asking for Thomson's is to put them off Thomson's whisky. If people regularly drink Thomson's whisky and get it bad, it puts them off and damages our trade. Apart altogether from any profit that Thomson & Company would have derived from satisfying the demand by the real article, there is a very great deal of damage done to our trade by discouraging people from asking for it. It is a serious injury to the character and reputation of the whisky. We find that where a man in a particular locality is selling inferior whisky as ours, our trade drops down in that locality. That represents a large pecuniary loss. I could not possibly put a money value upon it, because we don't know the amount that is done; but I say that is a very serious money damage to our trade and reputation."

There were produced in evidence thirty-five samples of whisky, which had been bought from the defender as "Henry Thomson & Company's whisky" at various dates during the year 1895. Two of these samples were admittedly genuine "Henry Thomson & Company." As regarded the precise character of the remainder there was considerable difference of opinion between the expert witnesses adduced by the pursuers and those adduced by the defender; but for the purposes of the present report it is sufficient to say that in the opinion of the Lord Ordinary it was conclusively proved that twenty-five of the samples were not genuine "Henry Thomson & Company," but something quite different.

Most of the samples had been procured through the agency of a firm of private detectives employed by the pursuers. The account of this firm of detectives against the pursuers amounted to about £54.

On 26th November 1896 the Lord Ordinary (Pearson) pronounced this interlocutor:—"Having considered the cause, finds and declares, interdicts, prohibits, and discharges, in terms of the conclusions of the

summons : Ordains the defender to pay to the pursuers the sum of **No. 206.**
ten pounds (£10) sterling in name of damages, and decerns : And in
respect of the defender's minute of tender, lodged on 10th March July 20, 1897.
1896, No. 6 of process, finds the pursuers entitled to expenses down Thomson &
 to said date : Finds the defender entitled to expenses thereafter : Co. v. Dailly.
Allows," &c.*

* "OPINION.—(After considering the questions whether the samples produced in evidence were genuine 'Henry Thomson & Company,' and whether the samples had been produced in the condition in which they had been sold by the defender, and coming to the conclusion that twenty-five of the samples were not genuine as produced, and that they had not been tampered with or altered, except for purposes of analysis, after having been purchased from the defender, his Lordship continued)—On the third question, whether the whisky was so supplied knowingly, I am dispensed from saying much. As I have already observed, mistake or inadvertence on the part of the defender is out of the case, according to the evidence on both sides. This is not a case where the defender, not professing to sell or to keep Henry Thomson's whisky at all, may have furnished an Irish whisky to those asking for 'Thomson,' on the footing that it was reasonable fulfilment of the request. The defender professed to keep and supply Thomson whisky, and had a conspicuous sign conspicuously displayed over the bar to that effect. The samples were asked for as Henry Thomson & Company's old Irish whisky, or in similar unmistakable terms; and they were habitually supplied out of a labelled 'Henry Thomson' bottle, and (though in one case this is left in some doubt) at a 'Henry Thomson' price, where the quantity taken was sufficient to indicate the price.

"The defender says he desired to discourage the sale of Henry Thomson's whisky, because he made relatively more profit out of cheaper whiskies. He certainly had very little 'Thomson' to go on with, and there is a remarkable falling off in the turnover of Thomson's whisky in his establishment compared with what it was in Macfarlane's time, though this is no doubt partly attributable to the difference in the class of customers, as explained in the evidence. But the defender got so little of Thomson's whisky during his seven years of the business, including two dozen to start with, two dozen ordered in December 1889, and two dozen more in May 1892, that the pursuers submitted figures to shew that unless he was selling other whiskies as 'Henry Thomson's,' he had not enough on his own shewing to supply the demand. But their figures fall short of demonstration, and I do not proceed on this as a ground of judgment. There is, however, a significant admission by the defender, which shews that he was eking out his supply. He had no 'Henry Thomson' in bulk, it was all in bottle. Whisky sold in bulk is over-proof, and requires to be watered; not so with bottled whisky, which is furnished as a specific merchantable article, ready for consumption. Now the defender says :—'It is possible that I may have watered Henry Thomson's whisky in bottle. (Q.) Was that when you were wanting to discourage the sale of it? (A.) I cannot say that would be the reason of it; it would be to get a little more profit out of it.' It is impossible to say how much there is behind this admission. But it is quite possible that one who did that not very flagrant thing might think it even comparatively meritorious, as well as safer under the Food and Drugs Act, to fill it up with cheap whisky instead of Dundee water. At all events, one who admits even so much does not hold a very secure position from which to make kindred charges against others.

"As to the amount to be awarded in name of damages, the pursuers asked for an exemplary sum. In my opinion, however, the proof affords no ground for making any safe calculation of the amount of loss sustained by the pursuer's firm, and I therefore propose to follow the course

No. 206. The pursuers reclaimed, and argued;—The defender having ^{not} conceded that the pursuers were entitled to interdict, the only questions were as to the amount of damages and as to expenses. The pursuers maintained that they were entitled to substantial damages and that to an amount exceeding the defender's tender; and that being established it followed of course that the pursuers were entitled to expenses; but even if the pursuers did not succeed in getting a larger sum than £50 in name of damages, they were nevertheless entitled to expenses, the tender being a qualified tender. (1) On the question of the amount of damages, it was difficult to understand the principle on which the Lord Ordinary had proceeded in reaching the sum of £10 which he had awarded. If it was nominal damages which the Lord Ordinary intended to award, £10 was too large a sum. If substantial damages were intended, the grounds of the award were indefensible, since the award was professedly based on what had been done in another case, and not on the evidence in the present case. The evidence here presented a strong case for awarding very substantial damages. The defender, who admitted that interdict must go out, had in his evidence deponed that he did everything in his power to discourage the sale of the pursuers' whisky; and the

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adopted in a previous case at the instance of the same pursuers, and to award £10."

"Since the above was written, I have been informed that the defender lodged a minute of tender on 10th March 1896, and I have heard counsel as to the bearing which it has on the question of expenses. The defender argues that it has effect as an ordinary judicial tender, and that while he is liable in expenses down to its date, he is entitled to expenses thereafter. The pursuers urge that, owing to the qualifications with which the minute is introduced, it is not to be regarded as a tender at all. I have considered its terms carefully in reference to the rule that a judicial tender must be precise and unconditional, or, as it is sometimes put, unqualified. I think this tender is so, within the meaning of that rule. The affirmation of innocence, and of the desire to avoid litigation with which it is prefaced, does not amount to a condition or qualification intrinsic to the offer made: the best test of that being that if the tender had been accepted the pursuers would have got decree in terms of the whole conclusions of their summons, subject only to the variance in the amount of damages. But the pursuers say that they are now entitled to more than decree in terms of the conclusions; that the proof having been led, and it being proved that on various occasions the defender knowingly and wrongfully sold as whisky blended by the pursuers whisky which was not so blended, they are entitled to have a finding to that effect inserted in the interlocutor as introductory to the decree of interdict,—a result which certainly would not have been reached had the tender been accepted. In this view they would to that extent get more than was tendered, as the finding would (I am informed) be inserted in the extract decree. If this is the true criterion, it would follow that I can make the tender good or bad, according as I withhold or give such a finding—a startling result. I had been disposed to insert such a finding when originally considering the case, until I found that in the case of *Bevy* decree was given simply in terms of the conclusions, which were the same as those in the present action. I am not disposed to insert the finding now merely for the purpose of enabling the pursuers to exclude the tender, even assuming it would have that effect. I accordingly uphold the defender's contention on this point."

evidence clearly proved that he had on a number of occasions sold inferior whisky under the name of the pursuers' whisky, with, it could not be doubted, the intention, and certainly with the result, of injuring the reputation of the pursuers' whisky, and so of discouraging people from buying it. It was not for the defender, with such evidence against him, to object that the items of damage had not been specifically proved, as might be legitimate enough in a case of innocent mistake; the Court, sitting as a jury, would assess the loss suffered by the pursuers as shewn by a reasonable view of the evidence; and so regarding the question, the loss proved was much greater than the sum tendered. Further, the pursuers had incurred an account of £54 to the firm of private detectives employed by them to investigate the defender's conduct. That was a legitimate item of damage, just as surveyor's fees were considered part of the damages in maritime cases. (2) Even if the amount of damages was held to be less than the sum tendered, the result, looking to the terms in which the tender was expressed, was *quoad* expenses the same. The pursuers' object in bringing such actions as the present was to put down serious and fraudulent interference with their trade; it was no part of their business to extort sums in name of damages from retail dealers who protested their innocence and against whom nothing had been proved. The tender therefore was not a tender which the pursuers were bound to accept; and now that the proof had been led and had established the defender's fraudulent conduct, the pursuers were entitled to a finding affirming that fraud, and thus they would obtain a decree in excess of the tender, even if the damages awarded remained at the sum fixed by the Lord Ordinary.

Argued for the defender;—The defender's position was, and had throughout been, that he was willing to make the utmost concessions in reason in order to avoid a litigation, from which he could, in no event, gain any pecuniary advantage. He conceded the pursuers' right to interdict, which involved the admission that the pursuers had proved in a sufficient number of cases sales of whisky as the pursuers' which was not in fact the pursuers', but in order to entitle them to interdict it was not necessary for them to prove that the sales were fraudulent, and the defender not having been guilty of fraud, was not to be held as admitting fraud by conceding the pursuers' right to interdict. (1) Upon the question of damages, the defender acquiesced in the Lord Ordinary's interlocutor, but he did not support that award or the grounds on which it was based, any more than he conceded that the £50 which he had tendered really represented loss suffered by the pursuers, and the pursuers having maintained that they were entitled to a much larger award, it was necessary for the defender to argue the question on principle. So taking the question, the defender maintained that the pursuers were entitled to nominal damages only—one farthing or one shilling. The defender, no doubt, admitted that he took the most effective means in his power to discourage the sale of the pursuers' whisky. That was quite within his right, provided that the means he adopted were legitimate. Every retail dealer, if he used legitimate means only, was entitled to push the sale of such articles as he found to be most profitable to himself, and to discourage the sale of such as he found to be less profitable. It was said, however, that the defender had used illegitimate means—that he had fraudulently sold inferior whisky under the pursuers' name. Assume for the sake of argument that he had done so. The pursuers were entitled in

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No. 206. name of damages to no more than a sum representing the actual loss that they had sustained by reason of this assumed fraudulent conduct. July 20, 1897. The action was not a proceeding *in pœnam*, but was a civil action of damages to which the ordinary rule applied, that the measure of damages was the loss which the pursuer proved that he had suffered. Thomson & Co. v. Dailly. In ordinary actions of damages for slander, *solatium* for injured feelings was a relevant element in determining the sum to be awarded, and of necessity the sum to be awarded as *solatium* was just such a sum as the jury might consider reasonable in the whole circumstances. But *solatium* had no place in actions on account of trade slander; in such actions and in all actions on account of loss to trade through the wrongous act of another, the amount of loss being capable of precise determination, must be proved specifically, otherwise nominal damages only would be allowed.¹ In the present case no attempt had been made to prove special damage. As to the suggestion that the sum paid by the pursuers to the detectives was a legitimate item of damage, that was warranted neither on authority nor in principle. Possibly such expenditure might be a proper charge in a successful party's account of expenses, if treated as expert evidence, but as increasing the amount of the damages it was out of the question. (2) As to the argument that the tender was expressed in such terms as to make it a conditional tender, that argument proceeded on the assumption that a defender making a tender was bound not only to agree to decree against him going out, but also to admit everything averred by the pursuer against him. That assumption was ill-founded. A tender need not contain an express admission of wrong, and might contain a statement to the contrary. A defender in making a tender might expressly reserve his statements and pleas, and also deny that the pursuer had any claim against him at all.² If the pursuers had accepted the tender, they would have had a decree exactly in the terms of the decree here, except that they would have had £50 of damages and no expenses awarded against them.

LORD JUSTICE-CLERK.—The question here has really come to be one regarding the expenses of the action.

The case is certainly a very peculiar one. The Lord Ordinary has disposed of it upon the footing that the defender has been guilty for a considerable time of intentional fraud in dealing with the pursuers' whisky, and the defender has declined to impugn the judgment of the Lord Ordinary in so far as it finds that for a considerable time the defender has been in the habit of selling whisky as of the pursuers' manufacture when it was not in fact of their manufacture. Now, that is certainly a serious matter, and it is by no means an easy thing to estimate the amount of damage which has been caused in consequence of such a proceeding.

Various questions have been raised before us, the real point between the parties turning upon this, that as the Lord Ordinary has given a sum of damages which turns out to be less than the sum which had been tendered

¹ Morton v. Barclay, March 15, 1824, 3 Mur. 401; Leather Cloth Co. v. Hirschfeld, 1865, L. R., 1 Eq. 299.

² Strachan v. Munro, July 5, 1845, 7 D. 993, 17 Scot. Jur. 514; Muckarsies v. Dickson, Nov. 28, 1848, 11 D. 164, 21 Scot. Jur. 31; Mitchells v. Nicoll, May 24, 1890, 17 R. 795.

by the defender, the result of course is such that a very large part of the very heavy expenses incurred in this case have been awarded to the unsuccessful defender; and in order to obviate that result, the pursuers have urged various considerations with the view of increasing the amount of the damages by bringing in items which presumably the Lord Ordinary did not take into consideration, as otherwise it is said he could not have awarded so small a sum as he has actually awarded.

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It is said, in the first place, that part of the damage suffered by the pursuers consisted in the expenses to which they were put in establishing their case by sending persons to purchase whisky at the defender's place and thereby obtaining evidence of the frauds. Now, no case was quoted to us in which such an item—although it is an item which must have occurred in many cases—has been regarded as a legitimate element in fixing the amount of the damages in actions like the present, and it is difficult to see how such an investigation—though necessary in the interest of the party making it—can be held to be part of the damages caused by the person who does the wrong. But I give no final opinion upon that, for I have not seen sufficient reason for dealing with that matter as a ground for raising the damages in this case. I think that the case can be disposed of on another ground without entering into that question at all.

The Lord Ordinary, in considering the question of damages, says this,—“The proof affords no ground for making any safe calculation of the amount of loss sustained by the pursuers' firm, and I therefore propose to follow the course adopted in a previous case at the instance of the same pursuers, and to award £10.”

Now, if that sentence was one stating reasons which induced the Lord Ordinary to award this sum of £10 I should certainly have hesitated to interfere with the amount, because it always is inadvisable, except upon strong grounds, to interfere with the amount of damages ascertained by a Lord Ordinary; but I must say that I do not think that the statement is one which gives any reason, save that the same award of damages was given in another case, and I am unable to regard that as a reason. The conditions of the two cases may have been entirely different. The question depends in great measure upon how the things which caused the injury were done and upon the extent to which they were done. It does not appear to me to be a safe mode of proceeding for a Judge to take one case, although brought by the same person, and having ascertained that in that case an award of £10 had been made, to say,—“Because it is not very easy to estimate the amount of loss sustained by the pursuers' firm in this case, I will therefore give the same award as in the other case.” It is perfectly true, as the Lord Ordinary says, that it is not easy to make a safe calculation of the exact damage, but that is just what occurs in a great many cases. It must be estimated in a reasonable way. If it cannot be estimated with exactitude one must form one's opinion as a juryman would of the damage due upon the whole circumstances of the case, and make the best reasonable estimate that one can.

In this case I cannot for one moment say that making the most reasonable estimate that I am able to do I would have arrived at such a sum as £10. This is a matter of trade dealing, and trade dealing carried on upon a large

No. 206. scale, and it is one in which, if one set to work to diminish the sales of a particular article that was offered to the public, the damage that would be done by such a proceeding might be very large indeed. In this case it is quite certain, on defender's own statements, that he was anxious to damage the sale of the whisky of the pursuers, that is to say, that he was anxious to induce people not to buy that whisky when they wanted it, but to buy other whisky, and the mode he took to do that has been found to be a fraudulent mode, by selling as Thomson's whisky when people wished to have it something which was not Thomson's whisky, with the result that when people found what they believed Thomson's whisky to be an inferior article, they ceased to purchase Thomson's whisky. The defender's object may have been to make people cease purchasing Thomson's whisky from him, but the injury would not by any means stop there. If persons have asked for a particular article made by a particular maker, and an inferior article is sold to them under the name of that maker, they form an opinion that the manufacture of that article is deteriorating, and they not only cease to buy it for themselves but they naturally discourage other people from buying it. It is quite a reasonable deduction from the whole evidence in this case that persons who had bought what was called Thomson's whisky from the defender ceased to buy Thomson's whisky anywhere, and also that they informed others that Messrs Thomson's whisky was not so good as it was, and therefore led other people not to buy it. Now, a fraud of that kind in a peculiar trade like this is necessarily a serious fraud, and proceeding on the view which I take that it is a serious fraud, I think it must be dealt with as a serious fraud in the question of damages. It is not easy by any means to estimate the amount of damage, as the Lord Ordinary truly says, but I certainly think it cannot be estimated except at a very considerable sum, and giving the best consideration I have been able to give, the opinion I have formed is that £100 would be a very suitable sum of damages to give against this defender for his fraudulent conduct.

Therefore I move your Lordships to alter the interlocutor of the Lord Ordinary and assess the damages at £100, finding the defender liable in expenses.

LORD YOUNG.—I agree in the conclusion at which your Lordship has arrived.

The action is directed against the defender for interdict of certain conduct of the defender, and also for damages in respect of that conduct. The pursuers' case is substantially set out in cond. 2—(His Lordship read it). Now, the case so averred by the pursuers is not only found proved by the Lord Ordinary, but it is admitted by the defender that he sold as the pursuers' whisky an article which was not the pursuers' whisky. In his evidence he admits that he did this, and he states that he desired to put down and keep down the sale of the pursuers' whisky.

In article 6 of the condescendence the consequence of this is thus averred by the pursuers—(His Lordship read article 6). So that the claim for damages which the pursuers make in this action is based upon the ground that this fraudulent conduct on the part of the defender in selling, as the pursuers' whisky, whisky which the defender knew was not theirs,

damaged their trade, and damaged it to the extent stated, as the natural consequence of such conduct, and this the pursuers say is proved. There is no doubt that it was so intended, for the defender in his evidence says that the demand for the pursuers' whisky was worth discouraging, because he could make more out of others. He says,—“I did succeed in materially diminishing the demand for Henry Thomson's whisky, and took what I thought was the most effective means with that end in view.” Then it is put to him,—“Have you any doubt that the most effective way of accomplishing your avowed object of discouraging the sale of Thomson's whisky would be to give a bad article of some other kind for it?” (A.) “It would be a mode, as I said before. I told my shopman that I wanted to discourage the sale of Henry Thomson's whisky, and I told him to try and discourage it as best he could.” That being the view arrived at in the judgment of the Lord Ordinary, and as I have pointed out practically admitted by the defender, the only question is one of the amount of damages.

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Now, this is not a count and reckoning to see what the profits are on the one hand or the exact loss sustained by the pursuers on the other; it is a general action of damages,—a question as to the amount of damages in an action by a sufferer from a course of misconduct against the party who is guilty of that misconduct.

One question which was argued was whether it would be reasonable in estimating the amount of damages to take into account the expenses to which the pursuers were necessarily put in detecting the misconduct. With your Lordship, I desire to express no opinion upon that question. I avow it all the more readily, and I think all the more properly, because this is not put forward as a ground of a claim on record. The claim of damage as put on record is solely founded upon this, that the pursuers' trade was damaged by conduct which had a tendency to damage it, and which was intended to have that effect; and we must estimate the damage generally as best we can in a general question of damage. Doing that here upon the evidence before us, which is to the effect, not only that this conduct was pursued, and pursued with that aim and object, but that it was followed by a very notable falling off in the sales of the pursuers' whisky in Dundee, I think there is ground for giving a substantial sum of damages, which the Lord Ordinary has not done, and without entering on the matter of the legitimacy of taking into account in estimating the damages the expenses to which the pursuers were properly put in taking proper and reasonable measures to detect the fraud, I agree with your Lordship that the damage might with propriety be estimated at £100.

That removes any necessity for considering any specialties in the tender here. I avoid giving any opinion upon that question, upon which something was said on both sides, only observing with reference to that, that I think tenders in such terms as this ought to be avoided, and that when a tender is made it ought not to be accompanied with emphatic declarations that the pursuers' case is unfounded and untrue. I altogether abstain from expressing any opinion judicially as to the position of the pursuer of an action upon such allegations as we have here who refuses to accept a sum of damages offered which is accompanied by a statement, and qualified by that statement, that the ground upon which the claim is made is abso-

No. 206. *lutely untrue. A great deal might depend on the nature of the allegation in the particular case; but I avoid that question here, because the question does not arise, and is of no practical importance if we are of opinion that the damages offered in this tender are less than the damages to which the pursuers are entitled.*

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I think, therefore, that the Lord Ordinary's judgment should be affirmed substituting only £100 for the £10 which he gave, and finding the pursuers entitled to expenses against the defender.

LORD TRAYNER.—I agree. With your Lordships I abstain from expressing any opinion on the questions whether the defender's tender is an effective tender, looking to the terms in which it is expressed; and also whether the expenses of the detectives who actually discovered this fraud and became witnesses to it afterwards should be included or considered in estimating the damages due to the pursuers. I agree in the result at which your Lordships have arrived, that the £10 found due by the Lord Ordinary is quite inadequate. I think it is a case for exemplary damages. I do not say that there should be vindictive damages, but I think that the pursuers' case may be regarded liberally, because the defender persistently over a long course of time has done all he could to hurt the pursuers' trade by deteriorating the character of the whisky he was selling. I am a little astonished (because it is unusual in cases of this kind) to find the defender acknowledging that in what he did he was doing all he could to injure Henry Thomson & Company's trade, not because their whisky was a bad thing to supply to his customers nor because he had a better to offer in its place, but simply because according to his own evidence, his object was the making of more profit for himself on something else. When you take that to be the object and purpose for which the defender acted fraudulently for several months, and consider that the result of his proceedings (according again to his own statement) was that the demand which existed for the pursuers' whisky ultimately got less, I think the defender may be reasonably called upon to bear the result of such conduct on the pursuers' trade. The Lord Ordinary says in language which your Lordship quoted, that "the proof affords no ground for making any safe calculation of the amount of loss sustained by the pursuers' firm." I fancy what his Lordship means is "any precise calculation," because "safe calculation" would affect a finding of £10 as much as £1000. But I agree with the Lord Ordinary in thinking that in this case no precise figure is proved as the damage arising from the defender's conduct. That there was damage done is admitted by the defender, because he says that the result of his discouragement of the trade was to decrease that trade. Therefore there was some damage done by the defender's wrongful and fraudulent proceedings. In these circumstances, while it is impossible to say what was the actual amount of damage done to the pursuers' business, we can as a jury estimate the loss, and upon that matter I agree that, sitting as a jury, we are not giving the pursuers too much by assessing the damage at £100.

LORD MONCREIFF.—I am of the same opinion. I think this is a case in which the pursuers are entitled to substantial damages, and I do not think

the sum of £100 is excessive. I think the Lord Ordinary has been No. 206, influenced to a considerable extent by the sum awarded in the case of *Begg*.¹ July 20, 1897. I was the Lord Ordinary in that case, and, speaking from recollection, the Thomson & Co. v. Dailly. misdoings of *Begg* were trifling compared with the misdoings of the defender in the present case. I do not think that in *Begg's*¹ case there was any evidence of any avowed intention on his part to injure the trade of the pursuers. That being so, I think the Lord Ordinary was probably misled in taking the sum awarded in that case. The present case is very different. The number of instances in which the defender is proved to have sold as the pursuers' whisky an adulterated whisky is six times as numerous at least as in *Begg's* case. He avows the intention in one way or another of putting a stop to the sale of the pursuers' whisky—although he does not admit that it was adulterated whisky that he endeavoured to substitute for it. On the whole matter, I think £100 is not too large a sum to award.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor reclaimed against: Find and declare, interdict, prohibit, and discharge in terms of the conclusions of the action: Ordain the defender to pay to the pursuers the sum of £100 sterling in name of damages: Decern, and find the defender liable in expenses."

BOYD, JAMESON, & KELLY, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

JOHN GILHOOLY, Pursuer.

JAMES M'HARDY, Defender.—*Baxter—Cosens.*

No. 207.

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Gilhooly v.
M'Hardy.

Process—Jury Trial—Abandonment—A. S., 16th Feb. 1841, sec. 46.—In an action of damages, a verdict in the pursuer's favour was set aside, and a new trial granted, the diet for the trial being 14th June. On 12th June counsel and agents for the pursuer proposed to lodge a minute of abandonment, on the ground that no new evidence was obtainable, but the pursuer refused to consent to this, and they in consequence withdrew from the case, and the diet for trial was discharged and the jury countermanded. The defender then lodged a note praying the Court to grant decree of absolver, with expenses. A copy of this note was sent to the pursuer on 14th June, with an intimation that it would be moved on 16th June. The Court, on the motion being made in terms of the note for the defender, there being no appearance for the pursuer, delayed consideration of the case for two days, and ordered further intimation to be made to the pursuer. This having been done, and no answer from the pursuer having been received, and no appearance being made for him, the Court granted the prayer of the note.

On 4th February 1897 the trial of an action of damages, brought by John Gilhooly against James M'Hardy, took place before Lord Moncreiff and a jury, when a verdict for the pursuer, assessing the damages at £30, was returned. 2D DIVISION.

On 3d March the Second Division granted a new trial, which was fixed to take place before the Lord Justice-Clerk on Monday, 14th June.

On the morning of Saturday, 12th June, the defender's agents received from the pursuer's agents a copy of a note to the Lord

¹ This was an action by the present pursuers against another defender, referred to by the Lord Ordinary *supra*.

* Decided June 18, 1897.

No. 207. Justice-Clerk on behalf of the pursuer, which, *inter alia*, stated,—
 July 20, 1897. “The pursuer has been unable to procure further evidence in the
 Gilhooly v. cause than that upon which he procured his former verdict, and in
 M’Hardy. these circumstances he accordingly begs leave to state that he does
 not intend to proceed with said new trial, and consents to absolver
 of the defender, with expenses.” The pursuer’s agents, in their letter
 sending the copy note, stated that the principal note would be lodged
 with the Clerk of Court, and moved on that day.

This motion was not made. *Guy*, who had been counsel for the
 pursuer, appeared, and informed the Court that after the note had been
 intimated, the pursuer had refused to sign it or allow it to be signed,
 and that counsel and agents had ceased to act for pursuer. The diet
 for the trial of the cause was discharged and the jury countermanded.
 No appearance was made for the defender on 12th June.

On 14th June the defender sent a registered letter to the pursuer
 enclosing a copy of a note to the Lord Justice-Clerk, and intimating
 that the Court would be moved, in terms of the note, on 16th June.

The note (No. 22 of process) prayed the Lord Justice-Clerk to move
 the Court to assoilzie the defender, with expenses.

On 16th June, in Single Bills, counsel for the defender argued in
 support of the note;—When it appeared that a pursuer had aban-
 doned his suit, the Court was bound to hold him as confessed. The
 provision of the A. S., 16th February 1841, sec. 46,* in so far as
 regarded abandonment, was still in force,¹ although the provision
 regarding delay for twelve months had been superseded by the Court
 of Session Act, 1850, sec. 40.² The pursuer here must be held to
 have abandoned his suit; he had had intimation of the present
 motion and had not appeared. The difficulty arose from the jury
 having been countermanded. If the jury had been empanelled and the
 pursuer had not appeared, the defender could then have proceeded in
 terms of the latter part of section 46 of the A. S., 16th February
 1841. It was true that he could still get a jury summoned by pro-
 ceeding under the A. S., 24th February 1846,† and that having been

¹ Ross v. Mackenzie, June 26, 1889, 16 R. 871.

² Macfarlane v. Beattie & Sons, July 1, 1892, 19 R. 953; Baird v.
 Cornelius, July 16, 1881, 8 R. 982.

* The Act of Sederunt, 16th February 1841, sec. 46, enacts as follows:
 —“That if it shall be made to appear to the Court that a party has
 abandoned his suit, or if the pursuer or the party appointed to stand as
 pursuer, shall not proceed to trial within twelve months after issues have
 been finally engrossed and signed, the Court shall proceed therein as in
 cases in which parties are held as confessed, unless sufficient cause be
 shewn for the delay to the satisfaction of the Court. And in case either
 party shall not appear at the trial of a cause after due notice of trial has
 been given by the opposite party, the party appearing, if pursuer in the
 issue, shall be entitled to lead his evidence and go to the jury for a verdict;
 and if the party appearing be the defender in the issue, he shall be entitled
 to obtain a verdict in his favour without leading evidence, but if the party
 appearing shall decline to proceed in this manner, then the Judge presiding
 at the trial shall certify to the Division the fact of the other party not
 appearing, and the Division shall thereupon proceed as in cases in which
 parties are held as confessed, unless it shall be shewn to the satisfaction of
 the Court that the failure of the party to appear at the trial was occasioned
 by some sufficient cause.”

† The Act of Sederunt of 24th February 1846 enacts, *inter alia*, as

done, he could then proceed under section 46 of the earlier A. S., but it was an operose and expensive method to summon a jury in order that the Court might pronounce a decree of absolvitor. No. 207.

Guy attended at the bar and in answer to the Court stated that he had no instructions. July 20, 1897.
Gilhooly v. M'Hardy.

The Court intimated that they would dispose of the case on the 18th of June, and directed intimation to be made to the pursuer.

On the same day the defender's agents sent a registered letter to the pursuer intimating that the case had been before the Second Division, and that their Lordships were to give their decision on the note on 18th June.

A copy of the registered letter was lodged in process, with a post-office registration receipt appended (No. 24 of process).

On 18th June counsel for the defender appeared and stated that no answers had been received to the letters of intimation sent to the pursuer.

There was no appearance for the pursuer.

THE COURT pronounced this interlocutor:—"Having considered the note for the defender, No. 22 of process, along with the production No. 24 of process, assoilzie the defender from the conclusions of the action, and decern: Find him entitled to expenses," &c.

GORDON PETRIE & SHAND, S.S.O., Agents.

JOHN MOONEY, Pursuer.

WILLIAM DIXON, LIMITED, Defenders.—*Clyde.*

No. 208.

Process—Jury Trial—Abandonment—A. S., 16th Feb. 1841, sec. 46.—The pursuer in an action of damages for personal injury, whose agent had ceased to act for him, failed to pay the fee fund dues necessary, in terms of the A. S., 18th December 1896, to enable a precept for citation of a jury to be transmitted to the Sheriff. In consequence no jury was cited to try the cause on the day appointed for the trial. The defender then moved the Court to pronounce decree of absolvitor. The Court directed intimation of the motion to be made to the pursuer, and thereafter no reply having been received from him, and no appearance being made for him, *assoilzied* the defenders, with expenses. July 20, 1897.*
Mooney v. William Dixon, Limited.

In an action of damages by John Mooney against William Dixon, 2D DIVISION.

follows:—"That as soon as the issue or issues in the cause are finally engrossed and lodged in the office in the Register House, it shall be competent to the pursuer in the issue or issues to give notice of trial; and if the pursuer does not give notice of trial within ten days from the time the said issue or issues are so lodged as aforesaid, or, after giving notice of trial, countermands the same and does not renew the notice of trial within ten days after such countermand, it shall thereafter be competent to the defender to give notice of trial to the pursuer, and also to countermand such notice of trial in like manner as is competent to the pursuer. But if the defender countermands then the pursuer's right to take the lead shall recur for other ten days from the date of such countermand. . . . And the party who shall be served with a countermand shall be entitled to such expense as may have been incurred in consequence of such notice of trial, and which may not be available for the trial of the cause when it afterwards takes place."

* Decided July 13, 1897.

No. 208. Limited, an issue was approved for the trial of the cause, and the case was appointed to be tried on 2d July 1897.
July 20, 1897. Thereafter the pursuer's law-agents ceased to act for him, and the
Mooney v. pursuer failed to pay the dues exigible in terms of the A. S., 18th
William Dec. 1896, I. 23 (5)—which enacts that Law Courts' stamps for £2
Dixon, must be affixed to the precept for citation of the jury before it is
Limited. transmitted to the Sheriff. In consequence of this failure no jury
was cited, and the trial did not take place on 2d July.

On that day counsel for the defenders moved the Court for decree of absolvitor, with expenses, in respect of the circumstances above detailed, and referred to the immediately preceding case of *Gilhooly v. M'Hardy*.

The Court directed the defenders to make intimation to the pursuer that in the event of his not taking steps to go on with the jury trial they would move for absolvitor on a specified day.

The defenders' agents on the same day sent a registered letter to the pursuer giving him notice that upon Saturday, 10th July, they would move the Court to assoilzie the defenders, with expenses, in respect of the pursuer's failure to provide for citation of a jury and of his failure to appear at the trial.

A copy of this letter was lodged in process.

On 13th July counsel for the defenders appeared and stated that intimation had been duly made and no answer received. He moved for absolvitor, with expenses.

There was no appearance for the pursuer.

THE COURT pronounced the following interlocutor:—"The Lords, in respect of the pursuer's failure to cite a jury, and of the intimation made to him, dismiss the appeal, and assoilzie the defenders from the conclusions of the action, and decern: Find them entitled to expenses in this and in the inferior Court," &c.

W. & J. BURNES, W.S., Agents.

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ACCOUNTING. See *Agent and Client*, 2, 3, 4—*Discharge*, 3.

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ADMINISTRATION OF JUSTICE. Judge—*Declinature*—*Waiver*—*Court of Justiciary*.

1. A railway company appealed to the High Court of Justiciary against a judgment of a Sheriff acquitting a person of a contravention of one of the company's statutes. Two of the Judges proposed a declinature on the ground that they were shareholders in the company. *Question*, whether it was competent for the parties to waive the declinature by joint minute. *Caledonian Railway Co. v. Ramsay*, March 12, 1897, *Just. Cases*, p. 48.

Law-agent—*Petition for removal of law-agent's name from roll*—"Written application"—*Law-Agents (Scotland) Act*, 1873, sec. 14.

2. The written application by an agent to have his name removed from any of the registers kept under the *Law-Agents (Scotland) Act*, 1873, may be made directly to the keeper of the register. *Incorporated Society of Law-Agents v. Purves*, Jan. 22, 1897, p. 394.

Law-Agent—*Petition for removal of law-agent's name from roll*—*Proof*—*Law-Agents (Scotland) Act*, 1873.

3. A society of solicitors petitioned the Court to have the name of S., one of their number, struck off the roll of enrolled law-agents, on the ground that he had been guilty of fraud and embezzlement. It being alleged that S. had left the country, the order for service allowed a period of six weeks for the lodging of answers. The petition was served edictally. No answers were lodged. *Held* that, as S. had been neither convicted of the offences charged against him nor fugitated, the petitioners must prove their averments before the prayer of the petition could be granted. *Society of Solicitors in Aberdeen*, Feb. 5, 1897, p. 511.

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1. *Held* that the accession by a creditor to a composition agreement may be proved by the writ of his duly authorised agent. *Henry v. Strachan & Spence*, July 10, 1897, p. 1045.

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4. Scale of charges for attending meetings of trustees when law-agent himself is a trustee. *Turner v. Fraser's Trustees*, March 6, 1897, p. 673.

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5. Decree in name of agent-disburser. *Paolo v. Parias*, July 3, 1897, p. 1030.

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6. Law-Agents and Notaries Public (Scotland) Act, 1891, sec. 6. "Recovered or preserved on behalf of client." *Carruthers' Trustee v. Finlay & Wilson*, Jan. 16, 1897, p. 363.

AGENT AND PRINCIPAL. *Agent's powers—Ship—Charter-party.*

1. Deviation from charter-party by charterer's agent at port of loading. *Lindsay & Son v. Scholefield*, Feb. 19, 1897, p. 530.

Agent's powers—Insurance.

2. Authority of agent to receive payment of fire insurance premium, and to effect insurance on behalf of insurance company. *M'Elroy v. London Assurance Corporation*, Jan. 6, 1897, p. 287.

Liability of Agent who has acted contrary to instructions.

3. The charterer of a ship having litigated unsuccessfully with the ship-owners a question as to the mode of discharge depending on the terms of the charter-party, and having been found liable in demurrage and expenses, brought an action for relief against the shipping-agent, through whom he had effected the charter, on the ground that the shipping-agent had taken the charter-party in the terms in which it was taken contrary to instructions. *Held* that the shipping-agent was not liable, in respect the loss had not been caused by his failure to take the charter-party in terms of his instructions, but by the pursuer's failure to take delivery in terms of the charter-party. *Barkley & Sons v. Simpson*, Jan. 16, 1897, p. 346.

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4. Carrying over—Averaging purchases by broker—Broker acting as principal—Acquiescence. *Clavering, Son, & Co. v. Hope*, June 16, 1897, p. 944.

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APPEAL (HOUSE OF LORDS). *Interlocutor ordaining defender to commence building operations within specified period—Effect of judgment in appeal affirming interlocutor—Decree ad factum præstandum.*

1. By interlocutor dated 18th July 1895, the First Division ordained the defenders in an action to commence certain building operations "within three months from the date of this interlocutor." The defenders appealed to the House of Lords, but subsequently, with their consent, the interlocutors appealed against were affirmed and the appeal dismissed. *Held* that the period within which the defenders were bound to commence building was three months from the date of the judgment of the House of Lords. *Marshall v. Callander and Trossachs Hydropathic Co., Limited*, Oct. 22, 1896, p. 33.

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2. Leave to appeal against an interlocutor repelling a plea of no title to sue, and *quoad ultra* allowing a proof before answer, *refused*. *Assets Co., Limited, v. Shirres' Trustees*, Jan. 28, 1897, p. 418.

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ARBITRATION. *Procedure extra cursum curiæ*.

1. Objection to the competency of an appeal on the ground that the respondent had so deviated from the statutory course of procedure as virtually to constitute the Sheriff an arbiter, *repelled*. *Gordon v. Bruce & Co.*, May 12, 1897, p. 844.

Clause of reference—Construction—Sale.

2. Clause of reference in a contract of sale of sugar between A, who was a member of the Beetroot Sugar Association, and B, who was not a member, on a construction of which it was *held* that the council of the association was referee of all disputes, and that the decision of the council that one of the rules of the association applied to B, although not a member, was final. *Stewart, Brown, & Co. v. Grime*, Jan. 27, 1897, p. 414.

Bank—Savings Bank—Depositor—Action by depositor—Savings Banks Acts Amendment Act, 1863, *sec.* 48.

3. M brought an action against the trustees of a savings bank for payment of £50 which had been deposited in her name, and which she alleged the officials of the bank had paid away upon a forged order to another person. The defenders denied that the order was forged, or that they were responsible even if it was. They pleaded that the action was excluded by the arbitration clause (*sec.* 48) of the Savings Banks Acts Amendment Act, 1863. At the date when the action was brought M had no funds at her credit in the books of the bank. *Held* that the action being founded upon the contract of deposit involved a question between the bank and a depositor in the sense of the statute, which fall to be decided by arbitration. *Melrose v. Trustees for Edinburgh Savings Bank*, Feb. 2, 1897, p. 483.

See *Railway*, 1.

ARRESTMENT. *Petition for recall of arrestments—Answers—Personal Diligence Act*, 1838, *sec.* 21.

1. Competency of appeal against judgment recalling arrestments, where no answers lodged—Necessity for answers—*Extra cursum curiæ*—Arbitration. *Gordon v. Bruce & Co.*, May 12, 1897, p. 844.

Foreign—Competition as to right in moveables in warehouse in Scotland.

2. Goldsmith, a domiciled Englishman, resident in London, was the owner of certain whisky lying in a bonded warehouse in Glasgow, and held a warrant for the whisky granted by the warehouse-keepers, bearing that they held the whisky to order of Goldsmith "or assigns by indorsement hereon." By contract executed in London, Goldsmith borrowed £3000 from Inglis, also a domiciled Englishman, on the security of the whisky, and indorsed and delivered the warrant to Inglis. Thereafter, Robertson & Baxter, creditors of Goldsmith, arrested the whisky in the hands of the warehouse-keepers. In a competition between Robertson & Baxter and Inglis, who maintained that by the law of England the indorsement and delivery of the warrant gave him a right to the whisky which was preferable to that of any creditor of Goldsmith doing diligence subsequently, *held* by a majority of the whole Court that the competition fell to be determined by the law of Scotland. *Robertson & Baxter v. Inglis*, March 18, 1897, p. 758.

ASSESSMENT. See *Police*, 6, 7, 10.

ASSIGNATION. *Statute—Construction—"Assets"—Claims of damages—City of Glasgow Bank Liquidation Act*, 1882.

In 1882 the Assets Company, Limited, under a private Act of Parlia-

ASSIGNATION—Continued.

ment, took over the outstanding assets of the City of Glasgow Bank, which had gone into liquidation in 1878. In 1896 the Assets Company brought an action against the trustees of a contributory who had, in 1879, been discharged of his liabilities to the bank upon a compromise with the liquidators, concluding for a reduction of the discharge, or for damages, on the ground that the contributory in transacting with the liquidators had fraudulently understated the amount of his property. The defenders pleaded no title to sue, maintaining that upon a sound construction of the Act such claims had not been assigned to the company. The Court *repelled* the plea of no title to sue. *Assets Co., Limited, v. Shirres' Trustees*, Jan. 28, 1897, p. 418.

See *Lease*, 3.

BANK. Savings Bank—Depositor—Action by depositor—Arbitration—Savings Banks Acts Amendment Act, 1863, sec. 48.

M brought an action against the trustees of a savings bank for payment of £50 which had been deposited in her name, and which she alleged the officials of the bank had paid away upon a forged order to another person. The defenders denied that the order was forged, or that they were responsible even if it was. They pleaded that the action was excluded by the arbitration clause (sec. 48) of the Savings Banks Acts Amendment Act, 1863. At the date when the action was brought M had no funds at her credit in the books of the bank. *Held* that the action being founded upon the contract of deposit involved a question between the bank and a depositor in the sense of the statute, which fell to be decided by arbitration. *Melrose v. Trustees for Edinburgh Savings Bank*, Feb. 2, 1897, p. 483.

BANKRUPTCY. Illegal Preference—Lease—Tenant possessing a farm and stock under contract of service—Landlord taking possession on death of servant—Act 1696, c. 5—Bankruptcy (Scotland) Act, 1856, sec. 110.

1. A landlord, in an agreement with G., his ground officer, agreed to give him possession of a farm from Whitsunday 1887 rent free as part of his salary, and also to hand over to him the horses and farm implements and corn crop of 1887 without payment, it being stipulated that a valuation should be made in the same way as if G. were an incoming tenant, and that a similar valuation should be made when the arrangement terminated, and any difference paid by landlord or tenant as the case might be. The agreement was yearly, and might be terminated at any Whitsunday on four months' notice. On G.'s death (on 14th May 1895) the landlord took possession of the farm, and sold the horses, &c. Within seven months after G.'s death his estates were sequestrated, and thereafter the trustee in the sequestration brought an action calling upon the landlord to account for the value of the horses, implements, and crop. He averred that at the date of his death G. was notour bankrupt. *Held* that the contract was terminated by G.'s death, and that the landlord thereupon became entitled to take possession of the farm and of the horses, implements, and crop, as proprietor thereof, and that his possession was not open to challenge either under the Act 1696, cap. 5, or section 110 of the Bankruptcy Act, 1856. *Torrance v. Traill's Trustees*, March 19, 1897, p. 837.

Illegal Preference—Sheriff—Competency—Declarator of illegal preference—Bankruptcy (Scotland) Act, 1856, sec. 10—The Bankruptcy and Real Securities (Scotland) Act, 1857, sec. 9—The Sheriff Courts (Scotland) Act, 1877, sec. 8 (2).

2. *Held* that an action praying the Court to find a certain payment by an insolvent debtor within sixty days of bankruptcy to be null and void at common law and under the Act 1696, c. 5, and to find that the payment was an illegal preference, and to set aside the same, was com-

BANKRUPTCY—*Continued.*

petent in the Sheriff Court. *M'Laren's Trustee v. National Bank of Scotland, Limited*, June 12, 1897, p. 920.

Illegal Preference—Title to Sue—Trustee under voluntary trust-deed.

3. *Held* that a trustee under a voluntary trust-deed for behoof of creditors has no title to sue an action to set aside an illegal preference granted by the debtor to the prejudice of prior creditors who have assented to the trust-deed. *M'Laren's Trustee v. National Bank of Scotland, Limited*, June 12, 1897, p. 920.
4. *Held* (1) that a prior creditor who alleges that he has been prejudiced by his debtor making a payment after insolvency, and within sixty days of his bankruptcy, has a title to sue for declarator that the payment is null, but (2) not to sue for payment either to himself or to a trustee for creditors. *M'Laren's Trustee v. National Bank of Scotland, Limited*, June 12, 1897, p. 920.

Illegal and Fraudulent Preference—Retiring an accommodation bill before maturity—Act 1696, c. 5.

5. A bank discounted a bill for the drawer, who informed the bank that it had been accepted for his accommodation. Before the bill matured the drawer paid the bill in cash, and the bill was delivered to him. At the time of the payment the drawer was insolvent, and he became bankrupt within sixty days thereafter. In an action brought against the bank by a prior creditor for declarator that the payment was illegal, it was proved that as at the time of the payment the bank had no knowledge of the drawer's insolvency, and had no reasonable ground for believing that he was insolvent, and that the retiring a bill before maturity was within the ordinary course of a banker's business. *Held* that the payment was not an illegal preference within the meaning of the Act 1696, c. 5, and was not a fraudulent preference at common law. *M'Laren's Trustee v. National Bank of Scotland, Limited*, June 12, 1897, p. 920.

Deed in fraud of creditors—Title to Sue—Title of trustee in foreign bankruptcy—Reduction.

6. Where a domiciled Scotsman carrying on business in a foreign country is declared bankrupt by the Courts of that country, and the administration of his estates is transferred to an official with the right to sue on behalf of the creditors, the Courts of this country will recognise his title to sue in this country. *Obers v. Paton's Trustees*, March 17, 1897, p. 719.

Deed in fraud of creditors—Spes successionis.

7. A bankrupt is not entitled to do any act in relation to a *spes successionis* to the prejudice of his creditors. *Obers v. Paton's Trustees*, March 17, 1897, p. 719.

Trust for creditors—Adoption of lease by trustee—Deed of assignation and renunciation—Liability for rent.

8. Deeds of assignation and renunciation on a construction of which it was *held* that the trustee for the creditors of a farmer had possessed the farm as tenant under the lease, and that he was personally liable for the rent of the year during which he had possessed. *Moncreiffe v. Ferguson*, Oct. 24, 1896, p. 47.

Trust for creditors—Lease—Compensation.

9. By the lease of a farm, the landlord, in the event of the tenant becoming insolvent, had the option to terminate the lease, and in the event of his exercising this option he was bound to settle with the tenant as if the lease had naturally expired. Under the lease the tenant became entitled on its termination to the value of certain meliorations on buildings taken over by him from the previous tenant as the same might be fixed by arbitration, and the general regulations of the estate, which were incorporated in the lease, *inter alia*, provided,—“The outgoing and incoming tenants must settle between themselves regarding

BANKRUPTCY—*Continued.*

the payment of crop, manure, and other things, without any responsibility on the heritor, unless the heritor chooses to interfere." The tenant having become insolvent and having granted a trust-deed for behoof of his creditors, the landlord terminated the lease and let the farm to a new tenant. Thereafter the landlord and the trustee entered into a reference to have the value of the meliorations on buildings and of the manure, &c., fixed. Under this reference the value was fixed at £189, 1s. The trustee having brought an action against the landlord for payment of this sum, the landlord pleaded compensation in respect of a sum of £197, 12s. 6d., being the amount of arrears of rent due by the tenant. The trustee maintained that the plea of compensation was ill founded in respect (1) that the landlord having the option under the lease of either leaving the tenant to settle with the incoming tenant for meliorations, manure, &c., or of himself settling with the tenant, the agreement under which he elected the latter course was to be regarded as constituting an obligation incurred to the trustee subsequently to the tenant's insolvency, to which the doctrine of compensation was inapplicable; and in respect (2) that the landlord having (as the trustee averred) acceded to the trust, the trustee was vested in the tenant's right to the manure, &c., free of any obligation to compensate. *Held* that both claims arose out of the contract of lease, and that the plea of compensation fell to be sustained. *Jaffray's Trustee v. Milne*, Feb. 26, 1897, p. 602.

Trust for creditors—Liability of trustee for payment of invalid claim.

10. *Held* that a trustee for behoof of creditors who had in good faith, but against the protest of the truster, and so precipitately that the latter had no opportunity of interdicting him, paid a claim which was afterwards held to be invalid, was liable to make good the sum so paid away by him. *Buttercase & Geddie's Trustee v. Geddie*, July 16, 1897, p. 1128.

Sequestration—Recall—Declarator that sequestration at an end—Nobile Officium.

11. The estates of a deceased person were sequestrated, and an abbreviate of the sequestration was recorded in the Register of Inhibitions, and an abbreviate of the trustee's confirmation recorded in the Register of Sequestrations. The estates consisted in part of a heritable property burdened with a bond and disposition in security. This property was vested in the bankrupt's testamentary trustees, and they having paid to the trustee the value of the reversion obtained a discharge of all claims at his instance. The sequestrated estates were then divided and the trustee was discharged. The testamentary trustees thereafter presented a petition to the Court praying for recall of the sequestration, or otherwise for declarator that the sequestration was at an end and the trustees reinvested in the property in question, and to appoint and grant warrant authorising the judgment to be entered in the Register of Sequestrations and in the Register of Inhibitions. The Court, holding that it was inappropriate to recall a sequestration which had run its course, granted the alternative prayer of the petition. *Macleish's Trustees*, Nov. 14, 1896, p. 151.

Sequestration—Defect in statement of concurring creditor's claim—Petition for recall—Bankruptcy Act, 1856, secs. 21 and 49.

12. In a petition by a debtor for sequestration the affidavit of the concurring creditor described the debt due to him as "being the amount contained in an account for goods supplied by the deponent" to the debtor. The relative account contained forty-eight items of varying amounts and under different dates. The sole description in the case of each item was "Goods." The Court granted a petition for recall of the sequestration on the ground that the account produced by the concurring

BANKRUPTCY—Continued.

creditor was not sufficiently specific in its terms to satisfy the requirements of the Bankruptcy Act. *Riddell v. Galbraith*, Oct. 27, 1896, p. 51.

Sequestration—Title to Sue—Trustee—Expenses.

13. A, who had as trustee on a sequestrated estate raised an action and obtained from a Lord Ordinary a decree for expenses, was afterwards removed from office. The defender having reclaimed, and the new trustee having declined to sist himself, A presented an application to be sisted on the ground that he had an interest in the question of expenses. The Court *refused* the application. *Mackenzie v. Fowler*, July 13, 1897, p. 1080.

Accession to composition agreement—Writ—Writ of Agent.

14. Held that the accession by a creditor to a composition agreement may be proved by the writ of his duly authorised agent. *Henry v. Strachan & Spence*, July 10, 1897, p. 1045.

Report by trustee not obtainable—Nobile Officium—Bankruptcy (Scotland) Act, 1856, sec. 146—Bankruptcy and Cessio (Scotland) Act, 1881, sec. 5.

15. Where in consequence of the death of the trustee in a cessio the bankrupt was not able to obtain the statutory report with a view to his discharge, the Court remitted the case to the Accountant of Court for his report. *Mackay*, Dec. 8, 1896, p. 210.

See *Expenses*, 14—*Inhibition*, 1.

Prosecutions for Fraudulent Bankruptcy, see *Justiciary Cases*, 12, 25 to 29.

BARONY. See *Superior and Vassal*, 2, 4, 5.

BILL OF EXCHANGE. *Blank Acceptance—Authority to fill in name of third party as drawer—Accommodation Bill—Bills of Exchange Act, 1882, secs. 20 and 29.*

1. Russell, for the accommodation of Knox, handed to Knox a bill stamp with his (Russell's) acceptance written across the face of it, but otherwise blank. It was understood between the parties that a bill on Russell for £189, 13s. at four months should be completed on the acceptance, but there was no agreement that Knox himself should necessarily be the drawer. Knox, for facility of discount, procured the bill to be drawn for the agreed on sum and at the agreed on usance, by the Banknock Company, of which he was managing director, and to whom he was indebted. The company discounted the bill with a bank, and applied the proceeds in reducing a debt due by Knox to them. Knox having become bankrupt, and having failed to retire the bill, it was retired by Russell, who brought an action of relief against the Banknock Company. Held that the pursuer had no right of recourse against the defenders. *Russell v. Banknock Coal Co., Limited*, July 1, 1897, p. 1009.

Bankruptcy—Illegal Preference—Act 1696, c. 5.

2. Retiring an accommodation bill before maturity. *M'Laren's Trustees v. National Bank of Scotland*, June 12, 1897, p. 920.

Process—Summons—Action founded on bill of exchange—Court of Session Act, 1850, section 1, and schedule A—A. S. 31st October 1850.

3. Held (by Lord Kincairney, Ordinary) that where an action is founded on a bill of exchange, the bill must be set forth in the conclusions of the summons. *Davis v. Cadman*, Jan. 13, 1897, p. 297.

See *Jurisdiction*, 2.

BOARD OF TRADE. See *Ship*, 4.

BREACH OF PROMISE TO MARRY. See *Husband and Wife*, 1.

BURGH. *Election of Police Commissioners—Casus improvisus—Burgh Police (Scotland) Act, 1892, sec. 17.*

1. A burgh administered by twelve police commissioners elected by the whole burgh was divided into four wards in 1895, and in 1896 an

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election fell to take place in each of the four wards for the purpose of filling the places of the four senior commissioners, who were bound to retire from office in that year. Prior to the date of the election a fifth commissioner intimated his resignation, and, as he had been elected by the burgh and not by a ward, the election of his successor did not fall to any particular ward. The commissioners applied to the Court for an order under sec. 17 of the Burgh Police Act of 1892. The Court ordered the election of an additional commissioner by the First Ward. *M'Callum v. Lochhead*, Oct. 17, 1896, p. 26.

Extension of boundaries—Confirmation of resolution to extend—Expenses—Burgh Police (Scotland) Act, 1892, secs. 11, 12, and 13.

2. *Held* that under section 12 of the Burgh Police Act, 1892, the Sheriff or the Court of Session, must either confirm the resolution of magistrates to extend the boundaries of the burgh *simpliciter* or refuse confirmation, and that therefore it is not competent to confirm the resolution as regards part of the area resolved to be added, and to refuse confirmation as regards the rest of the area.

Held further that in an application for confirmation of a resolution of magistrates under section 12, it is the duty of the Sheriff, or the Court, to consider all reasonable grounds of objection to the confirmation, including objections based on the number of dwelling-houses in the area proposed to be added and the amount of its population.

Circumstances in which the Court in a petition under section 13 of the Act, for recall of a deliverance of the Sheriff confirming a resolution of magistrates to extend the boundaries of a burgh, *recalled* the deliverance of the Sheriff, and *refused* to confirm the resolution.

The Court *refused* a motion by the petitioners for expenses, Lord Young observing that the proceedings were not a litigation. *White v. Magistrates of Rutherglen*, Jan. 28, 1897, p. 446.

Revision of boundaries of wards—Proof of expediency—Sheriff—Burgh Police Act, 1892, secs. 11 and 13.

3. *Held* that the power given to the Sheriff by section 11 of the Burgh Police Act, 1892, is administrative, and not judicial, and that he is not entitled to grant an application to alter the boundaries of a burgh in respect of no opposition, but only if *tota re perspecta* he considers it expedient to do so. *Lindsay v. Magistrates of Leith*, May 22, 1897, p. 867.

Resolution regarding salary of official—Jus quæsitum.

4. At a meeting the Commissioners of a burgh resolved to increase by £10 the salary of their sanitary inspector, but no official intimation of the resolution was made to him. At a subsequent meeting they cancelled their former resolution. In an action against them by the sanitary inspector, *held* that the pursuer had no *jus quæsitum* under the resolution, as it had not been intimated to him. *Burr v. Commissioners of Bo'ness*, Nov. 13, 1896, p. 148.

Dean of Guild—Jurisdiction—Public Street—Glasgow Police Act, 1866, secs. 286 and 290.

5. A proprietor of vacant ground in Glasgow presented a petition to the Dean of Guild for the lining of a street, stating that he intended to form a public street. After the Master of Works had been cited, the petitioner obtained a warrant from the Dean of Guild to form the intended street "as a public street." When the street was formed he presented a petition to the Dean of Guild craving him to declare the street a public street. The petition, which was opposed by the Master of Works as incompetent, was granted. The Master of Works having appealed, the Court *dismissed* the petition as incompetent, holding that the Dean of Guild had no jurisdiction under sec. 290 of the Glasgow Police Act, 1866, to declare a street a public street, but only under

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sec. 286, on a joint application by the proprietor and the Master of Works. *Dixon's Trustees v. Whyte*, March 4, 1897, p. 639.

Dean of Guild—Street—Taking down and re-erecting buildings—Height—Glasgow Police Act, 1866, secs. 290 and 364.

6. In 1872 a proprietor obtained a warrant from the Dean of Guild for the lining of a street on an application in which he stated that the maximum height of the intended buildings was 60 feet. *Held* that the lining did not determine the height of the buildings for all time, and did not make it incompetent for the Dean of Guild in 1896 to authorise the erection in the street of buildings of a greater height than 60 feet. *Waddell v. Whyte*, March 17, 1897, p. 677.

Dean of Guild—Alteration of existing building—Provision for light and ventilation—Burgh Police (Scotland) Act, 1892, sec. 167.

7. Where the plans for the alteration of a building shewed that the alteration would have the effect of improving the light and ventilation of the premises, *held* that the Dean of Guild Court were not entitled, under sec. 167 of the Burgh Police Act, 1892, to refuse a warrant on the ground that they were not satisfied that the plans provided suitably for light and ventilation of the building. *Macgregor v. Magistrates of Leith*, June 18, 1897, p. 971.

Dean of Guild—Alteration of existing buildings—Edinburgh Municipal and Police Amendment Act, 1891, sec. 49.

8. In a petition for warrant to add to an existing building, *held* that the light and ventilation as to which the Dean of Guild required to be satisfied were the light and ventilation of the additional building for the erection of which warrant was craved, and that the Dean of Guild was not entitled to refuse a warrant on the ground that the proposed addition would interfere with the light and ventilation of the existing buildings. *Saltoun v. Magistrates of Edinburgh*, March 19, 1897, p. 832.

Dean of Guild—Alteration of existing buildings—Edinburgh Municipal and Police Amendment Act, 1891, sec. 50—Edinburgh Improvement and Municipal and Police Act, 1893 (56 and 57 Vict. c. cliv.).

9. In 1893 the proprietor of a tenement used for business purposes, situated in Queen Street, Edinburgh, obtained warrant from the Dean of Guild for the erection of a hall and buildings accessory thereto on an open space behind the street tenement. In 1896 the proprietor applied for authority to erect a room to be used as a cloak-room in connection with the hall above part of the buildings erected under the warrant previously granted by the Dean of Guild. The Magistrates of Edinburgh opposed the petition, on the ground that the proposed addition to the height of the buildings on the back-ground would prejudicially affect the light and ventilation of the street tenement. The Dean of Guild refused to grant the warrant craved. On appeal *held* that the provisions of section 50 did not apply, in respect that the application was neither for warrant to erect a new building nor for warrant to convert a dwelling-house into business premises. *Saltoun v. Magistrates of Edinburgh*, March 19, 1897, p. 832.

See Church—Police.

BYELAW. *See Fishings, 1.*

CARRIAGE. *See Railway, 8, 9.*

CAUTIONER. *Suspension.*

Personal liability of cautioner for expenses in a suspension brought by a trustee. *Stewart v. Forbes*, July 15, 1897, p. 1112.

CESSIO. *Discharge—Report by trustees not obtainable—Nobile Officium—Bankruptcy (Scotland) Act, 1856, sec. 146—Bankruptcy and Cessio (Scotland) Act, 1881, sec. 5.*

Where in consequence of the death of the trustee in a cessio the bank-

CESSIO—*Continued.*

rupt was not able to obtain the statutory report with a view to his discharge, the Court remitted the case to the Accountant of Court for his report. Mackay, Dec. 8, 1896, p. 210.

CHARITABLE AND EDUCATIONAL BEQUESTS AND TRUSTS. *Alteration of scheme framed by Educational Endowments Commissioners.*

Competency of considering, under a petition for the alteration of a scheme, an amendment of the scheme not within the scope of the petition. School Board of Crieff, July 14, 1897, p. 1096.

CHURCH. *Stipend—Competent and legal stipend—Amount—Burgh.*

1. The magistrates, councillors, and freemen of a burgh were bound by decree of disjunction and erection of a parish to provide the minister serving the cure with a legal and competent stipend, in addition to a manse, cow's grass, and allowance for Communion expenses. In an action by the minister the Court, having regard to the number of the population, the duties entailed on the minister by the character of the parish, and the emoluments of neighbouring charges, fixed £300 as the amount of the stipend to be provided by the magistrates, councillors, and freemen. *Rainie v. Magistrates of Newton-on-Ayr*, Feb. 26, 1897, p. 606.

Parish partly landward partly burghal—Repairs to church—Liability for expense of repairs—Real or valued rent—Custom of parish—Res judicata—Burgh.

2. By decree pronounced in 1761 in an action of declarator brought by the heritors of Kinghorn against the burgh of Kinghorn, it was found and declared "that the community of the burgh of Kinghorn are entitled to retain possession of that proportion of the area of the kirk of Kinghorn presently possessed by them; and that the heritors of the landward parish are also entitled to retain possession of that proportion of the area of the said kirk presently possessed by them . . . and of consent found, and hereby find, that the community of the burgh of Kinghorn has been in use to pay one half of the repairs of the kirk, manse, and office-houses. Therefore that they are liable in the one-half of the present repairs and also in the half of all the repairs on said kirk, manse, and office-houses in time coming." After this decree the burgh paid one half of the cost of repairs on the church down to 1855. In that year the burgh refused to pay one half of the cost of a new manse, and under a compromise with the heritors were assessed in one-fifth only. In 1856, 1869, and 1878, a similar assessment was levied on the burgh in connection with repairs on the church and manse. In all these instances the entry made on the assessment-roll was "without prejudice to the right of parties in future similar cases." In 1894 a question having arisen as to the rebuilding or repairing of the church, the Sheriff found that the church could be repaired, and directed the necessary work to be done. The work executed on the church was of a very extensive character, the expense amounting to about four-fifths of the estimated cost of building a new church. In a question as to the mode of assessment for the expense, held that there had been no dereliction of the rights and liabilities determined by the decree of 1761; that that decree determined the rule of liability for the repairs of the church so long as the then existing fabric continued; that the Sheriff's judgment being final, the work done was to be regarded as repairs only, and not as rebuilding, and that accordingly the assessment fell to be levied to the extent of one half on the burgh of Kinghorn, and to the extent of the other half on the old valued rent heritors, according to their valued rents. *Heritors of Kinghorn v. Magistrates of Kinghorn*, March 12, 1897, p. 704.

COLLEGE. See *Revenue*, 5.

COLLISION. See *Ship*, 2.

COMMISSIONERS. See *Fishings*, 1.

COMPANY. *Shares—Prospectus—Application for shares “on faith” of the prospectus—Fraud—Proof—Onus—Companies Act, 1867, sec. 38.*

1. A person applied for shares in a joint stock company on a form which requested allotment “upon the terms of the prospectus,” and shares were allotted to him. In an action brought by his representatives against the directors for declarator that the prospectus was fraudulent within the meaning of section 38 of the Companies Act, 1867, in respect that it did not specify a certain agreement, the pursuers, to shew that the deceased had applied for the shares on the faith of the prospectus, founded on the terms of his application, and proved that the prospectus had been widely advertised in Glasgow, where the deceased was living. There was no direct evidence that the deceased had read the prospectus. The defenders proved that the deceased had applied for the shares in reliance on the advice of one of the directors who was a personal friend. *Held* that the pursuers had failed to prove that the shares had been applied for on the faith of the prospectus, and that section 38 did not apply. *M’Morland’s Trustees v. Fraser*, Oct. 29, 1896, p. 65.

Shares—Application for—Fraud—Concealment of material facts by director who was also vendor to company.

2. In an action raised by the representatives of A, a deceased coalmaster against one of the directors of a colliery company, which had gone into liquidation, for damages on the ground that the deceased had been induced to take shares in the company by fraudulent representation and concealment on the part of the defender, *held*, after a proof, that there had been no fraudulent misrepresentation or concealment on the part of the defender. *M’Morland’s Trustees v. Fraser*, Oct. 29, 1896, p. 65.

Debenture—Insurance of debenture in mortgage company.

3. “Failure to pay” debenture in the sense of the policy—Liquidation of insurance company prior to maturity of mortgage. Liquidators of Employers Company of Great Britain, Limited, v. Benton, June 9, 1897, p. 908.

Debenture—Agreement to pay share of profits to trustee as a sinking fund to secure debentures—Interest of sinking fund.

4. A company by an agreement entered into with a trustee for future debenture-holders became bound each year “to accumulate as a sinking fund in the hands of” the trustee a proportion of its free annual profits for securing and paying the debentures, the trustee being authorised to invest the trust funds in his hands from time to time. *Held* that the interest derived from the funds so invested by the trustee did not fall to be credited to the company as part of its annual profits, but that the trustee was bound to accumulate it with the funds forming the sinking fund. *Arizona Copper Co., Limited, v. London Scottish American Trust, Limited*, March 5, 1897, p. 658.

Income or Capital.

5. Realisation of investments—Income in the sense of the Income-Tax Acts. *Assets Co., Limited, v. Inland Revenue*, Feb. 23, 1897, p. 678.

Reduction of Capital—“Capital lost or unrepresented by available assets”—Companies Act, 1867, secs. 9 to 19—Companies Act, 1877, secs. 3 and 4.

6. A company registered as a company limited by shares under the Companies Acts, and which under its articles of association had power to reduce its capital and to accept the surrender of its shares, passed a special resolution to reduce its capital by permanently cancelling cer-

COMPANY—*Continued.*

tain fully paid-up shares belonging to two shareholders who had agreed to the cancellation in order to recoup the company against a loss resulting from the misappropriation of the funds of the company by one of its officials. The company having presented a petition praying the Court to confirm the resolution and the proposed reduction of capital and to dispense with the addition of the words "and reduced" to the company's name, the Court, after a remit for inquiry and a report, granted the prayer of the petition. *Banknock Coal Co., Limited*, Jan. 30, 1897, p. 476.

Winding-up—Objection to intimation of petition for winding-up—Companies Act, 1862, secs. 79 and 80.

7. Circumstances in which objections by a limited company to intimation of a petition by a debenture-holder for the judicial winding-up of the company, which was in course of being wound up voluntarily with a view to reconstruction, on the ground that the intimation would be injurious to the interest of the company, *repelled*. *Wotherspoons v. Brescia Mining and Metallurgical Co., Limited*, Dec. 5, 1896, p. 207.

Winding-up—Reduction of compromises between liquidators and contributories—"Assets."

8. *Held* that under the City of Glasgow Bank Liquidation Act, 1882, the Assets Company, Limited, had a title to bring an action against the trustees of a contributory in the liquidation of the bank, who had been discharged of his liabilities upon a compromise with the liquidators, concluding for reduction of the discharge, or alternatively for damages, on the ground that the contributory, in transacting with the liquidators, had fraudulently understated the amount of his property.

Proof before answer of general averments of fraudulent understatement of property *allowed*. *Assets Co., Limited, v. Shirres' Trustees*, Jan. 28, 1897, p. 418.

See *Revenue*, 4.

COMPENSATION. See *Bankruptcy*, 9—*Expenses*, 17—*Process*, 4.

COMPROMISE. See *Executor*, 3—*Judicial Factor*, 1.

CONDITION. See *Contract*, 1—*Insurance*, 3, 5—*Lease*, 15—*Succession*, 14.

CONFIDENTIALITY. See *Insurance*, 4.

CONTRACT. *Constitution—Offer and Acceptance—Condition—Mora.*

1. In an action for implement of an offer to execute the mason work required for the erection of a house in Aberdeen made by the defender to the pursuer's architect on 10th June, and accepted by the pursuer on 21st June, the defender maintained that there was no concluded contract, in respect (1) that his offer had not been accepted within seven days as provided by one of a number of "conditions of tendering" agreed to by the architects and builders of Aberdeen; (2) and that in any view there had been undue delay in accepting his offer. After a proof *held* (1) that the so-called "conditions" were not to be regarded as implied conditions in building contracts in Aberdeen, but rather as rules for the guidance of architects; and (2) that the offer had been accepted without undue delay, and was binding. *Murray v. Rennie & Angus*, June 18, 1897, p. 965.

Constitution—Fraud—Damages or restitutio in integrum.

2. Agreement to give credit to third party induced by fraud—Loss resulting from advances made during a course of years—Right of party who has made the advances to be relieved of the contract and restored against the loss by the party who has induced him to enter into the agreement. *Thin & Sinclair v. Arrol & Sons*, Dec. 3, 1896, p. 198.

Construction.

3. Agreement to transfer engineer's business with plant in consideration of payment of annuity—Whether to be understood as a lease of the pre-

CONTRACT—Continued.

mises containing the plant. *Thomson v. Thomson*, Dec. 18, 1896, p. 269.

Construction—Obligation not to "take legal steps" to recover debt.

4. A, who had been financing B, declined to make further advances, but with the view of assisting B to get advances from T, sent to T a letter agreeing (1) that he, A, should "not take legal steps against B within seven years from this date to enforce payment of the balance" due to him; (2) that during that time he would not sell or foreclose mortgages held by him over B's property; (3) that he would not hold against B's debt any goods sent by B for sale which had been purchased with T's money. *Held* that A's letter did not preclude him during the currency of the seven years from recovering payment of B's debt by other means than those specified in the letter. *Thin & Sinclair v. Arrol & Sons*, Dec. 3, 1896, p. 198.

Construction—Dynamo.

5. Contract to supply dynamo. *Electric Construction Co., Limited, v. Hurry & Young*, Jan. 14, 1897, p. 312.

Condition—Forfeiture—Drunkenness.

6. Lease of public-house—"Doing anything which may endanger" licence. *Noble v. Hart*, Nov. 24, 1896, p. 174.

Implement—Executory Contract—Fraud—Process—Remit.

7. Contract for execution of drainage work—Action alleging fraudulent execution of the work, and praying for remit to man of skill to report, and for execution of such work as he might report to be necessary—Competency of action. *Magistrates of Kilmarnock v. Reid*, Jan. 22, 1897, p. 388.

See *Servitude*, 1.

CONVERSION. See *Succession*, 2.

CORPORATION. See *Superior and Vassal*, 1.

COUNTY COUNCIL. District Committee—Public Health (Scotland) Act, 1869.

Lands taken by County Council—Erection of hospital by District Committee on lands—Competency of claim against District Committee for compensation. *District Committee of the Middle Ward of Lanark v. Marshall*, Nov. 10, 1896, p. 139.

See *Process*, 39.

CROFTERS HOLDINGS ACTS. Valuation Acts—Fair Rent—Crofter Proprietor—Crofters Holdings (Scotland) Act, 1886, sec. 6.

A crofter, the rent of whose farm had been fixed at a fair rent by the Crofters Commission, purchased his holding. The Assessor, assuming that the fair rent represented only the landlord's interest in the croft, added thereto, in fixing the valuation, a sum representing the annual value of permanent improvements on the holding. *Held* that the valuation was right. *Mackay v. Assessor for Sutherland*, March 17, 1897, p. 737.

CROWN. See *Superior and Vassal*, 2 to 5.

CUSTOM. See *Church*, 2.

DEAN OF GUILD. See *Burgh*, 5 to 9.

DECLINATURE. See *Administration of Justice*, 1.

DECREE. See *Fishings*, 1—*Process*, 16 to 19.

DELIVERY. See *Writ*, 2.

DENTIST. See *Justiciary Cases*, 30.

DESTINATION. See *Succession*, 4, 5.

DILIGENCE. See *Arrestment—Inhibition—Poinding*.

DILIGENCE FOR RECOVERY OF DOCUMENTS. See *Process*, 23 to 26.

DISCHARGE. *Absolute or revocable*.

1. Discharge by daughters of rights under their parents' marriage-contract held to be irrevocable, although it involved the gratuitous surrender of right to absolute payment in fee, and acceptance of a provision in liferent and fee to children. *Neish's Trustees v. Neish*, Jan. 13, 1897, p. 306.

Absolute or conditional—Discharge of legitim.

2. A bankrupt executed a deed of discharge whereby, on the narrative that he had received various advances of money from his father, and that it was reasonable and proper that "in respect of such advances" he should execute the discharge after written, he exonerated and discharged his father, his heirs and executors, of any legitim which he could claim through the death of his father. Held that the deed was not to be construed as conditional upon the father's claim for repayment of the advances being discharged, but was a gratuitous discharge of the son's right to legitim. *Obers v. Paton's Trustees*, March 17, 1897, p. 719.

Agent and Client—Accounting—Settled Account—Trust—Beneficiary's right to taxation of business account of trust after settlement.

3. A beneficiary having right to a share of residue under a trust-settlement granted a discharge to the trustees, and afterwards, on discovering the sum paid to the trustees' law-agent for law expenses and commission, raised an action of accounting against the trustees for the purpose of having the law-agent's account taxed, and any overcharge restored to the estate—the pursuer alleging that the charges were excessive. Held that the pursuer was not precluded from raising the action by the discharge. *M'Farlane v. M'Farlane's Trustees*, Feb. 23, 1897, p. 574.

DIVORCE. See *Husband and Wife*, 4, 5.

DOMICILE. See *Husband and Wife*, 6.

ELECTION LAW. *Franchise—Failure to pay poor-rates—Partial payment of consolidated rates without specific appropriation to poor-rate—Representation of the People (Scotland) Act, 1868, sec. 3.*

1. The claim of a person to be enrolled as a parliamentary voter was objected to on the ground that he had not paid the poor-rates due by him at the 15th of May preceding. In a case stated it appeared that the claimant had been assessed for 2s. 8d. of consolidated parish rates, of which 1s. 6d. was poor-rate, and that he had paid 2s. to account, but that he had not appropriated this payment to poor-rate. It was not stated that the collector had so appropriated it. Held that the claimant had not paid the poor-rate, and was not entitled to be enrolled. *Bell v. Galt*, Jan. 19, 1897, p. 374.

Franchise—Lodger Franchise—Evidence of value—Valuation-roll—Declaration as evidence of qualification—Representation of the People (Scotland) Act, 1868, sec. 4.—Registration Amendment (Scotland) Act, 1885, sec. 14.

2. A person claimed to be registered as a lodger in respect of the occupation of two rooms and a surgery in a house. The rent for the furnished lodgings payable by the claimant was 8s. a week, amounting to £10, 16s. per annum. An objection was taken that the yearly rent of the whole house (as shewn by the Valuation-roll) was £5, and that the value of the lodgings, which formed only part of the house, could not therefore be of the clear yearly value, if let unfurnished, of £10. The Sheriff, proceeding on the rent actually paid for the lodgings, held that as matter of fact they were of the statutory value, and admitted the

ELECTION LAW—Continued.

claim. The Court *refused* an appeal, holding that the entry in the Valuation-roll was only an element in the proof, and that the Sheriff was not thereby precluded from forming his own judgment on the value of the rooms occupied by the claimant, and that there was no ground in law for interfering with the Sheriff's decision on the question of fact. *Kellie v. Little*, Jan. 19, 1897, p. 379.

Franchise—Service Franchise—Representation of the People Act, 1884, sec. 3.

3. A constable residing in police barracks had the exclusive use and occupation of a room, of which he kept the key. He slept in the room, and when off duty was entitled to use it and to receive visitors in it. Separate common rooms were provided in the barracks for meals and recreations. The right of the constable to the room was contingent on his remaining in the force, and the barracks were subject to the control of the chief-constable, who might at any time remove the constable from the barracks, order him to change his bedroom or keep certain hours, order him to give up the key of his room on ceasing to occupy it, forbid him to receive visitors in the room, and order him to open the door of his room so as to let any person in authority enter. *Held* that the constable inhabited the "dwelling-house" in the sense of section 3 of the Representation of the People Act, 1884, and that the "dwelling-house" was not inhabited by any person under whom he served, and that therefore he was entitled to be registered. *Wallace v. Borrie*, Jan. 19, 1897, p. 376.

Appeal—Jurisdiction—Municipal Roll—Representation of the People (Scotland) Act, 1868, sec. 22.

4. *Held* that the Registration Appeal Court has no jurisdiction under sec. 22 of the Representation of the People (Scotland) Act, 1868, to entertain an appeal from a judgment of the Sheriff in adjusting the list of voters for a municipal election. *Wood v. Laing*, Jan. 19, 1897, p. 382.

Election Petition—Return of election expenses—Failure to make timeous and true return—Petition for authorised excuse—Corrupt Practices Act, 1883, sec. 34.

5. *Opinions* that the Court has no jurisdiction to entertain an application by a candidate under sec. 34 of the Corrupt Practices Act, 1883, for an authorised excuse for failure to make a timeous and true return of election expenses unless the petitioner admits in his petition that he has contravened the statute. *Clark v. Sutherland*, Dec. 2, 1896, p. 183.
6. Where a candidate applies under sec. 34 of the Corrupt Practices Act, 1883, for an authorised excuse for failure to make a timeous and true return of election expenses, any elector in the constituency has a title to appear and oppose the application. *Clark v. Sutherland*, Dec. 2, 1896, p. 183.
7. In a petition by a Member of Parliament, who had acted as his own election agent, for an authorised excuse for failure, *inter alia*, to enclose certain vouchers with the return of his expenses, and to insert in the declaration the amount of his expenses in the election, *held*, after a proof, that the failure was due to inadvertence, and not to want of good faith, and excuse *allowed*. *Clark v. Sutherland*, March 18, 1897, p. 821.
8. It is incompetent to amend a petition by a candidate at a parliamentary election, for an authorised excuse for errors in his return of election expenses, by adding a statement of an additional error requiring an excuse, without notice being given to the constituency. *Clark v. Sutherland*, March 18, 1897, p. 821.
9. *Held* that it is competent for a person opposing a petition by a candidate

ELECTION LAW—*Continued.*

for an authorised excuse for certain errors in his return of election expenses to lead evidence of other errors in the return, with the view of shewing that those specified were not due to mere inadvertence. *Clark v. Sutherland*, March 18, 1897, p. 821.

EXECUTOR. *Confirmation—Competition—Testament—"My heir."*

1. A holograph will provided, *inter alia*,—"My cousin Thomas Forrest is to be my heir." Various legacies were then left. Mrs Jerdon, the testator's sister, craved to be appointed executrix-dative *qua* next of kin of the testatrix. Thomas Forrest, who was thirty-eight years of age and had lived with the testatrix since he was three years old, craved confirmation as executor-nominate, or as executor-dative *qua* general donee and universal legatory of the deceased. The Court preferred the claim of Mrs Jerdon, on the ground that it was not clear from the terms of the will that the testatrix had conferred on Thomas Forrest the character claimed by him. *Jerdon v. Forrest*, Jan. 23, 1897, p. 393.

Title to Sue—Declarator of marriage—Breach of promise and seduction—Process—Summons—Conclusions.

2. A woman brought an action against a man concluding for declarator of an irregular marriage, "but if it shall be found that the pursuer is not married to the defender, then and in that case" for £3000 as damages for breach of promise and seduction. The pursuer pleaded that decree of declarator ought to be pronounced, "or alternatively" that decree ought to be pronounced "in terms of the alternative conclusions of the summons." While the action was in dependence the pursuer died, and her executor craved leave to be sisted as pursuer, stating that he proposed to insist in the conclusion for damages only. The defender objected, on the ground that the conclusion for damages was in terms conditional on decree of absolvitor in the declarator being pronounced, and that the executor was not *in titulo* to move for declarator. *Held* that the conclusions were truly alternative, and that the executor was entitled to be sisted to the effect of pursuing the conclusion for damages. *Green or Borthwick v. Borthwick*, Dec. 8, 1894, p. 211.

Settlement of action by majority of executors—Title of non-consenting executor to continue action.

3. Where an action on behalf of an executry estate had been raised by the executors, six in number, and the case had been settled by joint minute for five executors without the consent of the sixth, and decree of absolvitor pronounced, *held* that the executor who did not consent to the settlement had no title to continue the action, no unfairness on the part of the other executors being alleged. *Scott v. Craig's Representatives*, Jan. 29, 1897, p. 462.

EXPENSES. *Awarding—Amendment of record—Court of Session Act, 1868, sec. 29.*

1. Circumstances in which the Court allowed the appellant in a Sheriff Court action to amend his defences, on condition that he should find caution for the sum of £30, to meet the expense of the prior proceedings in the case in the event of it turning out that he was in fault in not originally proponing the defence embodied in the proposed amendment. *Paton v. M'Knight*, Feb. 23, 1897, p. 554.

Awarding—Decree by default—Appeal—Reponing.

2. No appearance being made for the pursuer of an action in a Sheriff Court at a diet of debate, the Sheriff-substitute assoilzied the defender. The pursuer appealed. *Held* that, as a condition of being allowed to proceed with the action, the pursuer must pay the whole expenses of the defender in both Courts. *M'Carthy v. Emery*, Feb. 27, 1897, p. 610.

EXPENSES—Continued.*Awarding—Ministerial Procedure—Extension of burgh boundaries.*

3. The Court having, in a petition under section 13 of the Burgh Police (Scotland) Act, 1892, recalled a deliverance of a Sheriff confirming a resolution of the magistrates of a burgh to extend the boundaries of the burgh and refused to confirm the resolution, further *refused* a motion by the successful petitioner for expenses, Lord Young observing that the proceedings were not a litigation. *White v. Magistrates of Rutherglen*, Jan. 28, 1897, p. 446.

Awarding—Recall of Inhibition—Refusal of debtor to discharge inhibition.

4. A creditor raised an action for payment of a debt and used inhibition on the dependence, but he acceded to a composition arrangement on his debtor's estate, and the summons was not called. He subsequently refused to discharge the inhibition on payment of the composition being tendered. In a petition at the instance of the debtor, *held* that he was entitled to have the inhibition discharged, and that the creditor was liable for the expenses of the application. *Robertson v. Park, Dobson, & Co.*, Oct. 20, 1896, p. 30.

Awarding—Tender—Delay in accepting.

5. In an action of damages for personal injury, the pursuer was found liable in part of the expenses incurred between the date on which a tender was made and the date of acceptance in respect of undue delay in accepting the tender. *M'Laughlin v. Glasgow Tramway and Omnibus Co., Limited*, June 30, 1897, p. 992.

Awarding—Tender—Conditional Tender.

6. *Question*, whether an offer of a sum by the defender in an action of damages, accompanied by a declaration that the pursuers' case was unfounded and untrue, was a tender entitling the defender to expenses in the event of the offer being declined, and the sum awarded as damages being less than the sum mentioned in the offer. *Thomson & Co. v. Dailly*, July 20, 1897, p. 1173.

Awarding—Expense of debate on relevancy at adjustment of issues.

7. Where, at the adjustment of issues in an appeal from the Sheriff Court for jury trial, the defender objected to the relevancy of the action, and the Court repelled the objection, *held* that the pursuer was entitled to the expenses of the discussion. *Warwick v. Caledonian Railway Co.*, Jan. 28, 1897, p. 429.

Procedure—Reclaiming Note—Time for objecting to Lord Ordinary's award.

8. When a party reclaiming objects to an interlocutor not only as wrong on the merits but also as wrong in finding the claimer liable in expenses, even if right on the merits, he must state his objection as to expenses in opening on the reclaiming note. *Clark v. Sutherland*, March 18, 1897, p. 821.

Procedure—Title to Sue—Trust.

9. A, who had as trustee on a sequestrated estate raised an action and obtained from a Lord Ordinary a decree for expenses, was afterwards removed from office. The defender having reclaimed, and the new trustee having declined to sist himself, A presented an application to be sisted on the ground that he had an interest in the question of expenses. The Court *refused* the application. *Mackenzie v. Fowler*, July 13, 1897, p. 1080.

Parties liable—Dominus Litis—Parent and Child.

10. An action of damages on account of personal injuries to a pupil boy was raised by the father of the boy "as tutor and administrator-in-law of" the boy. During the dependence of the action the boy became a minor, and thereafter an interlocutor was pronounced sisting him, "with consent and concurrence of" his father, "as his curator and administrator-in-law, as pursuer in room and in place of the said" father. The

EXPENSES—Continued.

defenders having obtained a verdict, the Lord Ordinary (Kyllachy), on their motion, *granted* decree for expenses against the father up to the date of sisting the boy as pursuer, and against the father and the boy as pursuer, and against the father and the boy conjunctly and severally subsequent to that date. *Wilkinson v. Kinneil Cannel and Coking Coal Co., Limited*, July 1, 1897, p. 1001.

Parties liable—Judicial Factor—Decree against defender “as judicial factor”—Personal Liability.

11. A judicial factor upon the estate of a person deceased defended an action brought against him “as judicial factor” by a creditor of the deceased. An interlocutor was subsequently pronounced ordaining the defender “as judicial factor” to make payment to the pursuer of £159, and finding the defender “as judicial factor” liable in expenses to the pursuer. *Held* that the interlocutor could not be construed as imposing on the defender personal liability for expenses. *Craig v. Hogg*, Oct. 17, 1896, p. 6.

Parties liable—Judicial Factor.

12. In an action brought by a judicial factor in which he was unsuccessful, the Court *adhered* to a judgment of the Lord Ordinary *finding*, in the circumstances of the case, the pursuer liable in expenses, without the qualifying words “as judicial factor.” *Paterson’s Judicial Factor v. Paterson’s Trustees*, Feb. 4, 1897, p. 499.

Parties liable—Cautioner—Suspension—Caution for expenses—Personal liability of cautioner in suspension—Trust.

13. The complainer in a suspension of a charge upon a bill having died, his widow, one of his trustees, was at her own request sisted as complainer in his place as his “trustee,” and found caution, her cautioner becoming bound “that she shall, as trustee foresaid, pay” the sum in the bill “in full in the event of there being a sufficiency of trust funds, or rateably along with the other creditors” of the truster “in the event of his estate proving insufficient to pay his creditors in full,” and also “that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses in case of wrongous suspending.” The Court ultimately repelled the reasons of suspension, and found the complainer liable in expenses “as trustee.” In an action by the charger against the cautioner, *held* that whatever the liability of the complainer might be, the cautioner was liable to the charger in payment of the whole expenses. *Stewart v. Forbes*, July 15, 1897, p. 1112.

Parties liable—Trustee—Personal Liability.

14. In an action of multiplepounding raised in name of a trustee, a claimant objected to the condescendence of the fund *in medio*, in so far as the trustee took credit for a payment he had made to C, on the ground that C had no valid claim. The trustee maintained that C had a valid claim. The Court sustained the objection. *Held* that the trustee was personally liable in expenses to the objector, and that he was not entitled to charge his own expenses against the objector’s share of the fund *in medio*, reserving to the pursuer all right of relief competent to him against other persons. *Buttercase & Geddie’s Trustee v. Geddie*, July 16, 1897, p. 1128.

Taxation—General Finding—Objection to Auditor’s report—A. S. July 15, 1876, General Regulation 5.

15. The Court having decerned in favour of the pursuers in an action and found them entitled to expenses, the defenders, on the motion for approval of the Auditor’s report, objected that the Auditor should not have allowed the pursuers the expenses of the proof, in which they had been unsuccessful. *Held* that the objection came too late. *Electric Construction Co., Limited, v. Hurry & Young*, Feb. 6, 1897, p. 525.

Taxation—Sheriff—Action ad factum præstandum and for damages—

EXPENSES—Continued.

Conclusion ad factum præstandum dropped—A. S., 4th December 1878—General Regulations 1, 3, and 4.

16. In an action raised in a Sheriff Court for implement of a contract and for damages, the Sheriff-substitute, on the joint application of the parties before the record was closed, authorised the pursuer to accept another tender for the contract. The pursuer ultimately obtained decree in the Court of Session for payment of £11, 10s. of damages, with expenses. *Held* that the action having at the outset been converted into a mere action for damages, the Auditor was bound to tax the pursuer's expenses in the Sheriff Court on the lower scale, no direction having been given to the contrary. *Murray v. Rennie & Angus*, July 3, 1897, p. 1026.

Decree in name of Agent-disburser.

17. A, having been found liable to B in the expenses of an appeal to the Court of Session in an action which he had raised in the Sheriff Court against B, objected to decree going out in the name of the agent-disburser, on the ground that in a prior action with B, relating to the same matter, and tried in the same Sheriff Court, which was pending when the second action was brought, he had obtained decree for expenses against B which had not been paid, and which he maintained should be set off against the expenses in which he had been found liable. The decree in the prior action had been granted and extracted before the appeal in the second action came into Court. *Held* that the agent-disburser in the appeal was entitled to decree for expenses in his own name, in respect that at the date of the appeal the prior action was no longer pending. *Paolo v. Parias*, July 3, 1897, p. 1030.

Charging Order—Law-Agents and Notaries-Public (Scotland) Act, 1891 sec. 6.

18. The liferentrix under a trust-settlement having obtained a decree against the trustees ordaining them to restore to the trust-estate a sum of £104, which had been lost through the fault of the trustees, her law-agents presented an application for a charging order under the above section on the £104 for extrajudicial expenses. Owing to the payment of the principal and interest of preferable debts, the liferentrix had received nothing under her liferent, and she would receive nothing if she died before these debts had been paid off. The Court *refused* the application. *Carruthers' Trustee v. Finlay & Wilson*, Jan. 16, 1897, p. 363.

For Taxation of Law-agents' Business Accounts, see *Agent and Client*, 2, 3, 4.

For Election Expenses, see *Election Law*, 5 to 9.

FACULTIES AND POWERS. See *Succession*, 8, 11, 15, 18.

FREE AND LIFERENT. See *Marriage-Contract*, 1, 2, 3—*Succession*, 10 to 13.

FISHINGS. *Width of cruives—Old decree regulating width—Subsequent regulation by Commissioners—Statute—Possession—Salmon Fisheries (Scotland) Act, 1862, sec. 6, subsec. 6—Salmon Fisheries (Scotland) Act, 1868, Schedule F.*

1. *Held* that a proprietor of cruive fishings under Crown charters of ancient date, which did not specify the width of the cruives, who had since 1774 exercised his right in accordance with a finding of the Court of that date (in an action of declarator) that the cruives should not be less than 37 inches in width, was not exempted from the regulation in schedule F by the proviso in subsec. 6 of the Salmon Fisheries (Scotland) Act, 1862. *Duke of Fife v. George*, Feb. 23, 1897, p. 549.

River—Cruives.

2. The proprietor of lands on both banks of a river and of the cruive fishings thereon, in an action of declarator in 1774, was found entitled to

FISHINGS—*Continued.*

keep the cruives at a width of 37 inches, and to withdraw water from the river at the cruive dyke by a lade for the purpose of driving a mill, the entry of the lade to be two feet above the bed of the river. By the Salmon Fisheries Act, 1868, cruives were required to be four feet wide. In a special case presented in 1896, *held* that the proprietor was bound, when required by the Fishery Board, to widen the cruives to four feet, although it was admitted that the change would diminish the flow of water in the lade. *Duke of Fife v. George*, Feb. 23, 1897, p. 549.

See *Justiciary Cases*, 33, 34.

FOREIGN. *Arrestment.*

1. Competition as to right to moveables in warehouse in Scotland. *Robertson & Baxter v. Inglis*, March 18, 1897, p. 758.

Maritime Law.

2. The maritime law of Scotland is the same as that of England. *Currie v. McKnight*, Nov. 16, 1896, H. L., p. 1. See also ship "Blairmore" Co., Limited, v. Macredie, June 4, 1897 p. 893.
- Trust—Statute—Trusts (Scotland) Act, 1867—English Trust.*
3. The Trusts (Scotland) Act, 1867, does not apply to English trusts. *Carruthers' Trustees—Allan's Trustees*, Dec. 11, 1896, p. 238.

See *Bankruptcy*, 6—*Jurisdiction—Process*, 9—*Trust*, 11, 12, 13.

FORESHORE. See *Superior and Vassal*, 2 to 5.

FORISFAMILIATION. See *Poor*, 2.

FRANCHISE. See *Election Law*.

FRAUD. *Reduction—Restitutio in integrum—Relevancy—General averments of fraud—Mora.*

1. The City of Glasgow Bank went into liquidation in 1878, and in 1879 A, one of the contributories, settled with the liquidators, and was discharged of his liabilities to the bank. In 1896 the Assets Company, which had taken over the assets of the bank, brought an action against A's testamentary trustees concluding for reduction of the discharge, or, alternatively, for damages. The pursuers averred that A had fraudulently concealed from the liquidators items belonging to him which the pursuers specifically mentioned, and in addition "other assets belonging to him and money in his possession to the extent of at least £40,000." The defenders pleaded (1) that the reductive conclusion was incompetent, in respect that *restitutio in integrum* was impossible; and (2) that the general averment of fraudulent concealment was irrelevant for want of specification. The Court allowed a proof before answer. *Assets Co., Limited, v. Shirres' Trustees*, Jan. 28, 1897, p. 418.

Alleged fraudulent execution of executory contract.

2. Competency of remitting, without consent of parties, to a man of skill to report as to alleged fraudulent failure properly to execute certain drainage work, and thereafter decerning for the execution (at the cost of the contractor) of such work as the reporter might find to be defective. *Magistrates of Kilmarnock v. Reid*, Jan. 22, 1897, p. 388.

Contract induced by fraud of third party.

3. Question, whether a person, who has been induced to enter into a contract by the fraud of a third person, is entitled to be relieved of the contract by the third party, or is only entitled to damages. *Thin & Sinclair v. Arrol & Sons*, Dec. 3, 1896, p. 198.

See *Company*, 1, 2.

FRAUDULENT BANKRUPTCY. See *Justiciary Cases*, 25 to 29.

GROUND-ANNUAL. See *Superior and Vassal*, 9.

GUILD (DEAN OF). See *Burgh*, 5 to 9.

HARBOUR. *Liability of Harbour Trustees—Ship injured by storm while lying in berth assigned by harbour-master.*

1. In an action of damages by the owner of a steamship against Harbour Trustees, on the ground that the harbour-master had wrongfully directed the removal of the vessel to a berth which was known to be unsafe, *held* that the damage was due to the extraordinary violence of the storm, and not to any fault on the part of the harbour-master in fixing the berth, and that the defenders were not liable. *Niven v. Ayr Harbour Trustees*, June 4, 1897, p. 883.

Harbour Rates—Real or Heritable Security—Trusts (Scotland) Amendment Act, 1884, sec. 3 (b), 10 and 12.

2. A curator bonis lent a sum to Greenock Harbour Trustees, a corporation consisting of the Magistrates and Council, and nine elected trustees, on a debenture, in which they assigned to the creditor "the rates, duties, and other revenues of the trust." *Held* that the investment was not on real security nor on a debenture granted by a municipal corporation in the sense of the Trusts (Scotland) Amendment Act, 1884. *Cowan's Trustees v. Ferrie's Curator Bonis*, Feb. 26, 1897, p. 590.

HERITABLE AND MOVEABLE. See *Succession*, 2.

HERITORS. See *Church*, 2.

HOMOLOGATION. See *Minor and Pupil*, 4.

HUSBAND AND WIFE. *Constitution of marriage—Declarator of marriage—Breach of promise and seduction—Title to Sue—Executor—Process—Summons.*

1. A woman brought an action against a man concluding for declarator of an irregular marriage, "but if it shall be found that the pursuer is not married to the defender, then and in that case" for £3000 as damages for breach of promise and seduction. The pursuer pleaded that decree of declarator ought to be pronounced, "or alternatively" that decree ought to be pronounced "in terms of the alternative conclusions of the summons." While the action was in dependence the pursuer died, and her executor craved leave to be sisted as pursuer, stating that he proposed to insist in the conclusion for damages only. The defender objected, on the ground that the conclusion for damages was in its terms conditional on decree of absolvitor in the declarator being pronounced, and that the executor was not *in titulo* to move for declarator. *Held* that the conclusions were truly alternative, and that the executor was entitled to be sisted to the effect of pursuing the conclusion for damages. *Green or Borthwick v. Borthwick*, Dec. 8, 1896, p. 211.

Husband's liability for wife—Proof.

2. Whether refusal of wife to allow child to be vaccinated was refusal of husband in the sense of the Vaccination (Scotland) Act, 1863, sec. 18. *Cockett v. Beattie*, June 8, 1897, Just. Cases, p. 62.

Capacity of married woman.

3. *Held* that a married woman is disqualified for acting as the curator of a minor. *Chalmers' Trustees v. Sinclair*, July 10, 1897, p. 1047.

Divorce—Reclaiming Note—Competency.

4. *Held* that it was competent for the defender in an action of divorce for adultery, who had appeared by counsel, but had not lodged defences or contested the case on the merits, to reclaim against the interlocutor of the Lord Ordinary granting decree of divorce. *Ross v. Ross*, July 3, 1897, p. 1029.

Divorce—Adultery—Relevancy—Latitude as regards time.

5. In an action of divorce by a husband against his wife on the ground of adultery the pursuer averred that the defender had committed adultery with persons named "during" periods which extended over from one year to three years, but specified no precise date or occasion within the

HUSBAND AND WIFE—Continued.

several periods. The Court *refused* to allow a proof of these averments. *Soeder v. Soeder*, Jan. 5, 1897, p. 278.

Jurisdiction—Domicile—Separation.

6. In an action of separation and aliment brought by a wife residing in Scotland against her husband residing in England, evidence on a consideration of which it was *held* that the defender had never lost his Scottish domicile, and that the Court had jurisdiction. *Hood v. Hood*, June 24, 1897, p. 973.

INCOME-TAX. See *Revenue*, 3 to 6.

INDICTMENT. See *Justiciary Cases*, 25 to 28.

INHIBITION. Petition for recall—Expenses.

1. A creditor raised an action for payment of a debt and used inhibition on the dependence, but he acceded to a composition arrangement on his debtor's estate, and the summons was not called. He subsequently refused to discharge the inhibition on payment of the composition being tendered. In a petition at the instance of the debtor, *held* that he was entitled to have the inhibition discharged, and that the creditor was liable for the expenses of the application. *Robertson v. Park, Dobson, & Co.*, Oct. 20, 1896, p. 30.

Sale of heritage—Objection to title—Obligation to clear record.

2. In an action by a purchaser of heritage for implement of an obligation by the seller's agents to produce searches shewing a clear record, the defenders tendered searches which disclosed two inhibitions used against the seller prior to the date of the disposition by him. The defenders alleged that the inhibitions were invalid. *Held* that whether the inhibitions were or were not valid, the defenders were bound to implement their obligation to clear the record by having them discharged. *Dryburgh v. Gordon*, Oct. 15, 1896, p. 1.

INSURANCE. Fire Insurance—Agreement to insure—Occurrence of fire before premium paid—Payment to agent—Relevancy.

1. In action brought against an insurance company to recover loss arising from a fire which took place in May, the pursuer averred that in April he "insured with the defenders' agent A certain subjects, that a policy was duly prepared by the defenders, and the premium due thereunder was paid to A as defenders' agent, who has remitted the sum to them less the usual commission allowed for obtaining the insurance and collecting the premium as the agent of the defenders." The Court *dismissed* the action as irrelevant on the ground that the pursuer did not aver that the policy had been delivered or that the premium had been paid prior to the fire, and that A was authorised to receive payment on behalf of the company. *M'Elroy v. London Assurance Corporation*, Jan. 6, 1897, p. 287.

Marine Insurance—Valued Policy—Total Constructive Loss.

2. The question whether a ship, insured under a valued policy, is a total constructive loss or only a partial loss, is to be determined by the state of matters existing at the date when action on the policy is raised, and not by the state of matters at the date of notice of abandonment, and that whether the state of matters at the date of the action is due to accident, or the intervention of third parties, or to the exertions of the insurers themselves. *Ship "Blairmore" Co., Limited, v. Macredie*, June 4, 1897, p. 893.

Accident Insurance—Condition—Wilful, wanton, or negligent exposure to unnecessary danger.

3. A policy of insurance against accidental death or injury excepted from the risks covered by the policy accidents to the insured "whilst . . . wilfully, wantonly, or negligently exposing himself to any unnecessary

INSURANCE—Continued.

danger." The insured, who was an expert swimmer, was drowned when bathing alone from a boat in a Highland loch on an evening at the end of April. *Held* that the act of the deceased in bathing in the circumstances described was not of so manifestly dangerous a character as to exclude a claim under the policy. *Sangster's Trustees v. General Accident Insurance Corporation, Limited*, Oct. 28, 1896, p. 56.

Accident Insurance—Blood-poisoning—Proof—Confidentiality—Medical practitioner refusing to disclose patient's name.

4. An insurance company granted a policy in favour of a medical practitioner whereby they agreed to compensate him if he should "sustain any bodily injury caused by violent, accidental, external, and visible means operating accidentally on the person of the insured, and capable of direct proof." An indorsation bore that the policy "covered compensation for blood-poisoning which is the result of an accidental injury within the meaning of the policy." In an action upon the policy for compensation, the pursuer alleged that, in operating on a patient on 14th August 1894, he accidentally inflicted a slight wound on his left hand, and that he then received syphilitic blood-poisoning. The pursuer proved that, on 14th August, while performing a uterine operation, he scratched a finger on his left hand with the curette he was using, and that about twelve days after symptoms of syphilitic poisoning shewed themselves. Several medical witnesses deponed that they had no doubt that the place of inoculation was the wound on the finger. The pursuer led no evidence to shew that the patient on whom he operated was syphilitic, other than his own testimony and the medical evidence that the place of inoculation was the wound. He deponed that his father had been treating the patient for syphilis, but he did not call him as a witness, and he refused to disclose the name of the patient to the defenders, on the ground that it would be a breach of professional duty for him to do so. *Held* that the pursuer had failed to prove by the best available evidence that the patient was suffering from syphilis, and so capable of conveying the poison to him, and that the defenders were entitled to absolvitor. *A B v. Northern Accident Insurance Co., Limited*, Dec. 11, 1896, p. 258.

Accident Insurance—Conditions as to notice of accident—Post-mortem Examination—Waiver.

5. A policy of accident insurance with an insurance company provided that it should be a condition precedent to recovery that notice should be given within fourteen days of the accident, and that in the case of death the representatives should agree to a *post-mortem* examination if required by the insurers. The insured met with an accident and died about a month afterwards. Notice of the accident was not sent to the company till three days before his death. After the death the company wrote to the widow:—"In accordance with the conditions of our policy, we desire to have a *post-mortem* examination of the deceased." The company did not inform the widow that they intended to reserve the objection to want of timeous notice. The widow gave her consent to the *post-mortem* examination, which took place accordingly. In an action on the policy brought by the widow as executrix *held* that the company, by demanding a *post-mortem* examination, had waived the defence of want of timeous notice. *Donnison v. Employers' Accident and Live Stock Insurance Co., Limited*, March 10, 1897, p. 681.

Insurance of Debenture in Mortgage Company—"Failure to pay."

6. An insurance company guaranteed to B payment of £600 lent by him to a mortgage company on debenture, repayable on 1st June 1897, "in the event of failure to pay on the part of the debtors." The policy contained the conditions that B should pay a premium of £2, 5s. on 1st June in each year, and that the policy should be void in the event

INSURANCE—*Continued.*

of a premium remaining unpaid for fourteen days. In 1893 the mortgage company went into liquidation, and a reorganisation scheme was assented to by B in July 1894, the insurance company giving their consent in a letter to B, which bore, "This consent will not prejudice your claim under the insurance of your debentures of the" original mortgage company. By this scheme the assets and liabilities of the original mortgage company were transferred to the new company, and B exchanged the debenture which he held for the new company's debentures, which did not mature until 1904. B did not pay the premium payable on 1st June 1895. In July 1895 the insurance company went into liquidation, and B lodged a claim for the amount of the debenture. *Held* that there could be no "failure to pay" on the part of the debtors in the sense of the policy until June 1897, when the original debenture became payable, and that the policy had lapsed through B's failure to pay the premium due on 1st June 1895. *Liquidators of Employers' Insurance Co. of Great Britain, Limited, v. Benton*, June 9, 1897, p. 908.

See *Revenue*, 1, 2.

INTERDICT. *Competency of declarator in process of interdict.*

In a petition by a railway company for interdict to prevent a hotelkeeper, by himself or his servants, entering the station to meet customers arriving by train, except as permitted by the company, held that the pursuers were entitled to a declaration that, subject to any order or regulation which might thereafter be made by the Railway Commissioners, the defender, as tenant of his hotel, had no right to enter by himself or his servants, except with leave of the pursuers, and under such conditions as they might prescribe, and that in respect of the declaration it was unnecessary to dispose of the prayer for interdict. *Perth General Station Committee v. Ross*, July 27, 1897, H. L., p. 44.

See *Nuisance—Trade-Mark*, 3.

INTEREST. *Reparation—Mora—Acceptance of interest as bar to claim.*

1. Action of damages on account of delay in payment of money by trustees—Acceptance of interest as a bar to claim. *Roissard v. Scott's Trustees*, May 21, 1897, p. 861.

Agreement to pay share of profits to trustee as a sinking fund to secure debentures—Interest of sinking fund.

2. A company by an agreement entered into with a trustee for future debenture-holders became bound each year "to accumulate as a sinking fund in the hands of" the trustee a proportion of its free annual profits for securing and paying the debentures, the trustee being authorised to invest the trust funds in his hands from time to time. *Held* that the interest derived from the funds so invested by the trustee did not fall to be credited to the company as part of its annual profits, but that the trustee was bound to accumulate it with the funds forming the sinking fund. *Arizona Copper Co., Limited, v. London Scottish American Trust, Limited*, March 5, 1897, p. 658.

See *Trust*, 5, 6.

JUDGE. See *Administration of Justice*, 1.

JUDICIAL FACTOR. *Powers—Curator Bonis.*

1. Power to compromise claims relating to ward's moveable estate. *Scott v. Craig's Representatives*, Jan. 29, 1897, p. 462.

Curator Bonis to Minor—Investment of Curatorial Funds—Discharge—Pupils Protection Act, 1849, sec. 13.

2. *Held* that the passing by the Accountant of Court—at his annual audit of a judicial factor's accounts under section 13 of the Pupils Protection Act, 1849—of investments made by a judicial factor does not

JUDICIAL FACTOR—*Continued.*

relieve the factor from responsibility for improper investments. *Annan v. Annan's Curator Bonis*, May 14, 1897, p. 851.

See *Expenses*, 11, 12, 13—*Trust*, 9.

JURISDICTION. *Rectification of Register of Trade-Marks—Patents, Designs, and Trade-Marks Act*, 1883.

1. *Held* by Lord Kincairney, Ordinary, that he had jurisdiction to entertain a petition for rectification of the Register of Trade-Marks by a person aggrieved. *Herbert v. Cowie Brothers & Co.*, Jan. 16, 1897, p. 361.

Reconvention—Foreign.

2. C., a domiciled Englishwoman, brought a note of suspension to have D., the holder of a bill which bore to be accepted by her, interdicted from noting, protesting, or charging upon it. She stated that she was afraid that D., if not prevented, would protest the bill, and having registered the protest and taken out a certificate of registration in terms of the Judgments Extension Act, 1868, would proceed to attach her effects in England. In her condescendence and pleas she set forth various objections to the validity of the bill. D. having brought an action against C. for the amount of the bill, she pleaded "no jurisdiction." *Held* that the defender had not rendered herself liable to the jurisdiction of the Court *reconventionne* in respect that she had brought the note of suspension of necessity, to protect herself, and with the object of excluding the jurisdiction of the Court. *Davis v. Cadman*, Jan. 13, 1897, p. 297.

Domicile.

3. Husband and Wife—Action of Separation and Aliment. *Hood v. Hood*, June 24, 1897, p. 973.

See *Election Law*, 4—*Railway*, 1, 5, 6, 8.

JUS QUÆSITUM TERTIO. See *Public Official—Superior and Vassal*, 6 to 12.

JUSTICIARY CASES. *Judge—Declinature—Waiver—Court of Justiciary.*

1. A railway company appealed to the High Court of Justiciary against a judgment of a Sheriff acquitting a person of a contravention of one of the company's statutes. Two of the Judges proponed a declinature on the ground that they were shareholders in the company. *Question*, whether it was competent for the parties to waive the declinature by joint minute. *Caledonian Railway Co. v. Ramsay*, March 12, 1897, Just. Cases, p. 48.

Civil or Criminal—Poinding—Unlawful intromission with poinded effects
—"*Summary complaint*" to Sheriff—*Concurrence of Procurator-fiscal*
—*Personal Diligence Act*, 1838, sec. 30.

2. *Held* that the imprisonment provided by the Personal Diligence Act, 1838, sec. 30, is not *in modum pœnas*, but only the usual means of enforcing an order of Court *ad factum præstandum*, and that a complaint to the Sheriff under this section is a civil process, and does not require the concurrence of the Procurator-fiscal. *Wilson v. M'Kellar*, Dec. 11, 1896, p. 254.

Civil or Criminal—Dogs Act, 1871, sec. 2.

3. *Held* (quashing a conviction) that the procedure for obtaining an order under the Dogs Act, 1871, sec. 2, is of a civil, not of a criminal, character, and therefore that it was incompetent to "convict" of the "offence" of being owner of a dog which is dangerous and not kept under proper control. *White v. Main*, July 16, 1897, Just. Cases, p. 90.

Complaint—Relevancy—Want of specification—Penalty—Summary Jurisdiction (Scotland) Acts, 1864 and 1881.

4. A complaint brought under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, set forth a contravention of two Acts of Parliament,

JUDICIARY CASES—*Continued.*

and in the prayer craved the Court to adjudge accused "to suffer the penalties provided by the said Acts." The body of the complaint contained no reference to penalties. *Held* that the complaint was *irrelevant* for want of specification. *Jackson v. Stevenson*, Feb. 6, 1897, Just. Cases, p. 38.

Complaint—Relevancy—Clerical error in citation of section of statute—Penalty—Public-House.

5. A licensed grocer was convicted upon a complaint which set forth that the accused had been "guilty of an offence against the laws for the regulation of public-houses in Scotland, particularly the Public-House Acts Amendment (Scotland) Act, 1862, sec. 2 thereof, and the Act 9 Geo. IV. cap. 58, sec. 21 thereof, in so far as" he did on a certain day within his shop, and in breach of his certificate, sell whisky to a drunk man, "whereby the said accused is liable" in certain penalties specified, which were the penalties provided by the Act 9 Geo. IV. c. 58, sec. 21. He brought a suspension, in which he alleged that the figure 1 in the reference to sec. 21 of the Act 9 Geo. IV. cap. 58, had been added to the complaint after it was served upon him. The Court *refused* the bill, holding that as the penalties were specifically set forth in the complaint it was unnecessary to refer to the Act 9 Geo. IV. cap. 58, and consequently that the error in the citation of that Act, assuming that there was an error, did not invalidate the conviction. *Cormack v. Mackenzie*, Feb. 6, 1897, Just. Cases, p. 36.

Complaint—Relevancy—Specification—Bye-law—Stage carriage.

6. A bye-law issued by the magistrates of a burgh provided that "every stage carriage . . . shall be driven at a regular and steady rate, not exceeding six miles an hour, upon the journey, except when taking up or letting down passengers." The driver of a stage carriage was convicted on a complaint, which set forth that on a certain date and in a certain street within the burgh, and on a certain journey, he did fail "to drive said stage carriage at a regular steady rate not exceeding six miles an hour." Conviction *quashed* on the ground that the complaint was irrelevant for want of specification in respect that the bye-law might be contravened in a variety of different ways, and that the complaint did not specify the particular mode of contravention which it was proposed to prove against the accused. *Drummond v. Macmillan*, Nov. 2, 1896, Just. Cases, p. 1.

Complaint—Relevancy—Statute—Repeal—Statute Law Revision Act, 1892.

7. A complaint libelled a contravention of section 26 of the Excise Licences Act of 1825, "as altered or amended by the 8th and 9th sections of the Licensing (Scotland) Act, 1853." The 8th and 9th sections of the Act of 1853 were repealed by the Statute Law Revision Act, 1892. *Held* that the complaint was irrelevant, in respect that it was founded on sections of a statute which had been repealed. *Morrison v. Stubbs*, June 8, 1897, Just. Cases, p. 61.

Complaint—Instance—Private Prosecutor—Statutory title to prosecute.

8. Where a private person has by public statute a title to prosecute summary complaints for statutory offences it is not necessary to set forth in the complaint the statute giving the person his title to prosecute. *Emslie v. Paterson*, June 12, 1897, Just. Cases, p. 77.

Citation—Error in service copy of complaint.

9. Suspension on the ground that the date of the alleged offence was erroneously set forth in the service copy of the complaint *refused*, in respect that the accused had pleaded to the charge, and the leading of the evidence had commenced before the accused took the objection. *Dunsmore v. Threshie*, June 8, 1897, Just. Cases, p. 73.

JUDICIARY CASES—*Continued.*

Citation—Name of prosecutor—Sale of Food and Drugs Act Amendment Act, 1879, sec. 10.

10. Summons citing a person to answer to a complaint under the Sale of Foods and Drugs Act, 1875, *held* to be ineffectual in respect that it did not state the name of the prosecutor, as required by section 10 of the Sale of Food and Drugs Act Amendment Act, 1879. *Burns v. Williamson*, June 8, 1897, *Just. Cases*, p. 58.

Service—Time—Sale of Food and Drugs Act Amendment Act, 1879, sec. 10.

11. *Held* that the day on which the purchase took place was not to be taken into computation in calculating the statutory period under the Sale of Food and Drugs Act Amendment Act, 1879, sec. 10. *Frew v. Morris*, March 12, 1897, *Just. Cases*, p. 50.

Procedure—Separation of trials—Oppression—Fraudulent Bankruptcy.

12. Five persons were charged upon an indictment which contained eight charges of concealing property falling under bankruptcy, with intent to defraud the creditors of the bankrupt. The charges related respectively to the bankruptcy of one or other of three persons. All the acts charged were of a similar kind and were committed about the same time, and in the same neighbourhood. Two of the bankrupts were among the accused. One of the accused (not a bankrupt) was charged under one of the charges only. Each of the remaining accused was charged under two or more of the charges, but none of the accused was charged under all the charges. At the first diet the Sheriff granted a motion for separation of the trials in the case of the accused who was charged under one charge only, and refused the motion as regarded the remaining accused, three of whom were convicted. Suspension brought on the ground that the Sheriff had acted oppressively in refusing to separate the trials *refused*. *Sangster v. H. M. Advocate*, Nov. 2, 1896, *Just. Cases*, p. 3.
13. A father and daughter were charged, on a single complaint, with selling beer without a certificate. They moved for a separation of the trials. The magistrates refused the motion. The father, having been convicted, brought a suspension on the ground that the magistrates had acted oppressively in refusing to separate the trials. Suspension *refused*. *Collison v. Mitchell*, March 12, 1897, *Just. Cases*, p. 52.

Procedure—Conduct of trial—Recall of witness.

14. After the evidence for the prosecution and for the defence in a Police Court prosecution had been concluded, and before parties had addressed the Court, the magistrates recalled one of the witnesses and put certain questions to him. Suspension on the ground that the magistrates had acted incompetently in thus examining the witness *refused*. *Collison v. Mitchell*, March 12, 1897, *Just. Cases*, p. 52.

Procedure—Record of proceedings—Productions—Summary Procedure (Scotland) Act, 1864, sec. 16.

15. At the trial on a summary complaint the accused produced a bottle of beer, with a printed label on it, and put questions regarding the contents of the bottle to certain of the witnesses adduced by him. No mention of the bottle with label was made in the record of the proceedings. The accused having been convicted brought a suspension on the ground that "production, namely, a bottle of beer," was omitted from the record. Suspension *refused* in respect that the bottle was not "documentary evidence" within the meaning of section 16 of the Summary Procedure (Scotland) Act, 1864.

At the trial on a summary complaint, charging the keeping of beer for the purpose of illegally trafficking in it, one of the witnesses for the defence deposed that the beer labelled was his property, and took out of his pocket an invoice for beer in his favour from the brewers. He

JUSTICIARY CASES—*Continued.*

retained possession of the invoice, and no mention of it was made in the record of the proceedings. The accused was convicted. In a suspension on the ground that the invoice had not been noted on the record, *held* that, as the invoice had not been made a production, it was not necessary to note it on the record. *Collison v. Mitchell*, March 12, 1897, Just. Cases, p. 52.

Procedure—Record—Noting of documents.

16. *Observations* on the necessity, in summary prosecutions, of noting in the record of the proceedings all documents which are made productions. *Burns v. Williamson*, June 8, 1897, Just. Cases, p. 58.

Procedure—Adjournment.

17. *Held* that the absence of a written record of the adjournment in a summary prosecution was a fundamental nullity which vitiated the whole proceedings. *Craig v. Tarras*, July 16, 1897, Just. Cases, p. 88.

18. On 8th October, after part of the evidence for the prosecution on a summary complaint had been led, the presiding Justices adjourned the diet till 12th October in order to consider an objection by the accused to the competency of the proceedings. At the adjourned diet the accused was convicted. He brought a suspension pleading that it was incompetent for the Justices to adjourn the diet. *Suspension refused*. *Dunsmore v. Threshie*, June 8, 1897, Just. Cases, p. 73.

Procedure—Suspension—Irregularity in procedure—Visit by Magistrate to locus—Remit to Sheriff.

19. A person was charged in the Police Court with having wilfully and maliciously scratched and defaced a door of a dwelling-house in a particular street. After evidence had been led and counsel for the parties heard, the magistrate adjourned the diet. The accused having been subsequently convicted brought a bill of suspension, averring that, between the adjournment and the conviction, the magistrate had made an independent examination of the door in question. The Court having remitted to the Sheriff to inquire into the facts, the Sheriff reported that the magistrate had at the close of the trial made up his mind to convict, but had not determined upon the sentence, and that the alleged examination by him of the door was accidental and casual. *Held* that there was no sufficient irregularity to justify a suspension of the conviction. *Sime v. Linton*, June 8, 1897, Just. Cases, p. 70.

Proof—Rape—Evidence of woman's unchastity.

20. In a trial for rape or assault with intent to ravish, while it is competent, on due notice being given, to attack the woman's character for chastity by putting questions to herself, or to prove her general bad repute at the time of the alleged offence, or to prove that she had recently yielded her person voluntarily to the accused, it is not in general competent to prove individual acts of unchastity on her part with other men. *Dickie v. H. M. Advocate*, July 15, 1897, Just. Cases, p. 82.

Conviction—Alternative charge and general conviction.

21. Suspension on the ground that the conviction was a general conviction upon an alternative charge *repelled*, in respect that the charge was not alternative, but was a charge of committing the same statutory offence in two ways. *Gammel v. Weir*, Jan. 28, 1897, Just. Cases, p. 23.

Conviction—General Statutory Charge under two subsections of same section.

22. Conviction *suspended*, in respect that it was a singular conviction upon a complaint charging two separate and distinct offences. *Aitchison v. Neilson*, March 12, 1897, Just. Cases, p. 44.

Conviction—Penalty—Omission of statutory award of penalty—Vaccination (Scotland) Act, 1863 (26 and 27 Vict. c. 108), sec. 26.

23. A person charged, at the instance of the inspector of poor of the parish,

JUSTICIARY CASES—*Continued.*

with a contravention of the Vaccination (Scotland) Act, 1863, pleaded guilty and was convicted by the Sheriff. The conviction adjudged the accused to pay a penalty of 20s., but contained no award and order regarding the penalty in terms of section 26 of the statute. In a suspension, *held* that the conviction fell to be quashed in respect that it contained no award and order in terms of section 26. *M'Callum v. Barrowman*, Nov. 3, 1896, Just. Cases, p. 15.

Sentence.

24. Oppression. *Sime v. Linton*, June 8, 1897, Just. Cases, p. 70.

Offence—Fraudulent Bankruptcy—“Intent to defraud”—Debtors (Scotland) Act, 1880, sec. 13—Criminal Procedure (Scotland) Act, 1887, sec. 8.

25. It is unnecessary to set forth intent to defraud in an indictment charging a sequestrated bankrupt with a contravention of the 13th section of the Debtors (Scotland) Act, 1880, by concealing his property. *Taylor v. H. M. Advocate*, June 8, 1897, Just. Cases, p. 65.

Offence—Fraudulent Bankruptcy—Indictment—Concealment of property—Relevancy—Debtors (Scotland) Act, 1880, sec. 13.

26. An indictment under the Debtors (Scotland) Act, 1880, after setting forth that the accused had been sequestrated, and that within four months next before the presentation of his petition for sequestration he had concealed his property, proceeded,—“and thus he did not, to the best of his knowledge and belief, fully and truly disclose the state of his affairs, in terms of the Bankruptcy (Scotland) Act, 1856, and did not deliver up to his said trustee all his property which he was required by law to deliver up, contrary to the Debtors (Scotland) Act, 1880, section 13, subsection (a), 1, 2, and 3 thereof.” It was objected that the statement that the bankrupt had concealed his property was not libelled as a substantive charge, but was introduced merely as explaining the mode in which he committed the offences of failing to disclose and failing to deliver his property to the trustee. *Held* that this was a good charge of concealment of his property by the bankrupt under subsection 3 of section 13 of the Act. *Taylor v. H. M. Advocate*, June 8, 1897, Just. Cases, p. 65.

Offence—Fraudulent Bankruptcy—Property and all documents in control of the bankrupt—Relevancy—Debtors (Scotland) Act, 1880, sec. 13, subsec. 2.

27. *Held* that in an indictment under subsections 1, 2, and 3 of section 13 of the Debtors (Scotland) Act, 1880, it is unnecessary, in order to the relevancy of a charge under subsection 2, to set forth that the property which the bankrupt is alleged to have failed to deliver to the trustee in his sequestration was “in his custody or under his control.” *Taylor v. H. M. Advocate*, June 8, 1897, Just. Cases, p. 65.

Offence—Fraudulent Bankruptcy—Indictment—Specification—Locus—Debtors (Scotland) Act, 1880, subsecs. 1, 2, and 3.

28. A bankrupt was charged under the Debtors (Scotland) Act, 1880, with having concealed “in the stable in Charles Street Lane, Edinburgh, and in the dwelling-house at No. 5 Bristo Street, Edinburgh, then both occupied by Robert Forrest, cattle-dealer,” certain specified property, including a large number of articles. Objection that the *locus* was indefinite and wanting in specification *repelled*. *Taylor v. H. M. Advocate*, June 8, 1897, Just. Cases, p. 65.

Offence—Fraudulent Bankruptcy—Art and part—Aiding or abetting a fraudulent bankrupt.

29. Aiding or abetting a bankrupt or insolvent person on the eve of bankruptcy in putting away or concealing his effects with intent to defraud his creditors is a crime at common law. *Sangster v. H. M. Advocate*, Nov. 2, 1896, Just. Cases, p. 3.

Offence—Dentists Act, 1878, sec. 3—Unregistered Person—“American Dentistry”—“Dental Office.”

30. A. Emslie, a person who was not registered under the Act, placed on his

JUSTICIARY CASES—*Continued.*

door a brass plate with the inscription "American Dentistry. A. Emslie"; also another plate, with the inscription "Dental Office." *Held* (quashing a conviction) that in putting the plates on his door Emslie had not committed an offence under the Act, in respect that the inscriptions did not imply that he was registered under the Act, or that he was a person specially qualified to practise dentistry. *Emslie v. Paterson*, June 12, 1897, Just. Cases, p. 77.

Offence—Poaching—Game reserved to landlord—Verbal authority of tenant to kill rabbits—Ground Game Act, 1880, sec. 1, subsec. 1—Day Trespass Act, 1832.

31. The tenant under a lease which reserved to the landlord the game including the rabbits, hired A, who was not a servant on the farm, to kill rabbits, but did not grant written authority to A to do so. A having killed rabbits under this employment was convicted of a contravention of the Day Trespass Act, 1832. In an appeal A contended that at common law a tenant had right to employ a person to kill rabbits as vermin, and that a person in taking such employment was not bound to inquire into the terms of the lease. *Held* that, as the tenant had no right to kill rabbits except under the Ground Game Act, and as A had no written authority, the conviction was valid. *Richardson v. Maitland*, Feb. 6, 1897, Just. Cases, p. 32.

Offence—Trespass—Railway—Level Crossing—Caledonian Railway Act, 1893, sec. 37.

32. The Caledonian Railway Act, 1893, sec. 37, enacts certain penalties for trespass on the company's railways, lands, and property, subject to the proviso that no person should be subject to any penalty under this enactment unless the company proved, to the satisfaction of the Sheriff or Justices, that a public notice warning persons not to trespass had been affixed, *inter alia*, "at the level crossing (if any) nearest to the spot where such trespass is alleged to have been committed." *Held* that the term "level crossing" included private level crossings, and therefore that the company were barred from exacting a penalty for trespass under sec. 37, where the level crossing nearest to the spot where the trespass was alleged to have been committed was a private level crossing, and no notice had been affixed at that crossing. *Caledonian Railway Co. v. Ramsay*, March 12, 1897, Just. Cases, p. 48.

Offence—Fishing—Water-bailiff—Police-constable—Right to search before apprehension—Tweed Fisheries Act, 1857, sec. 37.

33. *Opinions per curiam* that water-bailiffs are not entitled to search a person whom they suspect to be guilty of illegal fishing unless they have previously apprehended him upon what they believe to be good grounds, or unless they have a warrant to search him. *Jackson v. Stevenson*, Feb. 6, 1897, Just. Cases, p. 38.

Offence—Fishing—Beam-Trawling—High and low-water marks—Herring Fishery (Scotland) Act, 1889, sec. 6.

34. The Herring Fishery (Scotland) Act, 1889, prohibits beam-trawling "within three miles of low-water mark of any part of the coast of Scotland" (except within areas to be defined by the Fishery Board). *Held* that the prohibited area includes the space between high-water mark and low-water mark. *Whyte v. Thomson*, June 8, 1897, Just. Cases, p. 55.

Review—Case stated—Refusal of inferior Judge to state case—Summary Prosecutions Appeals (Scotland) Act, 1875, secs. 3 and 5.

35. A Sheriff-substitute refused to state a case for appeal against a conviction. Note under section 5 for an order on the Sheriff-substitute to shew cause why a case should not be stated *refused* on the ground that it did not appear either from the Sheriff's certificate or from the note that any questions of law had been raised before or decided by the

JUSTICIARY CASES—*Continued.*

Sheriff-substitute, or that he had been asked to state any question of law. *Martin v. Beattie*, Jan. 27, 1897, Just. Cases, p. 21.

Review—Statutory exclusion of review—No written record of adjournment—Burgh Police (Scotland) Act, 1892, sec. 495.

36. *Held* that the absence of a written record of an adjournment in a Police Court prosecution was a fundamental nullity which vitiated the whole proceedings, and that the conviction was not protected from review by section 495 of the Burgh Police (Scotland) Act, 1892. *Craig v. Tarras*, July 16, 1897, Just. Cases, p. 88.

Review—Appeal against judgment acquitting accused—Reversal of judgment.

37. In an appeal against a judgment of a Sheriff acquitting the accused on a complaint charging a contravention of the Herring Fishery (Scotland) Act, 1889, the Court sustained the appeal and reversed the determination of the Sheriff, but *refused* to remit the case to him with their opinion. *Whyte v. Thomson*, June 8, 1897, Just. Cases, p. 55.

LAW-AGENT. See *Administration of Justice*, 2, 3—*Agent and Client*.

LEASE. *Constitution—Agreement to transfer engineer's business with plant in consideration of annuity—Implied right to occupy premises—Rent—Summary removal.*

1. In January 1894 A, an engineer, by written agreement assigned and transferred to B "the business of engineer presently carried on" by him in certain premises named which belonged to him, "and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises whether fixed or unfixed." B, on the other hand, agreed to pay to A an annuity of £250 during his life, A having a right to resume possession of the business in the event of his annuity remaining unpaid at any time for six months. It was further provided that B should not be entitled to sell the business or any part of the plant during A's lifetime. Part of the plant consisted of heavy fixed machinery which could not be removed except at great expense and loss of time, and the business had been carried on in the same premises for upwards of twenty years. A having brought an action of summary removal against B, *held* that, as in a question between A and B, the agreement imported a lease of the premises during A's life, the rent though not specifically stated being covered by the annuity, and the defender *assolvièd*. *Thomson v. Thomson*, Dec. 18, 1896, p. 269.

Constitution—Tramway.

2. Terms of a contract between a burgh corporation and a tramway company which was held to be truly a lease and not merely a licence to use carriages with flanged wheels on certain streets. *Glasgow Tramway and Omnibus Co., Limited, v. Corporation of City of Glasgow*, March 4, 1897, p. 628.

Joint Lease—Title to Sue—Assignment pendente processu.

3. One of two persons who *ex facie* of a lease were joint tenants of a farm sent a notice of a claim to compensation to the County Council, which had taken a feu of part of the farm, the landlord having power to resume under the lease. In a suspension of proceedings for having the claim determined by arbitration the County Council pleaded, *inter alia*, that the claimant being only a joint tenant was not *in titulo* to insist in the claim. The claimant answered that he had the whole real interest in the farm, and lodged *pendente processu* an assignment in his favour by the other tenant setting forth that fact. *Opinions* that the claimant had a good title. District Committee of the Middle Ward of Lanark *v. Marshall*, Nov. 10, 1896, p. 139.

Subject—Power to resume—Feu of lands resumed—Liability of feuor to

LEASE—Continued.

compensate tenant—County Council—Public Health (Scotland) Act, 1867, secs. 39 and 116.

4. By lease of a farm dated in 1886 the landlord, *inter alia*, reserved power "to take off such part of the lands hereby let as may be considered expedient for the purpose of feuing . . . it being hereby provided that the annual value of any ground thereby taken from the said lands shall be paid to the tenants" at the rate of £4 an acre. In 1893 the landlord resumed five acres of the farm, and by private agreement feued the land so resumed to the County Council. Thereafter the District Committee of the County Council erected a hospital on this land under the powers of section 39 of the Public Health Act, 1867. In 1896 the tenant, who had since the resumption been receiving from the landlord an abatement of rent equal to £4 an acre for the land resumed, served a notice on the District Committee in which he claimed compensation for unexhausted manure, &c., and, founding on section 116 of the Public Health Act, 1867, took proceedings for having the amount of such compensation settled by arbitration. In a note of suspension and interdict brought by the District Committee, *held* that the proceedings for arbitration fell to be interdicted in respect that the tenant's only right to compensation, if he had any, was against his landlord. District Committee of the Middle Ward of Lanark v. Marshall, Nov. 10, 1896, p. 139.

Subject—Lease of water in ponds and streams leading thereto.

5. Under the lease of a distillery there was let to the tenant the distillery and a piece of land, with two ponds, "with right to the water in the said ponds, and in the streams leading thereto." A stream from the hills entered the upper pond, from which the water flowed in a stream into the lower pond. A few yards from the lower pond, but not within the land leased, was a spring, from which water percolated through marshy ground into that pond. After the date of the lease the landlord collected the water from the spring already mentioned, and from other springs, into a tank, and by means of a pipe carried part of this water to the house of another of his tenants, the remainder of the water collected in the tank passing through an overflow pipe into the pond. The tenant of the distillery brought an action to have the landlord interdicted from interfering with the water from the spring. *Held* (diss. the Lord Chancellor, *aff. judgment of Second Division*) that the tenant was not entitled to interdict, in respect that water percolating from a spring to a pond did not constitute a stream in the sense of the lease. *Held further* (by the whole House) that assuming that there was an implied obligation on the landlord not to execute any operations which would have the effect of decreasing the amount of water in the ponds, the tenant had failed to prove that the landlord's operations had this effect. Opinion (per Lord Shand) that such an implied obligation was to be inferred from the terms of the lease. *M'Nab v. Robertson*, Dec. 15, 1896, H. L., p. 34.

Subject—"All as some time occupied by" preceding tenant—*Extrinsic Evidence*.

6. A farm was let for a term of years "all as some time occupied by" B, the preceding tenant. Some years after the date of the lease a question arose as to whether a piece of rough pasture which had been possessed by the tenant since his entry was included in the subjects let. It was proved that this pasture had not been occupied by B, but the tenant deposed that before offering for the farm he had applied to the landlord's factor to shew him the boundaries, and that the factor had pointed out the pasture as included in the farm. *Held* that, assuming the accuracy of the tenant's statement, the representation made by the factor had been superseded by the description given in the lease, that B's possession was the measure of the tenant's right,

LEASE—Continued.

and that the tenant was not entitled to the ground in question. *Gregson v. Alsop*, July 13, 1897, p. 1081.

Reparation—Defect in house accepted without complaint by tenant.

7. A tenant took a house entering from a common stair fenced by two walls, but having no hand-rail. He did not complain to the landlord of the want of a rail either when he took the house or subsequently. The tenant having fallen upon the stair and received injuries which resulted in his death, his widow raised an action of damages against the landlord, on the ground that the accident was due to his fault in not having provided a hand-rail. *Held* that, as the tenant had taken the house without objection, and had never afterwards complained to the landlord, there was no fault on the landlord's part in a question with the pursuer. *Russell v. Macknight*, Nov. 7, 1896, p. 118.

Reparation—Promise of landlord to repair defect.

8. The wife of a tenant of a house raised an action against the landlord to recover damages. The pursuer averred that her husband was occupying the house as a monthly tenant; that in February 1896 he complained to the defender's factor that the ceiling was in an apparently insecure condition; that the factor admitted that the ceiling required repair, and undertook to put it right; that the complaint and undertaking were repeated in April 1896; that the pursuer's husband, in reliance on the factor's assurances, continued the tenancy; that the factor did nothing; and that in November 1896 a portion of the ceiling fell on the pursuer and severely injured her. *Held* that the action was relevant. *Shields v. Dalziel*, May 14, 1897, p. 849.

Reparation—Emerging Defect.

9. The wife of a tenant of a house was injured by falling through a wooden stair in the house, and in an action of damages at her instance against the landlord she averred that her husband had been tenant of the house for thirty years; that the steps of the stair were after the accident discovered to be in a decayed, rotten, and ruinous condition; that the defender was personally aware of the dangerous state of the stair; that the pursuer's husband had frequently asked the defender to have the stair repaired, and that he had specially done so about a month before the accident, when the stair was inspected by the defender's factor. The Court, *holding* that the averments disclosed a case for inquiry, allowed an issue for the trial of the cause. *Hall v. Hubner*, May 29, 1897, p. 875.

Reparation—Defective Drainage.

10. In an action of damages by a tenant against his landlord for loss arising from defective drainage, the pursuer averred that the drainage of the house was defective; that the subjects let were old, and that the drains had not been examined for seven years; further, that for many years prior to his occupation the premises had been occupied, and "complaints have been made to the defender by previous tenants regarding the insanitary condition of the premises." *Held* that the last averment was not sufficiently specific to be admitted to probation, and that *quoad ultra* there was no relevant averment of fault on the part of the landlord. *Baikie v. Wordie's Trustees*, July 14, 1897, p. 1098.

Reparation—Obligation of tenant to occupy premises let—Damage to premises from leaving them unoccupied.

11. The landlord of a dwelling-house raised an action of damages against the tenant, and averred that the defender, without the pursuer's knowledge, left the house for seven months entirely unoccupied and uncared for, without fire or cleaning, and exposed to damp, frost, and dirt, greatly to the permanent injury of the house and its chances of finding another tenant; that one of the water-pipes burst and ran for days, to the injury of the floor, paper, and walls; and that the windows were

LEASE—Continued.

broken because of the filthy, deserted appearance of the house, and because of its being left without protection. *Held* that the pursuer's averments were relevant. *Smith v. Henderson*, July 14, 1897, p. 1162.

Termination—Tenant possessing a farm and steelbow stock under contract of service—Landlord taking possession on death of servant—Act 1696, c. 5—Bankruptcy (Scotland) Act, 1856, sec. 110.

12. A landlord, in an agreement with G., his ground officer, agreed to give him possession of a farm from Whitsunday 1887 rent free as part of his salary, and also to hand over to him the horses and farm implements and corn crop of 1887 without payment, it being stipulated that a valuation should be made in the same way as if G. were an incoming tenant, and that a similar valuation should be made when the arrangement terminated, and any difference paid by landlord or tenant as the case might be. The agreement was yearly, and might be terminated at any Whitsunday on four months' notice. On G.'s death (on 14th May 1895) the landlord took possession of the farm, and sold the horses, &c. Within seven months after G.'s death his estates were sequestrated, and thereafter the trustee in the sequestration brought an action calling upon the landlord to account for the value of the horses, implements, and crop. He averred that at the date of his death G. was not bankrupt. *Held* that the contract was terminated by G.'s death, and that the landlord thereupon became entitled to take possession of the farm and of the horses, implements, and crop, as proprietor thereof, and that his possession was not open to challenge either under the Act 1696, cap. 5, or section 110 of the Bankruptcy Act, 1856. *Torrance v. Traill's Trustees*, March 19, 1897, p. 837.

Termination—Irritancy—Option to declare lease ipso facto null and void in event of tenant executing trust-deed—Damages for breach of contract

13. The lease of a farm in favour of A and B jointly and their respective heirs, excluding subtenants and assignees, contained a clause declaring that if the estates of the tenants, or either of them, were sequestrated, or conveyed in trust for behoof of their creditors, the lease should, in the option of the landlord, be *ipso facto* null and void. Before the end of the lease the estates of A were sequestrated. B continued solvent and offered to go on with the lease. The landlord declined to agree to this, and claimed damages for loss through diminution of rent in consequence of the premature termination of the lease. In a question as to the validity of the landlord's claim, *held* (1) that assuming A to have abandoned the lease, such abandonment did not terminate B's tenancy; (2) that the lease must be held to have been terminated by the landlord in the exercise of his option, and therefore that the landlord was not entitled to damages for breach of contract. *Buttercase & Geddie's Trustee v. Geddie*, July 16, 1897, p. 1128.

Termination—Bankruptcy—Trust for creditors—Adoption of lease by trustee.

14. Deeds on a construction of which *held* that a trustee for tenant's creditors must be held to have possessed the farm as tenant under the lease, and that he was personally liable for the rent of the year during which he had possessed. *Moncreiffe v. Ferguson*, Oct. 24, 1896, p. 47.

Termination—Condition—Forfeiture—Drunkenness—Public-House—"Doing anything which may endanger" licence.

15. By lease of a restaurant for eleven years, from 28th May 1892, it was provided that in the event of the lessee failing to conduct the business properly, or committing any breach of the licence certificate held by him for the premises, or any offence against the Public-Houses Acts or Excise laws, or permitting betting on the premises, "or doing anything which may endanger the continuance or renewal" of the licence certificate, it should be competent for the lessors to bring this lease to

LEASE—*Continued.*

a termination either immediately or at any term of Whitsunday or Martinmas thereafter. Averments in an action of declarator of forfeiture of the lease on a consideration of which the Court *dismissed* the action as irrelevant. *Noble v. Hart*, Nov. 24, 1896, p. 174.

Termination — Meliorations — Compensation — Bankruptcy — Trust for creditors.

16. By the lease of a farm, the landlord, in the event of the tenant becoming insolvent, had the option to terminate the lease, and in the event of his exercising this option he was bound to settle with the tenant as if the lease had naturally expired. Under the lease the tenant became entitled on its termination to the value of certain meliorations on buildings taken over by him from the previous tenant as the same might be fixed by arbitration, and the general regulations of the estate, which were incorporated in the lease, *inter alia*, provided,—“The outgoing and incoming tenants must settle between themselves regarding the payment of crop, manure, and other things, without any responsibility on the heritor, unless the heritor chooses to interfere.” The tenant having become insolvent and having granted a trust-deed for behoof of his creditors, the landlord terminated the lease and let the farm to a new tenant. Thereafter the landlord and the trustee entered into a reference to have the value of the meliorations on buildings and of the manure, &c., fixed. Under this reference the value was fixed at £189, 1s. The trustee having brought an action against the landlord for payment of this sum, the landlord pleaded compensation in respect of a sum of £197, 12s. 6d., being the amount of arrears of rent due by the tenant. The trustee maintained that the plea of compensation was ill founded in respect (1) that the landlord having the option under the lease of either leaving the tenant to settle with the incoming tenant for meliorations, manure, &c., or of himself settling with the tenant, the agreement under which he elected the latter course was to be regarded as constituting an obligation incurred to the trustee subsequently to the tenant's insolvency, to which (in accordance with *Taylor's Trustees v. Paul*, 15 R. 313) the doctrine of compensation was applicable; and in respect (2) that the landlord having (as the trustee averred) acceded to the trust, the trustee was vested in the tenant's right to the manure, &c., free of any obligation to compensate. *Held* that both claims arose out of the contract of lease, and that the plea of compensation fell to be sustained. *Jaffray's Trustee v. Milne*, Feb. 26, 1897, p. 602.

See Jusiciary Cases, 31—Prescription—Public Burden.

LEGITIM. *See Succession, 1.*

LIBEL (SLANDER). *See Reparation, 5 to 10.*

LICENCE. *See Lease, 15—Public House.*

LIEN. *See Ship, 1.*

LIFERENT AND FEE. *See Marriage-Contract, 1, 2, 3—Succession, 10 to 13.*

LOCAL AUTHORITY. *See Burgh—Police—Public Health.*

MALICE. *See Reparation, 5, 6, 7.*

MANDATORY. *See Process, 9.*

MARRIAGE. *See Husband and Wife.*

MARRIAGE-CONTRACT. *Constitution—Trust-deed by a woman before marriage for behoof of spouses in liferent and children in fee—Revocation—Married Women's Property (Scotland) Act, 1881.*

1. Deed executed on the day before her marriage by a woman *sui juris* which was *held* in an action brought by her, with the consent of her husband, a year after the marriage, there being no children, to be revocable by her with his consent, in respect that it was unilateral and

MARRIAGE-CONTRACT—Continued.

executed without reference to any contract of marriage, and that there were no beneficiaries in existence other than the spouses. *Watt v. Watson*, Jan. 16, 1897, p. 330.

Construction—Whether grandchildren could claim as "issue" of the marriage—Renunciation of life-ent—Alimentary Provision.

2. Terms of a marriage-contract, on a construction of which it was held (1) that the words "issue of the marriage," as used in the deed, applied exclusively to the children, and did not include grandchildren; (2) that the husband was entitled to renounce a life-ent which he enjoyed under the marriage-contract; and (3) that the trustees were bound on production of a discharge by the children, and a renunciation of his life-ent by the husband, to divide the trust-estate among the children. *M'Murdo's Trustees v. M'Murdo*, Jan. 28, 1897, p. 458; *cf. Turner's Trustees v. Turner*, March 4, 1897, p. 619.

Estate conveyed.

3. Terms of a marriage-contract, on a construction of which held that a life-ent falling to the wife under her father's settlement did not fall within the conveyance of her whole means and estate in her marriage-contract. *Neilson's Trustees v. Henderson*, July 17, 1897, p. 1135.

Vesting—Vesting of provision to children—Clause of survivorship—Power of appointment—Acceleration of vesting by deed of appointment.

4. Terms of antenuptial marriage-contract, on a construction of which held, on the predecease of the husband, that the persons entitled to the fee of the estate conveyed by the wife, in the event of a power of appointment not being exercised, were the children alive at the death of the longest liver of the spouses, and the issue of such as might have predeceased that date; that these persons were the sole objects of the power of appointment; and therefore that the trustee under the marriage-contract was bound to hold the estate conveyed by the wife until her death. *Cuming's Trustee v. Cuming*, Nov. 14, 1896, p. 153.

Discharge—Power to revoke.

5. Deed of discharge by the daughters of a marriage, under which they gratuitously renounced a share of the marriage-contract funds in absolute fee, and in lieu accepted a life-ent of the share, with a fee to their issue, whom failing, to their brothers, held to be irrevocable. *Neish's Trustees v. Neish*, Jan. 13, 1897, p. 306.

MASTER AND SERVANT. See *Lease*, 12—*Reparation*, 18 to 26.

MEDICAL PRACTITIONER. See *Insurance*, 4.

MINES AND MINERALS. See *Reparation*, 21, 23, 24—*Superior and Vassal*, 2 to 5.

MINOR AND PUPIL. Curator—Married Woman.

1. Held that a married woman is disqualified for acting as the curator of a minor. *Chalmers' Trustees v. Sinclair*, July 10, 1897, p. 1047.

Heritable and Moveable—Conversion—Sale of heritage by factor loco tutoris—Minor's power to test on proceeds of sale.

2. A minor pube may dispose by will of moveable property belonging to him as a *surrogatum* for heritage. *Brown's Trustee v. Brown*, June 18, 1897, p. 962.

Authority to pay income of legacy for behoof of minor legatee domiciled in England.

3. Petition by trustees acting under a Scottish trust-settlement for authority to pay the income of legacies to the fathers of minor beneficiaries who were domiciled in England, and from whom, according to the law of England, a valid discharge could not be obtained, refused on the ground that the Court had no power to grant the authority craved. *Atherstone's Trustees*, Oct. 24, 1896, p. 39.

MINOR AND PUPIL—*Continued.*

Homologation—Adoption—Transaction by curators without concurrence of minor.

4. The right of a proprietor of estates adjoining the sea to work coal below low-water mark was challenged by the Crown during his minority. The estates to which the minor had succeeded consisted in part of entailed and in part of unentailed lands. The administration of the unentailed estate was vested in the testamentary trustees of the minor's father, who were also the curators of the minor. These trustees, without the concurrence of the minor, entered into a transaction with the Crown, whereby they on their part accepted a lease of the whole coal below low-water mark *ex adverso* of both the entailed and unentailed estates, and the Crown agreed not to claim damages in respect of the coal which had been worked in the past. After he came of age the proprietor accepted an assignation of the lease, and subsequently applied for and obtained from the Crown a reduction of the royalty payable under, and a modification of the mode of working enjoined by the lease. When he so acted in regard to the lease, the proprietor was unaware that he had well-founded claims to the coal below low-water mark, and that the lease was the result of a compromise, involving a surrender of his claims, between his father's trustees and the Crown. In an action of declarator brought by the proprietor against the Crown upwards of fourteen years after he had reached majority, *held* (1) that the trustees having had no right to transact in regard to the entailed estates, their whole agreement with the Crown was null; and (2) that the actings of the proprietor after he came of age, while he was ignorant of his rights, did not infer homologation or adoption of the transaction, and that he was not barred from challenging it. *Wemyss' Trustees v. Lord Advocate*, Dec. 11, 1896, p. 216.

Discharge of debtors of pupils—Factor loco tutoris.

5. Pupil children, whose parents were dead, having become entitled to a sum in settlement of an action of damages, moved the Court to appoint a person to receive the money and discharge the debtors. The Court, on the objection of the debtors, *declined* to make the appointment craved, on the ground that the debtors were entitled to an effectual discharge, and that a factor loco tutoris was the proper person to grant such a discharge. *Connolly v. Bent Colliery Co., Limited*, July 20, 1897, p. 1172.

MORA. See *Expenses*, 5—*Fraud*, 1—*Public Burden*, 3—*Prescription—Railway*, 9—*Reparation*, 12.

NEGLIGENCE. See *Reparation*, 14 to 26.

NEWSPAPER. See *Reparation*, 8, 11.

NOBILE OFFICIUM. See *Bankruptcy*, 11, 15—*Burgh*, 1—*Process*, 16—*Trust*, 2, 12, 13.

NUISANCE. *Tramways—Snow and Salt—Interdict—Actio popularis.*

A tramway company which had a statutory right to use certain streets in a town for their traffic were in the practice, when a snowstorm occurred, of removing the snow from their tramway lines to the sides of the street by the use of a snow-plough, and of afterwards scattering salt upon the lines. In a suspension and interdict brought by a member of the public to have the tramway company interdicted from continuing this practice, the tramway company pleaded that the operations complained of were within their statutory rights. It was proved that the operations of the tramway company created a nuisance to the complainant and to the public using the streets for horse traffic. *Held* (in rev. judgment of the Second Division) that the statutory powers given to the tramway company to use the streets did not authorise them to create a nuisance, and that the

NUISANCE—Continued.

complainer was entitled to an interdict against the company removing snow from the tramway lines in certain streets, and from scattering salt in the manner hitherto practised by them to the nuisance of the complainer and of the public using the streets for the purpose of traffic with horses. *Ogston v. Aberdeen Tramways Co.*, Dec. 14, 1896, H. L. p. 8.

ONUS. See *Company*, 1.

PARENT AND CHILD. See *Expenses*, 10—*Minor and Pupil*, 3.

PARTNERSHIP. See *Stamp*, 3.

PLEDGE. See *Right in Security*.

POACHING. See *Justiciary Cases*, 31, 33.

POINDING. *Unlawful intromission with poinded effects*—"Summary complaint" to Sheriff—Concurrence of Procurator-fiscal—*Personal Diligence Act*, 1838, sec. 30.

Held that the imprisonment provided by the Personal Diligence Act, 1838, sec. 30, is not in *modum pœnæ*, but only the usual means of enforcing an order of Court *ad factum præstandum*, and that a complaint to the Sheriff under this section is a civil process, and does not require the concurrence of the Procurator-fiscal. *Wilson v. M'Kellar*, Dec. 11, 1896, p. 254.

POLICE. *Election of Police Commissioners—Casus improvisus—Order by Court—Burgh Police (Scotland) Act*, 1892, sec. 17.

1. A burgh administered by twelve police commissioners elected by the whole burgh was divided into four wards in 1895, and in 1896 an election fell to take place in each of the four wards for the purpose of filling the places of the four senior commissioners, who were bound to retire from office in that year. Prior to the date of the election a fifth commissioner intimated his resignation, and, as he had been elected by the burgh and not by a ward, the election of his successor did not fall to any particular ward. The commissioners applied to the Court for an order under sec. 17 of the Burgh Police Act of 1892. The Court ordered the election of an additional commissioner by the First Ward. *M'Callum v. Lochhead*, Oct. 17, 1896, p. 26.

Public Official—Resolution regarding salary of official—Jus quæsitum.

2. At a meeting the Commissioners of a burgh resolved to increase by £10 the salary of their sanitary inspector, but no official intimation of the resolution was made to him. At a subsequent meeting they cancelled their former resolution. In an action against them by the sanitary inspector, held that the pursuer had no *jus quæsitum* under the resolution, as it had not been intimated to him. *Burr v. Commissioners of Bo'ness*, Nov. 13, 1896, p. 148.

Street—Nuisance—Tramways—Snow and Salt—Interdict—Actio popularis.

3. A tramway company which had a statutory right to use certain streets in a town for their traffic were in the practice, when a snowstorm occurred, of removing the snow from their tramway lines to the sides of the street by the use of a snow-plough, and of afterwards scattering salt upon the lines. In a suspension and interdict brought by a member of the public to have the tramway company interdicted from continuing this practice, the tramway company pleaded that the operations complained of were within their statutory rights. It was proved that the operations of the tramway company created a nuisance to the complainer and to the public using the streets for horse traffic. Held (in rev. judgment of the Second Division) that the statutory powers given to the tramway company to use the streets did not authorise them to create a nuisance, and that the

POLICE—Continued.

complainer was entitled to an interdict against the company removing snow from the tramway lines in certain streets, and from scattering salt, in the manner hitherto practised by them to the nuisance of the complainer and of the public using the streets for the purpose of traffic with horses. Ogston v. Aberdeen Tramways Co., Dec. 14, 1896, H. L., p. 8.

Street—Maintenance of foot-pavement—Order by Police Commissioners—Process—Appeal—Competency—Burgh Police (Scotland) Act, 1892, secs. 143, 339.

4. *Held* that the right of appeal to the Sheriff given by section 143 of the Burgh Police (Scotland) Act, 1892, was limited to cases where the appellant's property was affected, and therefore that it was competent for an owner of property within a burgh, who had been called upon by the Police Commissioners to repair a foot-pavement which bounded but was not upon, and did not affect, his property, to appeal to the Court of Session under section 339, in respect that, his property not being affected, he had no right of appeal under section 143. *Laurenson v. Police Commissioners of Lerwick*, Nov. 10, 1896, p. 135.

Street—Footway—Statute—Construction—Burgh Police (Scotland) Act, 1892, secs. 6, 141, and 327—General Police and Improvement (Scotland) Act, 1862, sec. 149.

5. *Held* that section 141 of the Burgh Police (Scotland) Act, 1892, applied to cases where a footpath had already been constructed under the General Police and Improvement (Scotland) Act, 1862. *Police Commissioners of Govan v. Airth*, Oct. 24, 1896, p. 41.

Special Water Supply and Drainage District—Farm Buildings within Special District—Principle of Valuation—Local Government (Scotland) Act, 1894, sec. 45, subsec. 1.

6. Of a farm of 223 acres, 9 acres, including the farm-house and steadings, lay within a special water supply and drainage district. The Assessor, in valuing the 9 acres, included the value of the buildings thereon. *Held* that the farm, with the farm buildings, should have been valued as an *unum quid*, and the amount distributed proportionally to acreage. *Forbes Irvine v. Assessor of Aberdeenshire*, March 17, 1897, p. 741.

Special Water Supply District—Assessment—Public Health (Scotland) Act, 1867, secs. 89, 94, and 97—Public Health Amendment Act, 1871, sec. 1.

7. A Local Authority is not entitled to promote a scheme for the introduction of a water supply into a special water supply district the estimated cost of which will exceed the amount which they can recover under their assessing powers within the special district. *Local Government Board for Scotland v. County Council of Elgin*, Feb. 5, 1897, p. 512.

Water Supply—Natural Water-course—"Sewer"—Burgh Police (Scotland) Act, 1892, sec. 215.

8. A burn which passed through a burgh was to some extent polluted by sewage from properties outside the burgh, but no sewage from the burgh entered it. *Held* that the burn was not a "sewer" in the sense of section 215 of the Burgh Police Act, 1892. *Glasgow, Yoker, and Clydebank Railway Co. v. Macindoe*, Nov. 20, 1896, p. 160.

Special Lighting District—Oil as an illuminant—Burgh Police Act, 1892, sec. 99.

9. *Held* that the use of oil as an illuminant is not excluded by the terms of section 99 of the Burgh Police (Scotland) Act, 1892. *Fleming v. Liddesdale District Committee*, Jan. 6, 1897, p. 281.

Assessments—Resolution to apply assessments to expenses of opposing bills in Parliament—Appeal—Competency—Burgh Police (Scotland) Act, 1892, sec. 339.

10. Police Commissioners passed a resolution to charge the expenditure

POLICE—*Continued.*

incurred by them in opposing a private bill in Parliament to the Public Health Assessment. A ratepayer appealed under sec. 339 of the Burgh Police (Scotland) Act, 1892, on the ground that the resolution was *ultra vires*. Appeal *dismissed* as incompetent. *Heddlie v. Magistrates of Leith*, March 5, 1897, p. 662.

See *Burgh—Justiciary Cases*, 6—*Police Force—Road*.

POLICE FORCE. *Consolidation of County and Burgh Police—Representation of burgh on Standing Joint Committee—Police (Scotland) Act, 1857, secs. 2 and 61—Local Government (Scotland) Act, 1889, secs. 11, 18, and 97.*

1. In 1893 an agreement was entered into between a county council and the police commissioners of a burgh for the consolidation of the county and burgh police, it being provided that the police commissioners of the burgh should have right to appoint three of their number to be members of the standing joint committee. *Held* that the burgh representatives were entitled to sit as members of the standing joint committee when acting as the police committee, but that they were not entitled to do so when the joint committee was transacting other county business, and therefore that the burgh representatives were not entitled to vote in the election of the permanent chairman of the standing joint committee. *County Council of County of Elgin v. Magistrates of Elgin*, Feb. 23, 1897, p. 537.

Police-constable—Right to search before apprehension.

2. *Opinions per curiam* that water-bailiffs are not entitled to search a person whom they suspect to be guilty of illegal fishing unless they have previously apprehended him upon what they believe to be good grounds, or unless they have a warrant to search him. *Jackson v. Stevenson*, Feb. 6, 1897, Just. Cases, p. 38.

Police-constable—Apprehension without a warrant.

3. A married woman living in Edinburgh brought an action against a detective in the Edinburgh police for damages on account of his having wrongfully compelled her to accompany him to the police-office. The pursuer averred that her son, a boy of twelve, having found some clinical thermometers in the street, brought them to her; and that while she and her husband were taking means to discover whether the thermometers were of any value the defender came to her house, and after charging her with having come by the thermometers dishonestly, forcibly, and without a warrant, compelled her to accompany him to the police-office, where, after a short examination, she was discharged; and that the defender had acted wrongfully, maliciously, and without probable cause. The Court *dismissed* the action as irrelevant. *Malcolm v. Duncan*, March 17, 1897, p. 747.

Police-constable—Slander—Privilege.

4. In an action of damages for alleged slander, brought by a woman against a detective-officer, the pursuer averred that the defenders came to her house and insisted on her accompanying him to the police-office, and repeatedly, and in a loud voice, in the presence and hearing of another detective and of her two sons, called her a "resetter" of certain articles which one of her sons had found in the street. The Court *dismissed* the action as irrelevant. *Malcolm v. Duncan*, March 17, 1897, p. 747.

Police-constable—Assault—Regulation of traffic.

5. The driver of a hackney carriage having been convicted of assaulting a police-constable of a burgh while in the execution of his duty, appealed on a case stated. The Court—being of opinion that it was the duty of every police-constable in a burgh to regulate the street traffic of the burgh—*dismissed* the appeal, and *found* that upon the facts stated there was no legal ground upon which the magistrate was bound to

POLICE FORCE—*Continued.*

hold that the constable was not acting in the execution of his duty at the time when the assault was committed. *Fowler v. Hodge*, Nov. 3, 1896, *Just. Cases*, p. 17.

POOR. *Settlement—Minor Pubes—Second marriage of pauper's mother.*

1. A derivative residential settlement acquired by a woman on her second marriage does not enure to a child of her first marriage. *Parish Council of Shotts v. Parish Councils of Bothwell and Rutherglen*, Nov. 24, 1896, p. 169.

Settlement—Forisfiliation—Pauper mentally weak.

2. Evidence on a consideration of which it was held that a girl, mentally and physically weak, had not been forisfiliated, and that the parish of her father's settlement was liable for sums disbursed on her behalf. *Parish Council of Brechin v. Parish Council of Barony Parish, Glasgow*, Feb. 24, 1897, p. 587.

Settlement—"Common Begging"—Poor-Law Amendment (Scotland) Act, 1845, sec. 76.

3. Evidence on a consideration of which it was held that a pauper had not acquired a residential settlement in the parish of B., in respect that, during the statutory period, she had had recourse to common begging. *Parish Council of Blantyre v. Parish Council of Rutherglen*, March 11, 1897, p. 695.

See *Election Law*, 1.

POOR'S-ROLL. *Circumstances warranting admission.*

1. Held that a workman earning 31s. 6d. a week, with a wife and two children dependent on him, who had been found to have a *probabilis causa litigandi*, was not entitled to the benefit of the poor's-roll. *Macaskill v. M'Leod*, June 30, 1897, p. 999.

Reporters equally divided in opinion.

2. An action of damages for personal injury was dismissed by a Sheriff-substitute as irrelevant, and the pursuer appealed to the Court of Session, and applied for admission to the poor's-roll. The reporters on *probabilis casu* were equally divided as to the relevancy of the pursuer's averments. The Court refused the application. *Ormond v. Henderson & Sons*, Jan. 23, 1897, p. 399.

POSSESSION. See *Fishings*.POST-MORTEM EXAMINATION. See *Insurance*, 5.POWERS. See *Succession*, 8, 11, 15, 18.PRESCRIPTION. *Quinquennial Prescription—Removal from the lands—Tenant becoming proprietor—Mora—Act 1669, c. 9.*

The tenant of a farm having become its proprietor did not leave the farm but continued to occupy it as proprietor. More than five years thereafter he was sued for rent effairing to the period of his occupancy as tenant. He pleaded the Act 1669, c. 9. Held that the Act did not apply, in respect that the defender had not removed from the lands. *Johnston's Executrices v. Johnston*, March 3, 1897, p. 611.

See *Superior and Vassal*, 2 to 5.

PROCESS. *Ordinary Procedure—Summons—Action by separate pursuers for lump sum of damages—Amendment—Competency.*

1. A's testamentary trustees, and B, a member of a dissolved firm, who had acted as A's law-agents, brought an action against C, who had been employed by A as an accountant, concluding for delivery of documents belonging to the trust-estate and for payment "to the pursuers" of £100 as damages. The pursuers alleged that C had been employed by A to audit the accounts of his business, and had also been employed to wind up the affairs of B's firm; that in these capacities he had

PROCESS—*Continued.*

obtained possession of documents having reference to the business carried on sometime by A and afterwards by his trustees, and that in breach of his duty he had communicated information so obtained to third parties, to the damage of the pursuers. The defender objected that the action was incompetent, being at the instance of separate pursuers for payment of a lump sum of damages. *Held* that it was competent to amend the summons by concluding for payment to the pursuers, A's trustees, instead of to the pursuers generally. *Brown's Trustees v. Hay*, July 15, 1897, p. 1108.

Ordinary Procedure—Summons—Action on bill of exchange—Court of Session Act, 1850, section 1, schedule A—A. S. 31st October 1850.

2. *Held* that where an action is founded on a bill of exchange, the bill must be set forth in the conclusions of the summons. *Davis v. Cadman*, Jan. 13, 1897, p. 297.

Ordinary Procedure—Summons—Conclusions—Declarator of marriage—Breach of promise and seduction.

3. A woman brought an action against a man concluding for declarator of an irregular marriage, "but if it shall be found that the pursuer is not married to the defender, then and in that case" for £3000 as damages for breach of promise and seduction. The pursuer pleaded that decree of declarator ought to be pronounced, "or alternatively" that decree ought to be pronounced "in terms of the alternative conclusions of the summons." While the action was in dependence the pursuer died, and her executor craved leave to be sisted as pursuer, stating that he proposed to insist in the conclusion for damages only. The defender objected, on the ground that the conclusion for damages was in its terms conditional on decree of absolvitor in the declarator being pronounced, and that the executor was not *in titulo* to move for declarator. *Held* that the conclusions were truly alternative, and that the executor was entitled to be sisted to the effect of pursuing the conclusion for damages. *Green or Borthwick v. Borthwick*, Dec. 8, 1896, p. 211.

Ordinary Procedure—Record—Admission qualified by counter claim—Irrelevancy of counter claim.

4. Where a defender judicially admitted the pursuer's claim to a sum of money subject to an alleged counter claim, but failed to state any relevant ground for the alleged counter claim, *held* that the pursuer was entitled to found on the admission as unqualified. *Robertson & Co. v. Bird & Co.*, July 10, 1897, p. 1076.

Ordinary Procedure—Record—Amendment—Court of Session Act, 1868, sec. 29.

5. Circumstances in which the Court allowed the appellant in a Sheriff Court action to amend his defences, on condition that he should find caution for the sum of £30, to meet the expense of the prior proceedings in the case in the event of it turning out that he was in fault in not originally proponing the defence embodied in the proposed amendment. *Paton v. McKnight*, Feb. 23, 1897, p. 554.
6. In an action of damages by a seller for breach of a contract of sale by the buyer failing to take delivery in terms thereof, the pursuer in his record as originally framed stated the damage he had suffered to be "the difference between the contract price and the current price" of the goods sold at the date of the alleged breach. After the Lord Ordinary had taken the case to avizandum on a proof, the pursuer proposed to amend his condescendence by substituting for the averment above quoted the following:—"The loss of profit occasioned to the pursuers through the said breach of contract amounts to the sum sued for." *Held* that the amendment was competent. *Govan Rope and Sail Co., Limited, v. Weir & Co.*, Jan. 19, 1897, p. 368.

PROCESS—Continued.

7. A brought an action in the Sheriff Court against B and C and the D company, averring that he had invested £450 in the purchase of certain shares in a ship; that B and C had held the ship in part in trust for him, and that in breach of this trust they had sold the whole ship to the D Company. He prayed for decree against the defenders, jointly and severally, for payment of £450, with interest from the date on which the investment had been made. In the record as closed the pursuer did not state his claim to be for damages, but after certain procedure in the action he craved leave to amend his record by adding certain averments, and a plea that he was entitled to the sum sued for as damages. The defenders objected that the proposed amendment was incompetent as not being within the scope of the action as originally laid. The Court *allowed* the amendment. *Rottenburg v. Duncan*, Oct. 23, 1896, p. 35.

Ordinary Procedure—Defences—All parties not called.

8. *The railway carriages on the East Coast Route from Edinburgh to London were the joint property of three companies, A, B, and C. In an action by A against B concluding, inter alia, for declarator that B was not entitled to use the joint property without the consent of A, held (aff. judgment of the First Division) that the conclusion fell to be dismissed in respect that the third joint owner C had not been made a party to the action.* *North British Railway Co. v. North-Eastern Railway Co.*, Dec. 17, 1896, H. L., p. 19.

Ordinary Procedure—Mandatory—Foreigner resident in England—Impecuniosity—Judgments Extension Act, 1868.

9. *Held* that an American pursuer, who was resident in England and had no immediate intention of leaving that country, was not bound to sist a mandatory, in respect that the decree of the Scots Court for expenses could be enforced against him in England under the Judgments Extension Act, 1868.

Mere impecuniosity is not a sufficient ground for ordaining a party to sist a mandatory. *Dessau v. Daish*, June 26, 1897, p. 976.

Ordinary Procedure—Caution for expenses—Personal liability of cautioner in suspension—Trust.

10. The complainer in a suspension of a charge upon a bill having died, his widow, one of his trustees, was at her own request sisted as complainer in his place as his "trustee," and found caution, her cautioner becoming bound "that she shall, as trustee foressaid, pay" the sum in the bill "in full in the event of there being a sufficiency of trust funds, or rateably along with the other creditors" of the truster "in the event of his estate proving insufficient to pay his creditors in full," and also "that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses in case of wrongous suspending." The Court ultimately repelled the reasons of suspension, and found the complainer liable in expenses "as trustee." In an action by the charger against the cautioner, *held* that whatever the liability of the complainer might be, the cautioner was liable to the charger in payment of the whole expenses. *Stewart v. Forbes*, July 15, 1897, p. 1112.

Ordinary Procedure—Reponing—Appeal—Expenses.

11. No appearance being made for the pursuer of an action in a Sheriff Court at a diet of debate, the Sheriff-substitute assoilized the defender. The pursuer appealed. *Held* that, as a condition of being allowed to proceed with the action, the pursuer must pay the whole expenses of the defender in both Courts. *McCarthy v. Emery*, Feb. 27, 1897, p. 610.

Ordinary Procedure—Reponing—Decree in default—Failure to lodge defences and accounts—Sheriff Court Act, 1853, sec. 6—Sheriff Court Act, 1876, sec. 20.

12. In an action raised in the Sheriff Court by trustees against the law-

PROCESS—*Continued.*

agent to the trust, concluding for an accounting, and failing this, for payment of £500, the defender lodged no defences, but put in a minute craving the Court to sist proceedings in order to give him time to lodge his accounts, which he alleged would shew a debit balance against the trust. The Sheriff-substitute granted a sist for ten days, and at the end of that period, the defender having failed to lodge defences or produce his accounts, the Sheriff-substitute decerned for the sum sued for. On appeal the Sheriff, in respect of no appearance being made for the defender, dismissed the appeal. The defender having appealed to the Court of Session, and moved to be reponed, the Court, in respect that the sum sued for, and for which the Sheriff-substitute had granted decree, was a random sum, *recalled* the Sheriff-substitute's interlocutor, and *remitted* to the Sheriff to consider the defender's application to be reponed, and in the event of sufficient cause being shewn, and of his lodging accounts within eight days, to allow defences to be lodged within two days. *Brown's Trustees v. Milne*, July 17, 1897, p. 1139.

Ordinary Procedure—Reclaiming Note—Competency—Court of Session Act, 1868, secs. 27, 28, and 54.

13. *Held* that it was competent for the defender in an action of divorce for adultery, who had appeared by counsel, but had not lodged defences or contested the case on the merits, to reclaim against the interlocutor of the Lord Ordinary granting decree of divorce. *Ross v. Ross*, July 3, 1897, p. 1029.
14. *Held* that an interlocutor (not falling within the provisions of sec. 28 of the Court of Session Act, 1868) which does not, either by itself or taken along with a previous interlocutor or interlocutors, dispose of the question of liability for expenses, is not an interlocutor disposing of the whole subject-matter of the cause, and cannot be reclaimed against without the leave of the Lord Ordinary.

The Court will not entertain an incompetent reclaiming note although the respondent waives his right to object. *Burns v. Waddell & Son*, Jan. 14, 1897, p. 325.

15. In an action of accounting at the instance of a beneficiary against trustees, the pursuer objected to the amount of the business account of the law-agent of the trustees. The Lord Ordinary remitted the account to the Auditor of the Court of Session to tax, and did not grant leave to reclaim. The defenders having reclaimed, the Court *refused* the reclaiming note as incompetent. *Turner v. Fraser's Trustees*, March 6, 1897, p. 673.

Ordinary Procedure—Decree—Recall—Res noviter—Nobile Officium—Court of Session Act, 1868, sec. 28.

16. After an interlocutor allowing proof in an action has become final in terms of section 28 of the Court of Session Act, 1868, the Court cannot, in the exercise of its *nobile officium*, order its recall on the application of one of the parties to the cause. *MacGown v. Cramb*, Feb. 2, 1897, p. 481.

Ordinary Procedure—Decree—Poiniding—"Summary complaint" to Sheriff—Concurrence of Procurator-fiscal—Personal Diligence Act, 1838, sec. 30.

17. *Held* that the imprisonment provided by the Personal Diligence Act, 1838, sec. 30, is not *in modum pœnae*, but only the usual means of enforcing an order of Court *ad factum præstandum*, and that a complaint to the Sheriff under this section is a civil process, and does not require the concurrence of the Procurator-fiscal. *Wilson v. M'Kellar*, Dec. 11, 1896, p. 254.

Ordinary Procedure—Decree—Decree ad factum præstandum—Appeal to House of Lords—Interlocutor ordaining defender to commence building

*Process—Continued.**operations within specified period—Effect of judgment in appeal affirming interlocutor.*

18. By interlocutor dated 18th July 1895, the First Division ordained the defenders in an action to commence certain building operations "within three months from the date of this interlocutor." The defenders appealed to the House of Lords, but subsequently, with their consent, the interlocutors appealed against were affirmed and the appeal dismissed. *Held* that the period within which the defenders were bound to commence building was three months from the date of the judgment of the House of Lords. *Marshall v. Callander and Trossachs Hydropathic Co., Limited*, Oct. 22, 1896, p. 33.

Ordinary Procedure—Decree—Interlocutor pronounced in error—Cancellation.

19. An interlocutor dismissing an action in respect of an undertaking by the defenders was pronounced in ignorance of circumstances which made its fulfilment impossible. The Court, on the application of the parties, *cancelled* the interlocutor. *Rottenburg v. Duncan*, Oct. 23, 1896, p. 35.

Ordinary Procedure—Expenses—Tender—Delay in accepting.

20. In an action of damages for personal injury, the pursuer was found liable in part of the expenses incurred between the date on which a tender was made and the date of acceptance in respect of undue delay in accepting the tender. *M'Laughlin v. Glasgow Tramway and Omnibus Co., Limited*, June 30, 1897, p. 992.

Ordinary Procedure—Expenses—Tender—Conditional Tender.

21. *Question*, whether the tender of a sum by the defender in an action of damages, accompanied by a declaration that the pursuers' case was unfounded and untrue, was a tender entitling the defender to expenses in the event of the tender being declined, and the sum awarded as damages being less than the sum mentioned in the tender. *Thomson & Co. v. Dailly*, July 20, 1897, p. 1173.

Ordinary Procedure—Expenses—Time for objecting to Lord Ordinary's award.

22. When a party reclaiming objects to an interlocutor not only as wrong on the merits but also as wrong in finding the reclamer liable in expenses, even if right on the merits, he must state his objection as to expenses in opening on the reclaiming note. *Clark v. Sutherland*, March 18, 1897, p. 821.

Proof—Diligence to recover writings—Slander—Newspaper—Anonymous letter—Diligence for recovery of original letter.

23. In an action of damages for slander against the proprietors of a newspaper founded on statements contained in an anonymous letter published in the newspaper, the pursuer, a parish clergyman, averred that the letter "was written or procured to be written by the defenders for publication in their newspaper in pursuance of a malicious design to injure the pursuer," and "to destroy his reputation" as a clergyman. The defenders refused to disclose the name of the writer of the letter, and the pursuer moved for a diligence for the recovery of the original letter. The Court *refused* the diligence. *Morrison v. Smith & Co.*, Jan. 30, 1897, p. 471.

Proof—Diligence to recover writings—Order for proof.

24. In an action of damages the ground of action averred by the pursuer was that the defender had refused to implement an award appointing him to retire certain bills of lading. The defender, besides disputing the validity of the award, denied liability on the ground that the goods covered by the bills were not conform to contract. The Lord Ordinary allowed the pursuer "a proof of his averments on record, and to the defenders a conjunct probation." *Held* that the defender was not

PROCESS—*Continued.*

entitled to a diligence for the recovery of documents bearing upon the condition of the goods—evidence on that question being excluded by the terms of the order for proof. *Scott, Simpson, & Wallis v. Forrest & Turnbull*, June 1, 1897, p. 877.

Proof—Diligence to recover writings—General averments of fraud.

25. In an action for reduction of a compromise between liquidators and a contributory, the pursuers averred that a contributory had fraudulently concealed from the liquidators certain specific items of property belonging to him, and also "other assets belonging to him and money in his possession to the extent of at least £40,000." The Court allowed a proof before answer, and thereafter *granted* a diligence entitling the pursuers to recover, not merely documents relative to the specific investments alleged to have been fraudulently concealed by the contributory, but also documents for the purpose of prosecuting a general inquiry into the completeness of the disclosures made by him to the liquidators. *Assets Co., Limited, v. Shirres' Trustees*, Jan. 28, 1897, p. 418.

Proof—Diligence to recover writings—Irrelevancy of averments.

26. When a Lord Ordinary had allowed a party a proof of his averments, *held* that the Lord Ordinary was not entitled to refuse a diligence for the recovery of documents on the ground that the averments remitted to probation were irrelevant. *Duke of Hamilton's Trustees v. Woodside Coal Co.*, Jan. 9, 1897, p. 294.

Proof—Jury Trial—Abandonment—A. S., 16th Feb. 1841, sec. 46.

27. Procedure where no jury cited, or where citation of jury countermanded, and no appearance made for pursuer. *Gilhooly v. McHardy*, July 20, 1897, p. 1185; and *Mooney v. William Dixon, Limited*, July 20, 1897, p. 1187.

Proof—Jury Trial—Abandonment—Appeal for Jury Trial—Judicature Act, 1825, secs. 10 and 40.

28. Where an action raised in a Sheriff Court has been removed to the Court of Session by appeal under the 40th section of the Judicature Act, 1825, it is competent for the pursuer to abandon the action in the form appropriate to abandonment under sec. 10 of that Act and Act of Sederunt, 11th July 1828, sec. 115, as if the case had originated in the Court of Session. *Aitken v. Farquhar*, Dec. 18, 1896, p. 268.

Proof—Jury Trial—Appeal for jury trial—Remit to Lord Ordinary—Judicature Act, 1825, sec. 40.

29. In an action of accounting raised in a Sheriff Court the defender, having appealed under the 40th section of the Judicature Act, 1825, moved for a proof in the Court of Session. The pursuer submitted that the case should be sent back to the Sheriff Court for proof. *Held* that the proper course was to take the proof in the Court of Session, there being no circumstances rendering the case specially suited for trial in the Sheriff Court. *Tosh v. Ferguson*, Oct. 27, 1896, p. 54.

Proof—Jury Trial—Notice of Motion for a new trial—Time—A. S., 16th Feb. 1841, sec. 36—Court of Session Act, 1868, sec. 4.

30. In determining whether a notice of motion for a new trial has been timeously given, the February week instituted by the Court of Session Act, 1868, sec. 4, is to be regarded as in the same position as the Christmas recess under the A. S., 16th February 1841. *Cockburn v. Hogg*, Feb. 18, 1897, p. 529.

Proof—Jury Trial—Motion for postponement of trial.

31. Circumstances in which the Court *refused* a motion for the postponement of a jury trial. *British Workman's and General Assurance Co. v. Stewart*, March 4, 1897, p. 624.

Proof—Remit to man of skill—Failure to execute contract—Averments of Fraud.

32. A contractor executed certain excavation and drainage work. Two years

PROCESS—*Continued.*

after the work had been completed and duly certified by the engineers, the owners presented a petition in the Sheriff Court against the contractor, in which they averred that the work done was disconform to contract in many important particulars, which they set forth, and that the defender "by means of fraudulent devices succeeded in palming off the work as being executed according to contract." The prayer of the petition was that the Sheriff should remit to a man of skill to inspect and value the work and report upon its present state, and also what was necessary to bring it into conformity with the specification; that the pursuers should be authorised to do whatever required to be done in accordance with such report, and to apply the balance of the contract price still in their hands to the completion of the work, in so far as it might be shewn by the reporter to be defective. The contractor lodged defences in which he denied the pursuers' averments. *Held* that the action was incompetent. *Magistrates of Kilmarnock v. Reid*, Jan. 22, 1897, p. 388.

Proof—Remit to reporter—Work to be "duly proceeded with" at sight of reporter—Province of reporter.

33. In an action by a superior against a vassal the defender was ordained "forthwith to proceed to rebuild the buildings" of a hydropathic establishment which had been destroyed by fire, "and that to the extent necessary to maintain said buildings as of the total value of £15,000, said rebuilding to be commenced within three months" from 8th May 1896, "to be duly proceeded with to the satisfaction of A, architect, and to be completed to his satisfaction within two years" from 8th May 1896. The defender having commenced to build within three months, and the reporter having reported that the buildings in course of erection were not of a satisfactory character, *held* that the defender must be left to act upon his own responsibility, and that the function of the reporter was merely to see that the work was being proceeded with, and when that work was completed to report whether it was what was ordered. *Marshall v. Callander and Trossachs Hydropathic Co., Limited*, March 12, 1897, p. 712.

Particular Actions—Count, reckoning, and payment—Competency—Claim against trustees for interest in respect of failure to invest.

34. In an action of accounting brought against testamentary trustees jointly by certain beneficiaries, the trustees produced accounts which shewed that the trust funds had been allowed to remain in bank for a number of years on deposit-receipt. The pursuers contended that the trust-estate fell to be credited with the additional interest which would have been realised if the funds had been invested on heritable security. The defenders maintained that this was a claim for damages for breach of trust, which could not be entertained in an action of accounting. *Held* that it was competent to entertain the question of the liability of the defenders for a higher rate of interest in the action of accounting. *Melville v. Noble's Trustees*, Dec. 11, 1896, p. 243.

Particular Actions—Declarator—Competency of declarator in process of interdict—Railway.

35. In a petition by a railway company for interdict to prevent a hotelkeeper, by himself or his servants, entering the station to meet customers arriving by train, except as permitted by the company, *held* that the pursuers were entitled to a declaration that, subject to any order or regulation which might thereafter be made by the Railway Commissioners, the defender, as tenant of his hotel, had no right to do so, except with leave of the pursuers, and under such conditions as they might prescribe, and that in respect of the declaration it was unnecessary to dispose of the prayer for interdict. *Perth General Station Committee v. Ross*, July 27, 1897, H. L., p. 44.

PROCESS—Continued.

Particular Actions—Declarator—Sheriff—Competency—Declarator of illegal preference—Bankruptcy (Scotland) Act, 1856, sec. 10—Bankruptcy and Real Securities (Scotland) Act, 1857, sec. 9—Sheriff Courts (Scotland) Act, 1877, sec. 8 (2).

36. Held that an action praying the Court to find a certain payment by an insolvent debtor within sixty days of bankruptcy to be null and void at common law and under the Act 1696, c. 5, and to find that the payment was an illegal preference, and to set aside the same, was competent in the Sheriff Court. *M'Laren's Trustee v. National Bank of Scotland, Limited*, June 12, 1897, p. 920.

Particular Action—Declarator—Building Restrictions.

37. In an action for declarator that certain building ground within a burgh was not subject to any building restrictions, the Lord Ordinary was of opinion that the ground was subject to certain restrictions and not to others, but he pronounced an interlocutor assailing the defenders, holding that it was incompetent to pronounce a limited decree unless the pursuers restricted their summons, which they declined to do. Held (rev. the judgment) that it was competent to pronounce a limited decree, and that decree fell to be pronounced accordingly. *Assets Co., Limited, v. Ogilvie*, Jan. 23, 1897, p. 400.

Particular Actions—Special Case—Questions not argued.

38. The Court will not answer questions in a special case which are not argued. *Mackinnon's Trustees v. MacNeill*, June 29, 1897, p. 981.

Particular Actions—Special Case—Competency.

39. A special case was presented by a County Council, as first parties, and a District Committee of the County Council, as second parties, to determine the question whether an assessment should be levied from the whole county or only from the district. The Court, *ex proprio motu*, dismissed the case as incompetent, in respect that the District Committee, not being concerned with the payment of rates, had no interest or title to appear. *County Council of County of Roxburgh v. Melrose District Committee*, March 5, 1897, p. 657.

Particular Actions—Suspension—Extrinsic objection to judgment of inferior Court—Competency—Court of Session Act, 1868.

40. It is not competent to set aside by way of suspension the decree of an inferior Court on the ground that it has been obtained by fraud. *Smith v. Kirkwood*, May 28, 1897, p. 872.

Particular Actions—Suspension—Bill-Chamber—Sheriff—Interim decree ad factum praestandum—Sist of execution.

41. In a Sheriff Court action the Sheriff granted warrant to the pursuer to restore a wall which had been interfered with by the defender, to its original condition, but refused to deal with the question of expenses until the wall had been restored. The interlocutor not being appealable the defender presented a note of suspension praying the Court to interdict the pursuer from interfering with the wall or enforcing the decree. The Lord Ordinary on the Bills granted interim interdict and passed the note. The pursuer reclaimed, and contended that the suspension was incompetent, and that any sist of execution would prevent an appealable interlocutor being obtained from the Sheriff, and would therefore be permanent. Both parties moved the Court to decide the case on the merits. The Court adhered to the Lord Ordinary's judgment, holding that the suspension was competent, but that it was not competent for the Court sitting in the Bill-Chamber to do more than to pass the note. *Caledonian Railway Co. v. Cochran's Trustees*, May 21, 1897, p. 855.

Particular Actions—Proving the Tenor—Requisite Adminicles.

42. Circumstances in which the Court refused to grant decree of proving the tenor of a deed, in respect that no evidence of the particular terms of

PROCESS—*Continued.*

the essential clauses of the deed was adduced. Incorporation of Skinnern and Furriers in *Edinburgh v. Baxter's Heir*, March 17, 1897, p. 744.

Appeal—Competency—Omission to lodge prints—Court of Session Act, 1868, sec. 71—A. S., 10th March 1870, sec. 3.

43. In an appeal in vacation from the Sheriff Court the appellant omitted to lodge prints as required by the Act of Sederunt, March 10, 1870, sec. 3. An objection was taken to the competency of the appeal, and the appellant having admitted that the failure to print was not due to inadvertence, the Court *dismissed* the appeal as incompetent. *Bell v. Bell*, May 13, 1897, p. 847.

Appeal—Competency when no answers lodged—Extra cursum curiæ—Arbitration—Petition for recall of arrestments—Personal Diligence Act, 1838, sec. 21.

44. In a petition for recall of arrestments the respondent lodged no answers, and the Sheriff "having heard parties" recalled the arrestments on caution. The respondent having appealed, the petitioner objected to the competency of the appeal, on the ground that the respondent, in failing to lodge answers, had so deviated from the course of procedure prescribed by the Personal Diligence Act, 1838, sec. 21, as virtually to constitute the Sheriff an arbiter. The Court *held* that there had been no deviation from the statutory procedure, and *repelled* the objection. *Gordon v. Bruce & Co.*, May 12, 1897, p. 844.

Appeal—Competency—Police—Maintenance of foot-pavement—Burgh Police (Scotland) Act, 1892, secs. 143, 339.

45. *Held* that the right of appeal to the Sheriff given by section 143 of the Burgh Police (Scotland) Act, 1892, was limited to cases where the appellant's property was affected, and therefore that it was competent for an owner of property within a burgh, who had been called upon by the Police Commissioners to repair a foot-pavement which bounded but was not upon, and did not affect, his property, to appeal to the Court of Session under section 339, in respect that, his property not being affected, he had no right of appeal under section 143. *Laurenson v. Police Commissioners of Lerwick*, Nov. 10, 1896, p. 135.

Appeal—Competency—Police—Assessments—Resolution to apply assessments to expenses of opposing bills in Parliament—Burgh Police (Scotland) Act, 1892, sec. 339.

46. Police Commissioners passed a resolution to charge the expenditure incurred by them in opposing a private bill in Parliament to the Public Health Assessment. A ratepayer appealed under sec. 339 of the Burgh Police Act, 1892, on the ground that the resolution was *ultra vires*. Appeal *dismissed* as incompetent. *Heddle v. Magistrates of Leith*, March 5, 1897, p. 662.

See *Revenue*, 8.

PROCURATOR-FISCAL. See *Poiniding*.PROOF. *Rape—Evidence of woman's unchastity.*

1. In a trial for rape or assault with intent to ravish, while it is competent, on due notice being given, to attack the woman's character for chastity by putting questions to herself, or to prove her general bad repute at the time of the alleged offence, or to prove that she had recently yielded her person voluntarily to the accused, it is not in general competent to prove individual acts of unchastity on her part with other men. *Dickie v. H. M. Advocate*, July 15, 1897, Just. Cases, p. 82.

Writ—Writ of Agent.

2. *Held* that the accession by a creditor to a composition agreement may be proved by the writ of his duly authorised agent. *Henry v. Strachan & Spence*, July 10, 1897, p. 1045.

PROOF—Continued.

Extrinsic Evidence.

3. Lease of farm "all as some time occupied by" preceding tenant. *Gregson v. Alsop*, July 13, 1897, p. 1081.

Husband and Wife.

4. Whether refusal of wife to allow her child to be vaccinated equivalent to the refusal of her husband. *Cockett v. Beattie*, June 8, 1897, *Just. Cases*, p. 62.

Private knowledge of Judge.

5. Inspection of *locus* by the Court. *Sime v. Linton*, June 8, 1897, *Just. Cases*, p. 70.

See *Company*, 1—*Insurance*, 4—*Process*, 23 to 33.

PROPERTY. See *Fishings*—*Road*—*Servitude*—*Superior and Vassal*.

PROVING OF THE TENOR. See *Process*, 42.

PUBLIC BURDEN. *Relief*—*Lease*—*Tramway*—*Valuation of Lands (Scotland) Act*, 1854, *sec. 6*.

1. By a contract bearing to be a "lease" the Corporation of Glasgow "let" to a tramway company the sole right to use carriages with flange wheels on the whole tramways authorised to be formed by the Glasgow Street Tramways Act, 1870, for the space of twenty-three years, on condition (1) that the company should pay interest on the sum expended by the Corporation in making the tramways and certain other annual payments during the lease; and (2) that the company should pay to the Corporation "the expense of borrowing, management, &c. [*sic*], and this provision shall be so construed as to keep the Corporation free from all expenses whatever in connection with the said tramways." As the lease extended beyond twenty-one years, the company were entered in the Valuation-roll as owners of the tramways at their annual value, and assessed accordingly. In defence to an action by the Tramway Company against the Corporation for relief of such part of the assessment as corresponded to the rent paid by the company, in terms of section 6 of the Valuation Act, 1854, the defenders maintained (1) that the contract was not truly a lease, but merely a licence to use carriages with flanged wheels on certain streets; and (2) that assuming the contract to be a lease, the pursuers were, by the contract, bound to keep the defenders free of this expense. *Held* (1) that the contract was a lease of a heritable subject, and (2) that the obligation to free the Corporation of all expenses in connection with the tramways did not apply to assessments for which the Corporation was liable as owners of the tramways. *Glasgow Tramway and Omnibus Co., Limited, v. Corporation of City of Glasgow*, March 4, 1897, p. 628.
2. *Held* that the right of relief conferred by section 6 of the Valuation of Lands Act, 1854, could be made effectual otherwise than by deduction from the rent, and that a tenant who had paid rent without deduction had a good claim against the proprietor for repayment of his proportion of rates and taxes. *Glasgow Tramway and Omnibus Co., Limited, v. Corporation of City of Glasgow*, March 4, 1897, p. 628.

Relief—*Lease*—*Acquiescence*—*Mora*—*Abandonment*.

3. Tenants under a lease for a period of twenty-three years intimated to their landlord a claim to be relieved of the owner's proportion of rates and taxes. The landlord repudiated the claim. *Held* that the tenants were entitled to insist in the claim, there being no special circumstances from which abandonment was to be inferred. *Glasgow Tramway and Omnibus Co., Limited, v. Corporation of City of Glasgow*, March 4, 1897, p. 628.

PUBLIC HEALTH. *Vaccination*—*Refusal to allow child to be vaccinated*—*Proof*—*Husband and Wife*—*Vaccination (Scotland) Act*, 1863, *sec. 18*.

1. A father was convicted of a contravention of the Vaccination (Scot-

PUBLIC HEALTH—*Continued.*

land) Act, 1863, sec. 18, by having refused to allow his child to be vaccinated. He appealed. The case stated that the Parish Council having issued an order to their vaccinator to vaccinate the child, notice of the order was sent to the accused, with an intimation that the Act directed the vaccination to take place within a period specified; that on a day within the period the vaccinator called at the house of the accused; and that he was then told by the wife of the accused "that she was expecting him, but that her husband, who was not at home, had instructed her on no account to allow the child to be vaccinated." The Court *sustained* the appeal, holding that it had not been proved that the accused had refused to allow his child to be vaccinated. *Cockett v. Beattie*, June 8, 1897, Just. Cases, p. 62.

Sale of Food and Drugs Act, 1875, secs. 13 and 14—Sale of Food and Drugs Amendment Act, 1879, sec. 3—Analysis—Division of sample—Milk—Statute—Incorporation.

2. *Held* that section 14 of the Sale of Food and Drugs Act of 1875 did not apply to cases in which an official had procured a sample of milk under section 3 of the Sale of Food and Drugs Amendment Act of 1879. *Morton v. Fyfe*, Nov. 2, 1896, Just. Cases, p. 9.

See *Justiciary Cases*, 10, 11, 23—*Lease*, 4—*Police*.

PUBLIC-HOUSE. *Certificate—Transfer—Act 9 Geo. IV. cap. 58, sec. 19.*

1. A transfer of a certificate running from May 1896 to May 1897 was granted in August 1896 on condition that it "be in force only . . . until the next general meeting to be held for granting such certificates, and be duly presented for entry at the collector's office of excise, Glasgow, within six days from this date, otherwise the same to be null and void to all intents and purposes." This latter condition was not complied with, but the transferee carried on the business of publican. Thereafter the magistrates at the general meeting in October 1896 refused to renew the transfer certificate. The original holder then resumed possession of the premises, and was afterwards convicted of trafficking in excisable liquors without a certificate. In an appeal the original holder contended that the transfer certificate being merely temporary and conditional, and the condition not having been purified, the original certificate remained in force. *Held* that he had been rightly convicted, the transfer having absolutely divested him of all right of trafficking under the original certificate. *Campbell v. Neilson*, Feb. 6, 1897, Just. Cases, p. 28.

Certificate—Confirmation—"New Certificate"—Publicans Certificate (Scotland) Act, 1876, secs. 4 and 6.

2. *Held* that a hotel certificate granted to a person who held a public-house certificate in respect of the same premises was a "new certificate" in the sense of the Publicans Certificate (Scotland) Act, 1876, and required confirmation in order to its validity. *Weir v. Bryce*, March 12, 1897, Just. Cases, p. 42.

See *Justiciary Cases*, 5, 7, 21—*Lease*, 15.

PUBLIC OFFICIAL. *Local Authority and official—Resolution regarding salary of official—Jus quesitum.*

At a meeting the Commissioners of a burgh resolved to increase by £10 the salary of their sanitary inspector, but no official intimation of the resolution was made to him. At a subsequent meeting they cancelled their former resolution. In an action against them by the sanitary inspector, *held* that the pursuer had no *jus quesitum* under the resolution, as it had not been intimated to him. *Burr v. Commissioners of Bo'ness*, Nov. 13, 1896, p. 148.

RAILWAY. *Compulsory Powers—Process—Arbitration—Res Judicata—Plea of competent and omitted.*

1. By Act of Parliament passed in 1891 the Lanarkshire and Dumbarton-

RAILWAY—*Continued.*

shire Railway Company were empowered to construct a line of railway from Glasgow to Dumbarton. Section 6, subsection 4, enacted that: the railway should "be carried under the joint sidings and works of the North British Company and the Caledonian Company at Stobcross in tunnel, and the company shall not, without the previous consent of the companies owning the same, in the construction of such tunnel, break open the surface of the ground, or in any way raise or interfere with the rails of the North British Company or of the joint property of that company and the Caledonian Company." The tunnel having been completed, the North British Company brought an action against the Lanarkshire and Dumbartonshire Company to have them ordained to remove a ventilating shaft which they had constructed within the North British and Caledonian Companies' depot at Stobcross, averring that they had not obtained the consent of the North British Company to its erection. The Lanarkshire and Dumbartonshire Railway Company having denied this averment, the cause was remitted for decision to an arbiter as required by the special Act of the Lanarkshire and Dumbartonshire Company. The decision of the arbiter was to the effect "that the construction of the shaft fell under the provisions of section 6, subsection 4, of the special Act, and required the consent of the North British and Caledonian Companies, and that the consent of the North British Company had not been obtained." The Lanarkshire and Dumbartonshire Company having thereafter served a notice to treat on the North British Company, intimating that they intended to take the ground upon which the shaft was constructed under their compulsory powers, the North British Company applied for interdict against them in any way following up the notice. In defence to this action the Lanarkshire and Dumbartonshire Company stated that the limitation on their power to acquire ground compulsorily imposed by section 6, subsection 4, of their Act applied solely to the joint sidings and works of the North British and Caledonian Companies, and that the ground proposed to be taken, though within the depot, was not part of their joint sidings and works. *Held* that this defence, not being open to the respondents prior to the service of the notice to treat, could not have been dealt with by or pleaded before the arbiter, and therefore that it was open to the respondents still to maintain it. *North British Railway Co. v. Lanarkshire and Dumbartonshire Railway Co.*, Feb. 23, 1897, p. 564.

Compulsory Powers—Lease.

2. Lease with power to landlord to resume lands—Exercise of power and disposition of lands resumed to County Council—Liability of County Council to compensate tenant. District Committee of the Middle Ward of Lanark v. Marshall, Nov. 10, 1896, p. 139.

Compulsory Powers—Superfluous Lands—Lands Clauses Consolidation (Scotland) Act, 1845, sec. 120.

3. A railway company which, under section 120 of the Lands Clauses Consolidation (Scotland) Act, 1845, was bound to sell its superfluous lands before 16th July 1892, had at that date two small plots close to its terminal station, and used them partly as a private means of access to the station buildings, but principally as ornamental garden ground, improving the amenity of the station and its public accesses. In 1896 the owner of lands adjoining, from whom the plots in question had been acquired by the railway company under their compulsory powers, brought an action for declarator that these plots were superfluous lands within the meaning of the Lands Clauses Consolidation (Scotland) Act, 1845, and that they therefore had vested in him on 16th July 1892. The Court *assuizied* the defenders, holding (1) that certain actings of the directors in regard to proposed sales of the plots

RAILWAY—Continued.

did not bar the company from pleading that the lands were not superfluous; (2) that these actings were evidence, but not conclusive evidence, that the plots were superfluous; (3) that the question whether the plots were superfluous was to be determined by the circumstances as existing at 16th July 1892; and (4) that on the evidence as a whole the plots were not superfluous. *Macfie v. Callander and Oban Railway Co.*, July 17, 1897, p. 1156.

Right of Railway Company to exclude from stations persons other than travellers—Interdict.

4. *Railway companies are entitled, as proprietors of their stations, to exclude from them all persons except passengers and persons entitled to enter them in virtue of any order or regulation of the Railway Commissioners.*

In a petition by a railway company for interdict to prevent a hotel-keeper, by himself or his servants, entering the station to meet customers arriving by train, except as permitted by the company, held that the pursuers were entitled to a declaration that, subject to any order or regulation which might thereafter be made by the Railway Commissioners, the defender, as tenant of his hotel, had no right to do so, except with leave of the pursuers, and under such conditions as they might prescribe, and that in respect of the declaration it was unnecessary to dispose of the prayer for interdict. *Perth General Station Committee v. Ross*, July 27, 1897, H. L., p. 44.

Facilities—Jurisdiction—Railway Commissioners.

5. *The Railway Commissioners have an exclusive jurisdiction to determine what rights of access members of the public who are not travellers may have to a railway station.* *Perth General Station Committee v. Ross*, July 27, 1897, H. L., p. 44.

Running Powers—Right of owning company to exclude running power company—Railway Commissioners.

6. *By an agreement incorporated in an Act of Parliament in 1862, it was provided that "for the purpose of maintaining and working in full efficiency in every respect the East Coast Route . . . the North British Company shall at all times hereafter permit the [North Eastern] Company to run over and use the North British Company's railway . . . between Berwick and Edinburgh and Leith, all inclusive . . . subject to the payment" of such rates as should be settled by agreement, or failing agreement by arbitration. Held that the extent to which, and the terms on which the running powers should be exercised, fell to be determined by agreement, or failing agreement by the Railway Commissioners.* *North British Railway Co. v. North-Eastern Railway Co.*, Dec. 17, 1896, H. L., p. 19.

Joint railway rolling stock—Process—All parties not called—Action by one of several joint owners against another.

7. *The railway carriages on the East Coast Route from Edinburgh to London were the joint property of three companies, A, B, and C. In an action by A against B concluding, inter alia, for declarator that B was not entitled to use the joint property without the consent of A, held (aff. judgment of the First Division) that the conclusion fell to be dismissed in respect that the third joint owner C had not been made a party to the action.* *North British Railway Co. v. North-Eastern Railway Co.*, Dec. 17, 1896, H. L., p. 19.

Rates—Undue Preference—Jurisdiction—Railway Commissioners—Railway and Canal Traffic Act, 1854, secs. 2, 3, and 6—Regulation of Railways Act, 1873, sec. 6—Railway and Canal Traffic Act, 1888, sec. 8.

8. *In an action by a railway company against a trader for rates due for the carriage of goods, the defender maintained that he was entitled to have the rates reduced in respect of illegal preferences granted by the pur-*

RAILWAY—*Continued.*

suers to other traders, contrary to the provisions of the Railway and Canal Traffic Act, 1854. *Held* that the Court had no jurisdiction, exclusive jurisdiction to deal with the matter of undue preferences under the Railway and Canal Traffic Act, 1854, having been conferred upon the Railway Commissioners by the Regulation of Railways Act, 1873, section 6, and the Railway and Canal Traffic Act, 1888, section 8. *North British Railway Co. v. North British Grain Storage and Transit Co.*, March 11, 1897, p. 687.

Authorised Rates—Deduction in respect of carriage of goods in trader's own waggons—Railway Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act, 1892, Schedule of Maximum Rates and Charges, section 2—Deduction unascertained by arbitration—Compensation.

9. The Railway Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act, 1892, provided by the Schedule of Maximum Rates and Charges, section 2, that where goods are carried for a trader in his own waggons, the rates authorised to be charged by the railway company shall be reduced by a sum to be determined (in the event of difference between the parties) by an arbiter appointed by the Board of Trade. In an action brought in 1895 by a railway company against a trader for rates for the carriage of goods between January 1893 and February 1894, the defender contended that he was entitled to a greater deduction from the rates than the railway company had allowed in respect of goods carried in his own waggons, and that the railway company was not entitled to decree for payment of rates until the legal amount thereof had been ascertained after an arbitration in terms of the statute fixing the deductions to be allowed. The Court *granted* decree for the rates sued for on the ground that the defender had unduly delayed to get the amount of the deductions settled by arbitration. *North British Railway Co. v. North British Grain Storage and Transit Co.*, March 11, 1897, p. 687.

Level Crossing—Trespass—Caledonian Railway Act, 1893, section 37.

10. The Caledonian Railway Act, 1893, section 37, enacts certain penalties for trespass on the company's railways, lands, and property, subject to the proviso that no person should be subject to any penalty under this enactment unless the company proved, to the satisfaction of the Sheriff or Justices, that a public notice warning persons not to trespass had been affixed, *inter alia*, "at the level crossing (if any) nearest to the spot where such trespass is alleged to have been committed." *Held* that the term "level crossing" included private level crossings, and therefore that the company were barred from exacting a penalty for trespass under section 37, where the level crossing nearest to the spot where the trespass was alleged to have been committed was a private level crossing, and no notice had been affixed at that crossing. *Caledonian Railway Co. v. Ramsay*, March 12, 1897, *Just. Cases*, p. 48.

Reparation—Negligence.

11. Liability of railway company for injury caused by defect in one of their waggons while used by another company—*Relevancy*. *Warwick v. Caledonian Railway Co.*, Jan. 28, 1897, p. 429.

Title to Sue—Public right of way.

12. *Held* by Lord Low, Ordinary, that a railway company has no title to sue a declarator of right of way in the public interest. *Park Yard Co., Limited, v. North British Railway Co., Limited*, July 17, 1897, p. 1148.

REAL OR VALUED RENT. See *Church*, 2.

RECONVENTION. See *Jurisdiction*, 2.

RELIEF. See *Agent and Principal*, 3—*Public Burden—Reparation*, 1.

REMIT. See *Process*, 32, 33.

REPARATION. *Relief—Relief against claim neither admitted nor established.*

1. An action concluding for relief against an action for damages which had been brought against the pursuer *dismissed* as irrelevant, in respect that the pursuer neither averred that he was liable for the damages, nor averred that he had been found liable. *Duncan's Trustees v. Steven*, June 1, 1897, p. 880.

Infringement of trade name—Measure of damages—Necessity for proving specific damage.

2. A firm of wholesale whisky merchants brought an action against a public-house keeper for interdict against the defender selling whisky as of the pursuers' manufacture or blending which was not of their manufacture or blending, and for £500 as damages on account of such sales. The defender admitted that the pursuers were entitled to interdict, but he maintained that he was liable in nominal damages only, in respect that the pursuers had not proved special damage. The Court held it to be proved that he had fraudulently sold whisky which was not the pursuers' under the pursuers' name in order to discourage the sale of their whisky. There was no evidence that, after the defender's tenancy of his public-house commenced, the total sale of the pursuers' whisky had diminished in the town in which the public-house was situated. *Held* that the fair inference was that the defender's fraudulent conduct had produced the result which it was intended to produce of substantially injuring the pursuers' trade, and that in the circumstances the damages fell to be assessed at £100. *Thomson & Co. v. Dailly*, July 20, 1897, p. 1173.

Fraud—Agreement to give credit to third party induced by fraud.

3. Right of a person who has been induced to enter into a contract by the fraud of a third person to be relieved of the contract by the third party, or to damages only. *Thin & Sinclair v. Arrol & Sons*, Dec. 3, 1896, p. 198.

Apprehension without a warrant—Police-Constable.

4. A married woman living in Edinburgh brought an action against a detective in the Edinburgh police for damages on account of his having wrongfully compelled her to accompany him to the police-office. The pursuer averred that her son, a boy of twelve, having found some clinical thermometers in the street, brought them to her; and that while she and her husband were taking means to discover whether the thermometers were of any value the defender came to her house, and after charging her with having come by the thermometers dishonestly, forcibly, and without a warrant, compelled her to accompany him to the police-office, where, after a short examination, she was discharged; and that the defender had acted wrongfully, maliciously, and without probable cause. The Court *dismissed* the action as irrelevant. *Malcolm v. Duncan*, March 17, 1897, p. 747.

Slander—Police-Constable—Privilege.

5. In an action of damages for alleged slander, brought by a woman against a detective-officer, the pursuer averred that the defender came to her house and insisted on her accompanying him to the police-office, and repeatedly, and in a loud voice, in the presence and hearing of another detective and of her two sons, called her a "resetter" of certain articles which one of her sons had found in the street. The Court *dismissed* the action as irrelevant. *Malcolm v. Duncan*, March 17, 1897, p. 747.

Slander—"Misappropriation of money"—Innuendo—Privilege—Relevancy.

6. In an action of damages for slander, brought by an auctioneer against a solicitor, the pursuer averred that, on 16th May 1896, the defender had employed him to sell some furniture belonging to a trust-estate; that the pursuer sold the furniture, and rendered to the defender a statement of the prices realised for which he was liable to account to

REPARATION—*Continued.*

the defender; that on 15th August the defender wrote to the pursuer a letter in which the defender, after acknowledging receipt of a letter from the pursuer, intimated that he (the defender) was to "convene the trustees early next week, and shall put before them your misappropriation of their money." The pursuer further averred that after he had paid the money realised by the furniture to the defender, the defender had falsely, maliciously, and calumniously stated to the agent of a bank that the pursuer had misappropriated trust money, meaning thereby that the pursuer had dishonestly appropriated to his own uses moneys belonging to the trustees. The defender averred in answer that the agent of the bank was his father and partner in business, and pleaded privilege. At the hearing counsel for the pursuer stated that he understood that this averment was accurate. *Held* (1) that as the letter of 15th August bore to be part of a correspondence it was competent, even on a question of relevancy, to look at the whole correspondence of which it formed a part; that so regarding the letter it was not in itself slanderous, and did not support the innuendo that the pursuer had been guilty of dishonest misappropriation of money; and therefore that an issue founded on the letter fell to be disallowed; but (2) that the pursuer's averments of verbal slander uttered to the bank agent were to be taken as they stood on record; that they relevantly set forth a case of verbal slander, but did not disclose a case of privilege, and therefore that an ordinary issue of damages for slander fell to be allowed, the question of privilege being left to be determined by the Judge at the trial. *Smyth v. Mackinnon*, July 13, 1897, p. 1086.

Slander—Privilege—Poaching.

7. A, the tenant of the shootings on a certain estate, complained to an innkeeper in the neighbourhood that poaching had been taking place on the estate, and the innkeeper promised to assist A in finding out who the poachers were. Thereafter the innkeeper was told by a gamekeeper that B had been poaching on the estate. The innkeeper communicated this information to A. In an action of damages for slander brought by B against the innkeeper, *held* that in making this communication to A the defender was privileged. *Nelson v. Irving*, July 10, 1897, p. 1054.

Slander—Newspaper—Anonymous Letter—Diligence for recovery of original letter.

8. In an action of damages for slander against the proprietors of a newspaper founded on statements contained in an anonymous letter published in the newspaper, the pursuer, a parish clergyman, averred that the letter "was written or procured to be written by the defenders for publication in their newspaper in pursuance of a malicious design to injure the pursuer," and "to destroy his reputation" as a clergyman. The defenders refused to disclose the name of the writer of the letter, and the pursuer moved for a diligence for the recovery of the original letter. The Court *refused* the diligence. *Morrison v. Smith & Co.*, Jan. 30, 1897, p. 471.

Slander—Veritas—Counter Issue.

9. Counter issues *disallowed* on the ground that they did not meet the pursuers' issue. *British Workman's and General Assurance Co. v. Stewart*, March 4, 1897, p. 624.
10. The pursuer in an action of damages for slander obtained an issue whether at a certain time and place "the defender falsely and calumniously said to . . . that the pursuer was a man of immoral character, and kept a mistress. . . ." The defender on record pleaded *veritas*, and averred that "the pursuer is a man of immoral character, and during the last two years has associated and has committed adultery with" A, but he only averred two occasions prior to

REPARATION—Continued.

the date of the alleged slander on which adultery had been committed. *Held* that the defender's averments did not entitle him to the counter issue "whether, during the period of two years prior to the raising of the action, the pursuer has repeatedly committed adultery with" A. Burnet v. Gow, Nov. 19, 1896, p. 156.

Taking decree in absence—Damages—Consequential Damages—Publication in "Black List."

11. In an action of damages against a defender for taking decree in absence in the Debts Recovery Court against the pursuer, in breach of an agreement not to do so, *held* that in assessing the damages the jury were entitled to take into account damage resulting from the publication of the decree in a "Black List," that being proved to be the natural and invariable consequence of a decree in absence being taken in the Debts Recovery Court. Gibson & Co. v. Anderson & Co., Feb. 23, 1897, p. 556.

Damages for delay in payment of money—Interest.

12. A widow raised an action against testamentary trustees for payment of £11,000 as damages on the ground that heritable properties belonging to her had been brought to a forced sale through the fault of the defenders in withholding payment of sums due to her. *Held* (1) that the action was not relevant, as the pursuer had not set forth circumstances inferring liability on the part of the defenders for damages for delay other than interest; and (2) that the pursuer's acceptance of interest excluded the claim for damages. Roissard v. Scott's Trustees, May 21, 1897, p. 861.

Ship—Harbour—Ship injured by storm while lying in berth assigned by harbour-master.

13. In an action of damages by the owner of a steamship against Harbour Trustees, on the ground that the harbour-master had wrongfully directed the removal of the vessel to a berth which was known to be unsafe, *held* that the damage was due to the extraordinary violence of the storm, and not to any fault on the part of the harbour-master in fixing the berth, and that the defenders were not liable. Niven v. Ayr Harbour Trustees, June 4, 1897, p. 883.

Negligence—Defective floor in granary—Duty of inspection—Latent Defect.

14. A plumber employed by a farmer sustained injuries while crossing the floor of a granary, which at a particular spot gave way beneath him. In an action of damages by him against the farmer it was proved that the floor had been overhauled two years before the accident by a competent tradesman, and that it had been ever since in daily use by the defender and his servants, who were in the habit of crossing it with heavy weights, and that there was no reason to suppose it was in a dangerous condition. *Held* that the pursuer had failed to prove that the accident was due to the fault of the defender. Paterson v. Kidd's Trustees, Nov. 5, 1896, p. 99.

Negligence—Unfenced hatchway in shop—Contributory Negligence.

15. A customer on entering a shop found the shopkeeper engaged with another customer, and a shopboy standing near the door. He playfully took the latter by the ear and led him to a narrow passage leading to the back of the shop. On turning to leave it the customer fell into a hatchway and was injured. In an action of damages brought by the customer against the shopkeeper, *held* (1) that the defender was in fault in not having the hatchway sufficiently fenced, and (2) that there was no contributory negligence on the part of the pursuer. Somerville v. Hardie, Oct. 29, 1896, p. 58.

Negligence—Precautions for safety of public—Leaving horse unattended in street.

16. A brought an action of damages against B, averring that the servant in charge of a horse and van belonging to the defender had left the same

REPARATION—*Continued.*

unattended in a street in Glasgow, although the horse was known to the defender to be a spirited animal, and that the horse had bolted and dashed into the window of the pursuer's shop. *Held* that the action was relevant. *M'Intosh v. Waddell*, Oct. 31, 1896, p. 80.

Negligence—Precautions for safety of the public—Safety of children—Wall separating public place from railway.

17. In an action against a railway company for damages on account of the death of a son, the pursuer averred that the defenders' line of railway, in passing through a town, was separated from a public court by a wall belonging to the defenders about five feet high on the side facing the court, with a drop about twenty-five feet in depth on the railway side; that this wall was flat on the top, and about fourteen inches wide; that the pursuer's son, who was a boy ten years of age, was playing in the court, and, following the example of his companions, got on to the top of the wall by means of a heap of rubbish, two feet high, which had been left by the defenders against the wall in the court; that the boy, while walking along the top of the wall, stumbled and fell down on to the railway and was killed; and that the accident was due to the negligence of the defenders in not having a fence or other obstruction to prevent children from getting on to the top of the wall, and also in placing the heap of rubbish against the wall. *Held* that the action was irrelevant. *Thomson v. Lanarkshire and Dumbartonshire Railway Co.*, July 3, 1897, p. 1025.

Negligence—Liability of railway company for injury caused by defect in one of their waggons while used by another company.

18. In an action by a widow against the Glasgow and South-Western Railway Company and the Caledonian Railway Company to make them liable jointly and severally, or otherwise severally, in damages for the death of her husband, a carter in the employment of the Glasgow and South-Western Railway Company, the Caledonian Railway Company pleaded that in respect the waggons (which had caused the accident, and which belonged to them) were not in their possession nor under their control when the accident happened, but were under the control of the other defenders, the action, in so far as directed against them, was irrelevant. *Held* that the case could not be decided without an inquiry into the circumstances, and issue *adjusted* against both defenders. *Warwick v. Caledonian Railway Co.*, Jan. 28, 1897, p. 429.

Negligence—Master and Servant—Railway—Injury to servant from defective plant of third party.

19. The children of a labourer, in the employment of the Glasgow Iron and Steel Company, who was killed while working as a platelayer on a railway siding situated within the steel company's premises, brought an action of damages against the steel company and the Caledonian Railway Company. They averred that the accident had been caused by a defect in the points, which had thrown several waggons off the line during a shunting operation; that the lines, and the engine and waggons which were using them at the time of the accident, belonged to the railway company; that the lines had been kept up by the steel company for at least ten years, and that both the defenders were responsible for their upkeep; that it was the duty of the steel company to have seen that the points could shut, and that the rails, &c., were in good condition, before putting the deceased to work at or near them. *Held* (1) that there was a relevant case against the railway company, but (2) that no relevant case was stated against the steel company, there being nothing in the pursuers' averments to shew that any duty to see to the maintenance of the line attached to these defenders. *Smyth v. Caledonian Railway Co.*, Feb. 3, 1897, p. 488.

Negligence—Master and Servant—Volenti non fit injuria.

20. A bottler, when in the employment of a firm of aerated water manufac-

REPARATION—*Continued.*

turers, received an injury to one of his fingers in consequence of the bursting of a bottle which he was engaged in filling. He brought an action of damages against the manufacturers, in which he averred that "in all aerated water manufactories the bursting of bottles is of constant occurrence, and it is the usual and proper precaution of the trade to supply the bottlers and other workers with rubber or worsted gloves and masks"; that it was the duty of the defenders to supply such gloves and masks; that they neglected this duty, and that in consequence of that neglect the pursuer received the injuries complained of. The pursuer further averred that the accident took place on the day after that on which he entered the defenders' employment, and that he had asked for gloves and a mask, and that his request had been refused by the defenders. *Held* that the action was relevant. *Smith v. Forbes & Co.*, March 11, 1897, p. 699.

Negligence—Master and Servant—Volenti non fit injuria—Risk voluntarily incurred to save another's life.

21. The father of a boy, thirteen years and four months old, raised an action against a coal company for damages under the Employers Liability Act, 1880, on account of injuries sustained by the boy when in the defenders' employment. The pursuer averred that while the boy and another employee of the defenders were standing on a coal waggon at the pithead of the defenders' pit trimming coal, an uncontrolled waggon was allowed (through the fault of a person entrusted with the superintendence of the shunting operations at the pithead) to approach the waggon on which the boy and his companion were standing at great speed on a down incline on the same line of rails; that the boy's companion, from his position on the stationary waggon, could not see the approaching waggon, but that the boy, "upon suddenly observing the near approach of the waggon running with great speed and force, in a moment of hurry and confusion, incident to his surroundings, and the extreme danger to himself and the said" companion, "jumped from the buffer of the stationary waggon, and seizing a wooden pit prop, about 5 or 6 feet in length, he 'snibbled' or stopped the waggon by inserting the prop between the spokes of one of the wheels and the body of the waggon. In doing so the momentum of the waggon caused one end of the prop to twist round with a sudden jerk, and, striking him on the stomach, threw him on his back, and his left arm falling on the rail, one of the waggon wheels passed over it from near the shoulder to the wrist. The waggon was stopped within 3 or 4 feet of the stationary waggon, and but for the piece of wood inserted in the wheel as aforesaid, . . . the two waggons would have come into violent collision, and been attended with great danger to the said" companion, "who was standing on the top of the coal in the stationary waggon, and also the said" boy. *Held* that the pursuer was entitled to an issue. *Wilkinson v. Kinneil Cannel and Coking Coal Co., Limited*, July 1, 1897, p. 1001.

Negligence—Master and Servant—Workman killed by fall of wall—Relevancy.

22. A mason having been killed by the fall of a wall which he was employed in building, his widow brought an action of damages at common law against his employers, the contractors for the mason work of the building, and averred that his death was due to the fault of the defenders, because—1. The wall was of weak and defective construction in respect (1) that the lime used contained an undue quantity of sand, and was insufficiently worked; and (2) that no proper "header" or binding stones were used in building it. 2. The defenders recklessly hurried on the building in spite of wet and unsuitable weather, and did not allow one course to be sufficiently dry before another was put on, with

REPARATION—*Continued.*

the result that the wall was in a very soft and raw condition. 3. While the wall was in this state, the defenders also, contrary to established custom, allowed the contractor for the carpenter work to drive "dooks" into the wall, with the result that the mason work was shaken and weakened. *Held* that no fault was relevantly averred against the defenders. *Rae v. Milne & Sons*, Nov. 20, 1896, p. 165.

Negligence—Master and Servant—Relevancy—Proximate cause of injury—Allegation of incompetency of fellow-servant.

23. A pit-bottomer sued his employers and the engineman at the pit for damages for personal injuries, averring that while the pursuer was engaged at the bottom of the pit in replacing a hutch on the rails close to the cage, the engineman at the pithead, without awaiting a signal, raised the cage, which caught the pursuer and forced him upwards between the shaft and the scaffolding for three feet before the engine was stopped, and that he was thereby injured. He further averred that the derailment of the hutch was caused by defects in the rails, and that there was a defect in the checking power of the engine which prevented or hindered or interfered with its prompt stopping . . . and that the engineman was not sufficiently qualified for the duties entrusted to him. *Held* that there were no relevant averments of fault against the employers in respect that (1) the pursuer's averments shewed that the derailment of the hutch was not the proximate cause of the accident, and (2) the averments of defect in the engine and the want of sufficient experience on the part of the engineman were not sufficiently specific. *Mackay v. John Watson, Limited*, Jan. 20, 1897, p. 383.

Negligence—Master and Servant—Mines and Minerals—Defect in ways—Manholes—Employers Liability Act, 1880, sec. 1, subsec. 1, and sec. 2, subsec. 1—Coal Mines Regulation Act, 1887, sec. 49—General Regulations 14 and 16.

24. Manholes constructed on the side of a roadway in a coal mine in terms of the Coal Mines Regulation Act, 1887, are part of the ways of the mine in the sense of the Employers Liability Act, 1880, and if a manhole in a mine is obstructed by rubbish in such a way as to justify a miner employed in the mine in believing that the manhole cannot be used, and he is injured in consequence of not using it, his employer will be liable to him in damages under the Employers Liability Act, 1880, provided that the obstruction arose, or had not been discovered or remedied, owing to the negligence of the employer or of some person in his service entrusted by him with the duty of seeing that the ways were in proper condition. *Ferris v. Cowdenbeath Coal Co., Limited*, March 3, 1897, p. 615.

Negligence—Master and Servant—Master's liability for plant—Employers Liability Act, 1880, sec. 1, subsec. 1—Defect in "ways" and "works."

25. A labourer, employed by the contractor for the brickwork in an unfinished house, was injured by the breaking of a step while carrying a load of bricks up the stair of the house. In an action of damages brought by the labourer against his employer, on the ground that the step was defective, *held* that no negligence had been proved on the part of the defender, he being entitled to rely on the fact that the stair was constructed by a competent tradesman, and was the permanent stair of the house. *M'Inulty v. Primrose*, Jan. 28, 1897, p. 442.

Negligence—Master and Servant—Notice of injury—Reasonable excuse for want of notice—Employers Liability Act, 1880, sec. 4.

26. Action for damages under the Employers Liability Act, 1880, dismissed, the Court holding that no reasonable excuse for the want of the statutory notice had been averred. *M'Fadyen v. Dalmellington Iron Co., Limited*, Jan. 16, 1897, p. 327.

See Lease, 7 to 11.

RES INTER ALIOS. See *Agent and Principal*, 3.

RES JUDICATA. See *Church*, 2—*Railway*, 1.

REVENUE. *Succession-duty—Insurance Policy—Succession-Duty Act*, 1853, secs. 2 and 17.

1. *A father who had for many years paid the premiums upon policies of insurance on his own life, assigned the policies, seven years before his death, gratuitously, but absolutely, to his daughter, who, from the date of the assignment, kept up the policies by herself paying the premiums. Upon the father's death the Crown maintained that the assignment of the policies disposed of the moneys payable under them, so as to create a "succession" in the sense of section 2 of the Succession-Duty Act, 1853, and to make the daughter liable for succession-duty. Held (aff. judgment of First Division) that the daughter did not become entitled to the sum in the policy by the disposition of her father but partly by her own payment of premiums, and that the section did not apply. Lord Advocate v. Robertson, Feb. 18, 1897, H. L., p. 42.*

Account-duty—Policy of insurance—Premiums—Customs and Inland Revenue Act, 1889, sec. 11.

2. *A person who had for many years paid the premiums on an insurance policy on his own life for his own behoof, assigned it to his daughter, who thereafter paid the premiums. In a claim by the Crown against the daughter for account-duty, held (aff. judgment of First Division) that section 11 of the Customs and Inland Revenue Act, 1889, did not apply, as the payments made by the father were not made for the benefit of a donee. Lord Advocate v. Robertson, Feb. 18, 1897, H. L., p. 42.*

Income-Tax—Profits or Gains—Property and Income-Tax Act, 1842, sec. 100, *Schedule D, First Case—City of Glasgow Bank (Liquidation) Act*, 1882, sec. 17.

3. *In order to enable the liquidation of the City of Glasgow Bank to be finally closed the Assets Company, Limited, was formed in 1882, and acquired from the liquidators the whole assets of the bank in return for a payment sufficient to discharge the outstanding liabilities of the bank, with the expenses of the liquidation, and a general undertaking to pay all debts of the bank which might afterwards emerge. These assets consisted of real and other properties and securities, and of sums which the liquidators expected to recover from the estates of contributories. At the date of the transference the assets stood in the books of the liquidators estimated at certain values, but these values did not represent the amount paid by the company, which would have been the same if the book values had been increased or diminished to any extent. The income of the company, as stated in the revenue accounts, consisted of the returns from these assets and investments. From time to time the company sold portions of the assets at prices exceeding the book values. The surpluses arising from such sales were not entered as income in the revenue accounts, but were credited to capital under the head of "suspense account for surplus assets." Large sums resulting from such sales and recoveries from debtors were carried to the credit of this account during each year subsequent to 1882, and in 1893 the directors, in terms of an interlocutor of the Court, distributed to the shareholders, from the sum standing in the suspense account, a sum of £15,000 as "repayment of surplus capital." The Inland Revenue claimed that the company were liable to income-tax for the year 1894-95 on the full amount of the sums carried to the credit of suspense account, and assessed the liability on an average of three years preceding 1894. In a case for appeal against the assessment, in which the foregoing facts were stated, held that as there was no statement of the price paid for each of the assets at the date of the transference, it was not possible to determine whether the realisation of the*

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assets had resulted in a profit to the company. *Assets Co., Limited, v. Inland Revenue*, Feb. 23, 1897, p. 578.

Income-tax—Company resident abroad trading in Scotland—Agent for foreign company assessed in his own name—Income-Tax Act, 1853, Schedule D—Income-Tax Act, 1842, sec. 41.

4. The shipping company "Chanaral" (owners of the ship "Chanaral") was incorporated under Norwegian law in Norway, and had its registered office in Christiania, where the books were kept, and the two managers resided. The managers held two of the ninety-five shares of the company, the remainder being held by shareholders in Scotland. J. W. & Company, Glasgow, effected the whole of the chartering, kept the whole accounts, and intromitted with the whole funds, and paid on behalf of the management from the profits of the first voyage a dividend direct to the shareholders. Prior to April 1896 the ship had made one voyage from Rotterdam to various ports, ending at Liverpool. Income-tax assessment under Schedule D having been imposed upon "J. W. & Company for the 'Chanaral'" for the year ending 5th April 1896, J. W. & Company appealed. *Held* (1) that the company was resident abroad; (2) that the profits were derived from trade in this country, and were liable to assessment; and (3) that the assessment was right in point of form, it being unnecessary to designate J. W. & Company expressly as agents for the company. *Wingate & Co. v. Inland Revenue*, June 16, 1897, p. 939.

Income-Tax—Exemption—Theological College—"Public School"—Income-Tax Act, 1842, sec. 61, Sched. A, Rule 6.

5. *Held* that a theological college which was intended primarily for the training of candidates for the ministry of the Free Church of Scotland and the regular students of which required either to be graduates or to have passed through a university course of arts before they were admitted to the college, was not a "public school" in the sense of the Income-Tax Act, 1842, sec. 61, Schedule A, rule 6. *Inland Revenue v. General Trustees of the Church of Scotland*, Feb. 4, 1897, p. 496.

Income-Tax—Exemption—Public Free Library—"Buildings used solely for the purposes" of Institution—Subscription Library—Income-Tax Act, 1842, sec. 61, Sched. A, Rule 6.

6. In the buildings of the Dundee Free Library accommodation was given to books belonging to the Dundee Subscription Library, and the expenses attending their safekeeping and circulation among the subscribers were defrayed out of the revenues of the Free Library. In consideration of the accommodation and services so given, each book, after being in circulation for a year, became the property of the Free Library. *Held* that the buildings in question did not fall within the exemption contained in the Income-Tax Act, 1842, sec. 61, Sched. A, Rule 6, inasmuch as they were not used "solely" for the purposes of the Free Library. *Inland Revenue v. Magistrates of Dundee*, June 16, 1897, p. 930.

Inhabited house duty—Hall—The House-Tax Act, 1851—Act 48 Geo. III. cap. 55, Schedule B, Rule V.—The Customs and Inland Revenue Act, 1878, sec. 13, subsec. 2.

7. *Held* (1) that the Free Church Assembly Hall and Free Church College were "halls or offices" within the meaning of Rule V. of Schedule B of the Act 48 Geo. III. cap. 55, and, being charged for poor and school rates, were liable to inhabited house duty under the House-Tax Act, 1851; and (2) that the hall and college were not entitled to the exemption conferred by the Customs and Inland Revenue Act, 1878, in respect that they were not occupied for the purposes of a business or calling, by which the occupier—the General Trustees of the Free

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Church—sought “a livelihood or profit.” *General Trustees of the Free Church of Scotland v. Inland Revenue*, Feb. 4, 1897, p. 492.

Exchequer Prosecutions—Court of Exchequer (Scotland) Act, 1856, sec. 6.

8. *Question*, whether an Exchequer prosecution must be tried by a jury.

Lord Advocate v. Thomson, Feb. 23, 1897, p. 543.

See *Stamp*.

RIGHT IN SECURITY. *Pledge of documents of title—Delivery-orders—Factors Act*, 1889, sec. 3—*Factors (Scotland) Act*, 1890, sec. 1.

Goldsmith, the owner of certain whisky in a bonded warehouse, for which he held the warrants of the warehouse-keeper, bearing that the whisky was held to the order of Goldsmith “or assigns by indorsement hereon,” borrowed a sum of money from Inglis, and granted him a letter bearing that he deposited the whisky with him in security of the loan, with power of sale. At the same time he indorsed and delivered the warrants to Inglis. Thereafter Robertson & Baxter, creditors of Goldsmith, arrested the whisky in the hands of the warehouse-keeper, who had received no intimation of the indorsement and delivery of the warrants to Inglis. In a competition for the whisky between Inglis, who founded on sec. 3 of the *Factors Act*, 1889, as giving him *vi statuti* constructive possession of the goods and a real right therein as pledgee, and Robertson & Baxter, founding on their arrestment, *held* (by a majority of the whole Court) that the claim of Robertson & Baxter, as arresting creditors, fell to be preferred. *Robertson & Baxter v. Inglis*, March 18, 1897, p. 758.

See *Sale*, 1—*Stamp*, 2—*Trust*, 9.

RIVER, LOCH, AND SEA. See *Lease*, 5—*Police*, 6, 7, 8—*Superior and Vassal*, 2 to 5.

ROAD. *Authority to take materials from enclosed land—Specification of time and place—Blasting—General Turnpike Act*, 1831, sec. 80.

1. A district committee of a county council served a notice upon a proprietor intimating that they intended, in the exercise of their statutory powers, to take road material from an enclosed field upon his estate, at a spot which “will on application by you to . . . the road surveyor of the said district, be . . . specifically pointed out on a map of the locality or on the ground.” In the course of the proceedings before the Sheriff which followed upon the notice, it appeared that the intention of the committee was to carry an existing quarry on unenclosed ground westwards into the proprietor’s enclosed land, and the spot where the enclosed land would be entered upon was pointed out on a map of the locality. The Sheriff pronounced an interlocutor finding that the committee were “entitled to proceed with their proposed operations, but under the restriction and condition” that, if the operations were carried more than fifty yards into the enclosed land they should provide a service bridge to give the proprietor access from one side of the workings to the other, and that no blasting should take place when agricultural work was being carried on within 100 yards of the spot where the blast was to be made. The extract decree bore, *inter alia*, that the Sheriff found that the committee were entitled to search for, dig, and carry away road material from the proprietor’s enclosed land at a spot which would be pointed out by the road surveyor on application by the proprietor. In an action by the proprietor for reduction of the notice, interlocutor, and extract, *held* (1) that the spot at which the material was to be taken was sufficiently identified as that which had been pointed out in the proceedings before the Sheriff; (2) that it was not necessary that any time limit should be imposed on the proposed operations, either in the notice or the decree; (3) that blasting, as a usual and necessary method of quarrying, was

ROAD—Continued.

authorised by the statute ; and (4) that the insertion by the Sheriff of the condition as to the erection of a service bridge was not a good ground for reducing the decree. *Whitson v. Blairgowrie District Committee*, Feb. 6, 1897, p. 519.

Servitude—Grant of access by passage within burgh—Right of owner of passage to diminish its breadth.

2. From 1728 onwards the titles of a house situated in a close or passage in Elgin contained the following clause, "with free egress and regress by the front passage from the High Street." In 1896 this close was a *cul-de-sac*, entirely surrounded by walls, and of irregular breadth, varying from 6 feet 10 inches at the entrance from the street up to 9 feet 4 inches. The owner of the *solum* of the close having in that year proposed to diminish the width of the close for some distance from the entrance to 3 feet 9 inches, the owners of the house brought an action of declarator against him. It was proved that from time immemorial the close had been of the dimensions and character specified. *Held* that the right of the pursuers was a right of egress and regress by the close, as it had existed from time immemorial, and therefore that the defender was not entitled to diminish its width. *Grigor v. Maclean*, Nov. 4, 1896, p. 86.

Public right of way—Title to Sue—Railway, 6.

3. *Held* by Lord Low, Ordinary, that a railway company had no title to sue a declarator of right of way in the public interest. *Park Yard Co., Limited, v. North British Railway Co.*, July 17, 1897, p. 1148.

RUNNING POWERS. See Railway, 6.**SALE. Sale of Moveables—Sale or Security—Sale of Goods Act, 1893, sec. 61, subsec. 4.**

1. Evidence on a consideration of which *held* that the parties intended a transaction to operate as a security over moveables and not as a sale. *Robertson v. Hall's Trustee*, Nov. 10, 1896, p. 120.

Sale of moveables—Right of inspection before taking delivery.

2. In an action by the seller of herrings in barrels against the buyer for the price, *held* that, while the defender, having inspected the herrings before purchasing, would not have been entitled to a second inspection with the view of ascertaining whether they were of the quality specified in the contract, his right to inspect them before taking delivery for the purpose of identifying them as in fact the herrings purchased by him was absolute ; that the pursuer was not entitled to refuse the defender's demand for an inspection on the ground that the defender intended to use the inspection for an illegitimate purpose ; that the pursuer, having refused to allow any inspection, was therefore in breach of contract ; and that the defender fell to be assoilzied. *Chalmers v. Paterson*, July 2, 1897, p. 1020.

Sale of Moveables—Clause of Reference.

3. On 27th May 1895 A, a member of the Beetroot Sugar Association, by contract with B, who was not a member, sold to him sugar at 10s. 9d. per cwt., to be delivered in October-December 1895. The contract incorporated the rules of the association as fully as if these had been expressly inserted therein, and further provided that the Council of the London Association was the referee of all disputes. Rule 32 provided,—“If any member liable on the face of unmatured contracts shall suspend payment . . . the Council of the United Kingdom Association to which he belongs shall, as soon as possible after the suspension . . . meet, fix, and publish official quotations and due dates for all periods of delivery that may be in question ; the prices to be according to the average buying and selling market value of the day on which the member defaulted or suspended payment. The contracts

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in question shall then be closed upon the terms so fixed." A suspended payment in June 1895, and the Council of the London Association fixed the market price of sugar at 10s. 3d., at which the contract fell to be closed, the purchaser, if the rule applied, thus becoming liable for the difference between that and the contract price. B refused to pay the difference, alleging that rule 32 only applied to contracts between members. A, after intimation to B, referred the dispute to the London Council, who decided that the rule applied, and ordained B to pay the sum so fixed. In an action by A for implement of the award, *held* that under the contract the Council was constituted referee of all disputes, and that their decision was final. *Stewart, Brown, & Co. v. Grime*, Jan. 27, 1897, p. 414.

Sale of Moveables—Breach of contract by buyer—Measure of damage—Sale of Goods Act, 1893, sec. 53, subsec. 2.

4. A ropemaker agreed to supply at a certain price 20 tons of rope of a special quality in such quantities as the purchaser should from time to time order, but on condition that the whole should be taken within a certain time. The special quality of rope was not kept in stock by the seller, but was made from time to time as each order was sent. The purchaser having failed to order the whole of the 20 tons within the time specified, the seller raised an action of damages for his loss of profit on the quantity which had not been ordered. *Held* that the true measure of the damages to which the seller was entitled was the difference between the contract price and the cost to the seller of the raw material plus the cost of manufacture. *Govan Rope and Sail Co., Limited, v. Weir & Co.*, Jan. 19, 1897, p. 368.

Sale of Moveables—Contract for successive deliveries of goods—Failure of buyer to take delivery—Defence that goods previously delivered disconform to contract.

5. In an action of damages by a seller for breach of a contract for the supply of a specified quantity of goods, of which delivery was to be taken as required, subject to the proviso that delivery of the whole should be taken before a certain date, the buyer sought to justify his failure to take delivery on the ground that particular lots of goods delivered under the contract had not been of the stipulated quality. *Opinion per Lord Adam* that the defence was relevant, although at the date when he should have taken delivery the buyer was not aware of the defect in the goods previously supplied. *Govan Rope and Sail Co., Limited, v. Weir & Co.*, Jan. 19, 1897, p. 368.

Sale of Moveables—Disconformity to contract—Rejection—Right to retain goods and set up breach of warranty in extinction of price—Sale of Goods Act, 1893, sec. 11, subsec. 2, and secs. 35 and 53.

6. *Held* (1) that where the purchaser of a machine intimated rejection of it as disconform to contract, and thereafter continued to use it for three months, he was not entitled to found on his alleged rejection; and (2) that the purchaser having elected to reject was not entitled thereafter to fall back upon the alternative remedy provided by the Sale of Goods Act of retaining the machine and claiming compensation on the ground that the seller had failed to perform a material part of the contract. *Electric Construction Co., Limited, v. Hurry & Young*, Jan. 14, 1897, p. 312.

Sale of heritage—Objection to title—Inhibitions—Obligation to clear record.

7. In an action by a purchaser of heritage for implement of an obligation by the seller's agents to produce searches shewing a clear record, the defenders tendered searches which disclosed two inhibitions used against the seller prior to the date of the disposition by him. The defenders alleged that the inhibitions were invalid. *Held* that whether the inhibi-

SHIP—Continued.

"inherent deterioration"—Agent and Principal—Deviation from charter-party by charterers' agent—*Ultra vires*.

5. By charter-party a steamship was chartered to proceed to Seville and there load from the charterers or their agents 1500 half chests of oranges, and being so loaded to proceed to Leith direct, and deliver the same agreeably to bills of lading, "the steamer to have liberty before loading fruit to load lead or mineral, also cork-wood, for owners' benefit, the same to be discharged after fruit." A marginal note on the charter-party bore that the captain was to apply to F. G. for cargo. The bills of lading for the fruit bore that it had been shipped "in good order and well conditioned," and took the shipowners bound to deliver it in the like good order and condition, subject to special exceptions, including "not responsible for . . . inherent deterioration." By agreement between F. G. and the master of the steamer, the fruit was loaded before, and was also to some extent discharged after, the mineral and the corkwood, with the result that the fruit was about six days longer in the hold than it would have been had the vessel been loaded in terms of the charter-party. The fruit having been delivered at Leith in a deteriorated condition, the charterers brought an action for damages against the shipowners, pleading that the damage had been caused by the undue detention of the fruit in the hold of the ship consequent on the deviation from the charter-party. The defenders maintained that they were not liable, in respect that the damage had arisen from the "inherent deterioration" of the fruit, and further, that F. G. having agreed that the order of loading should be varied from that provided in the charter-party, the pursuers were not entitled to found on any damage resulting from the variation. *Held*, after a proof (1) that the agreement between F. G. and the master was not binding on the pursuers, and (2) that the defenders were liable in respect that they had undertaken to deliver in good order and condition, and had failed to do so, or to prove that the damage was due to one of the excepted causes. *Lindsay & Son v. Scholefield*, Feb. 19, 1897, p. 530.

Charter-party—Construction—Commission—Commission on freight payable to charterers.

6. By charter-party the owner agreed "on the chartering to arrive of" a vessel then on a voyage from New York to Shanghai for a voyage as follows:—"The said vessel shall after discharge of inward cargo or ballast be made ready, and shall receive on board at Portland, Oregon, and/or other loading-places as hereinafter provided, a full and complete cargo. . . . Should the vessel fail to arrive at Portland, Oregon, at or before 6 o'clock P.M. on or before 31st January 1896, charterers to have the option of cancelling or maintaining this charter on the arrival of vessel." The concluding clause of the charter-party was as follows:—"A commission of three and three-quarters per cent shall be paid to charterers on the estimated gross freight in U. S. gold coin . . . on the completion of loading, or should vessel be lost." The vessel was lost on the voyage from New York to Shanghai. Founding on the last clause above quoted, the charterers raised an action against the shipowners for the amount of the commission on the estimated gross freight. *Held* that it was a condition precedent of the whole contract that the vessel should arrive at the port of loading, and that as that condition had not been purified the defenders fell to be assoltized. *Sibson & Kerr v. Ship "Barcraig" Co., Limited*, Nov. 4, 1896, p. 91.

Charter-party—Agent and Principal—Ultra vires—Relief.

7. The charterer of a ship having litigated unsuccessfully with the shipowners a question as to the mode of discharge depending on the terms of the charter-party, and having been found liable in demurrage and

SHIP—*Continued.*

expenses, brought an action for relief against the shipping-agent, through whom he had effected the charter, on the ground that the shipping-agent had taken the charter-party in the terms in which it was taken contrary to instructions. *Held* that the shipping-agent was not liable, in respect the loss had not been caused by his failure to take the charter-party in terms of his instructions but by the pursuer's failure to take delivery in terms of the charter-party. *Barkley & Sons v. Simpson*, Jan. 16, 1897, p. 346.

SHORE. See *Superior and Vassal*, 2 to 5.

SLANDER. See *Reparation*, 5 to 10.

SPECIAL CASE. See *Process*, 38, 39.

SPECIFIC IMPLEM. See *Process*, 18, 33.

SPEES SUCCESSIONIS. See *Bankruptcy*, 7.

STAMP. *Necessity for stamp*—*Stamp Act*, 1891, *secs.* 33 (1), 101 (1), and *First Schedule*, voce *Agreement*—*Bills of Exchange Act*, 1882, *secs.* 3, 10, 89.

1. A, a claimant in a sequestration, produced a document in the following terms:—"Borrowed from A, £67 Pounds, July 1878. Paid back £5 Pounds, May 1885. Leaving a balance of £62 Pounds to pay still." The document was holograph of and signed by the bankrupt, but was neither dated nor stamped. *Held* that the document was neither a promissory-note, nor an agreement, nor a receipt, within the meaning of the Stamp Act, 1891, and that it might be received as an item of evidence in support of A's claim without a stamp. *Todd v. Wood*, July 14, 1897, p. 1104.

Conveyance on Sale—*Decree under Heritable Securities Act*, 1894, *sec.* 8—*Stamp Act*, 1891, *secs.* 54, 57, and 62.

2. *Held* that an instrument for completing a feudal title in the form of an extract of a decree by a Sheriff under section 8 of the Heritable Securities Act, 1894, declaring the debtor's right of redemption under a bond and disposition in security to be extinguished and the creditor vested in the property at a price under the sum due on the bond, was not a decree whereby property was transferred "upon the sale thereof" in terms of section 54 of the Stamp Act, 1891, and was accordingly not liable to an *ad valorem* duty, but that it fell under section 62 of the Act, in respect that it had the effect of transferring and vesting in the creditor, otherwise than by sale or mortgage, a right of property which had previously been vested in the borrower, and was liable accordingly to a stamp-duty of ten shillings. *Tod v. Inland Revenue*, June 16, 1897, p. 934.

Penalties for insufficient stamping—*Action for penalties against individual partners of firm*—*Contract-note*.

3. The Lord Advocate laid an information against A and B, stockbrokers, carrying on business under the firm name of A, B, & Company, charging "both and each or one or other of them" with having on occasions specified issued contract-notes in the said firm name which were not duly stamped, contrary to the Statutes 54 and 55 Vict. cap. 39, sections 1 and 53 (2) and 56 and 57 Vict. cap. 7, section 3, whereby the said A and B had "both and each or one or other of them" incurred fines to amounts stated. The defenders objected that the information was incompetent as laid, in respect that there was no conclusion against the firm. *Held* that the information was well laid. *Lord Advocate v. Thomson*, Feb. 23, 1897, p. 543.

STATUTE. *Retrospective operation*—*Trusts (Scotland) Act*, 1867, *sec.* 2—*Trusts (Scotland) Amendment Act*, 1884, *sec.* 2.

1. *Opinion (per Lord Kincairney)* that section 2 of the Trusts (Scotland)

STATUTE—*Continued.*

Amendment Act, 1884, was declaratory, and therefore retrospective in its effect. *Scott v. Craig's Representatives*, Jan. 29, 1897, p. 462.

Foreign—Trusts (Scotland) Act, 1867.

2. The Trusts (Scotland) Act, 1867, does not apply to English trusts. *Carruthers' Trustees—Allan's Trustees*, Dec. 11, 1896, p. 238.

Repeal—Statute Law Revision Act, 1892.

3. A complaint libelled a contravention of section 26 of the Excise Licences Act of 1825, "as altered or amended by the 8th and 9th sections of the Licensing (Scotland) Act, 1853." The 8th and 9th sections of the Act of 1853 were repealed by the Statute Law Revision Act, 1892. *Held* that the complaint was irrelevant, in respect that it was founded on sections of a statute which had been repealed. *Morrison v. Stubbs*, June 8, 1897, Just. Cases, p. 61.

See *Assignment—Fishings*, 1—*Police*, 5.

STATUTES.

1669, cap. 9. See *Prescription*.

1696, cap. 5. See *Bankruptcy*, 1 to 7.

48 Geo. III. cap. 55 (*House-Tax Act*, 1808). See *Revenue*, 7.

6 Geo. IV. cap. 120 (*Judicature Act*, 1825). See *Process*, 28, 29.

9 Geo. IV. cap. 58 (*Home Drummond Act*, 1828). See *Public-House*, 1.

1 and 2 Will. IV. cap. 43 (*General Turnpike Act*, 1841). See *Road*, 1.

2 and 3 Will. IV. cap. 68 (*Day Trespass Act*, 1832). See *Justiciary Cases*, 31.

1 and 2 Vict. cap. 114 (*Personal Diligence Act*, 1838). See *Poinding*.

5 and 6 Vict. cap. 35 (*Income-Tax Act*, 1842). See *Revenue*, 3 to 6.

8 and 9 Vict. cap. 19 (*Lands Clauses Consolidation Act*, 1845). See *Railway*, 3.

8 and 9 Vict. cap. 83 (*Poor-Law Amendment Act*, 1845). See *Poor*.

12 and 13 Vict. cap. 51 (*Pupils Protection Act*, 1849). See *Judicial Factor*, 2.

13 and 14 Vict. cap. 36 (*Court of Session Act*, 1850). See *Process*, 2.

14 and 15 Vict. cap. 36 (*House-Tax Act*, 1851). See *Revenue*, 7.

16 and 17 Vict. cap. 34 (*Income-Tax Act*, 1853). See *Revenue*, 4.

16 and 17 Vict. cap. 51 (*Succession-Duty Act*, 1853). See *Revenue*, 1.

17 and 18 Vict. cap. 31 (*Railway and Canal Traffic Act*, 1854). See *Railway*, 8.

17 and 18 Vict. cap. 91 (*Valuation of Lands Act*, 1854). See *Public Burden—Valuation Acts*, 3.

19 and 20 Vict. cap. 56 (*Court of Exchequer Act*, 1856). See *Revenue*, 8.

19 and 20 Vict. cap. 79 (*Bankruptcy Act*, 1856). See *Bankruptcy*.

20 and 21 Vict. cap. 19 (*Bankruptcy and Real Securities Act*, 1857). See *Bankruptcy*, 2.

20 and 21 Vict. c. 72 (*Police Act*, 1857). See *Police Force*, 1.

20 and 21 Vict. cap. cxlviii. (*Tweed Fisheries Act*, 1857). See *Justiciary Cases*, 33.

25 and 26 Vict. cap. 35 (*Public-Houses Acts Amendment Act*, 1862). See *Justiciary Cases*, 5, 21.

25 and 26 Vict. cap. 89 (*Companies Act*, 1862). See *Company*, 7.

25 and 26 Vict. cap. 97 (*Salmon Fisheries Act*, 1862). See *Fishings*.

25 and 26 Vict. cap. 101 (*General Police and Improvement Act*, 1862). See *Police*, 5.

26 and 27 Vict. cap. 87 (*Savings Banks Acts Amendment Act*, 1863). See *Bank*.

26 and 27 Vict. cap. 108 (*Vaccination Act*, 1863). See *Justiciary Cases*, 23—*Public Health*, 1.

27 and 28 Vict. cap. 53 (*Summary Procedure Act*, 1864). See *Justiciary Cases*.

29 and 30 Vict. cap. cclxxiii. (*Glasgow Police Act*, 1866). See *Burgh*, 5, 6.

STATUTES—*Continued.*

- 30 and 31 Vict. cap. 97 (*Trusts Act*, 1867). See *Trust*, 7, 11.
- 30 and 31 Vict. cap. 101 (*Public Health Act*, 1867). See *Lease*, 4.
- 30 and 31 Vict. cap. 131 (*Companies Act*, 1867). See *Company*, 1, 6.
- 31 and 32 Vict. cap. 48 (*Representation of the People Act*, 1868). See *Election Law*, 1, 2, 4.
- 31 and 32 Vict. cap. 54 (*Judgments Extension Act*, 1868). See *Process*, 9.
- 31 and 32 Vict. cap. 100 (*Court of Session Act*, 1868). See *Process*.
- 31 and 32 Vict. cap. 123 (*Salmon Fisheries Act*, 1868). See *Fishings*, 1.
- 34 and 35 Vict. cap. 38 (*Public Health Amendment Act*, 1871). See *Police*, 7.
- 34 and 35 Vict. cap. 56 (*Dogs Act*, 1871). See *Justiciary Cases*, 3.
- 36 and 37 Vict. cap. 48 (*Regulation of Railways Act*, 1873). See *Railway*, 8.
- 36 and 37 Vict. cap. 63 (*Law-Agents Act*, 1873). See *Administration of Justice*, 2, 3.
- 37 and 38 Vict. cap. 94 (*Conveyancing Act*, 1874). See *Writ*, 1.
- 38 and 39 Vict. cap. 62 (*Summary Prosecutions Appeals Act*, 1875). See *Justiciary Cases*, 35, 37.
- 38 and 39 Vict. cap. 63 (*Sale of Food and Drugs Act*, 1875). See *Justiciary Cases*, 10, 11—*Public Health*, 2.
- 39 and 40 Vict. cap. 26 (*Publicans Certificate Act*, 1876). See *Public-House*, 2.
- 40 and 41 Vict. cap. 26 (*Companies Act*, 1877). See *Company*, 6.
- 40 and 41 Vict. cap. 50 (*Sheriff Courts Act*, 1877). See *Bankruptcy*, 2.
- 41 and 42 Vict. cap. 15 (*Customs and Inland Revenue Act*, 1878). See *Revenue*, 7.
- 41 and 42 Vict. cap. 33 (*Dentists Act*, 1878). See *Justiciary Cases*, 30.
- 42 and 43 Vict. cap. 30 (*Sale of Food and Drugs Amendment Act*, 1879). See *Justiciary Cases*, 10, 11—*Public Health*, 2.
- 43 and 44 Vict. cap. 34 (*Debtors Act*, 1880). See *Justiciary Cases*, 25 to 28.
- 43 and 44 Vict. cap. 42 (*Employers Liability Act*, 1880). See *Reparation*, 24, 25, 26.
- 43 and 44 Vict. cap. 47 (*Ground Game Act*, 1880). See *Justiciary Cases*, 31.
- 44 and 45 Vict. cap. 21 (*Married Women's Property Act*, 1881). See *Marriage-Contract*, 1.
- 44 and 45 Vict. cap. 22 (*Bankruptcy and Cessio Act*, 1881). See *Bankruptcy*, 15.
- 44 and 45 Vict. cap. 33 (*Summary Jurisdiction Act*, 1881). See *Justiciary Cases*.
- 45 and 46 Vict. cap. 61 (*Bills of Exchange Act*, 1882). See *Bill of Exchange*, 1—*Stamp*, 1.
- 45 and 46 Vict. cap. clii. (*City of Glasgow Bank Liquidation Act*, 1882). See *Assignment*.
- 46 and 47 Vict. cap. 51 (*Corrupt Practices Act*, 1883). See *Election Law*, 5 to 9.
- 46 and 47 Vict. cap. 57 (*Patents, Designs, and Trade-Marks Act*, 1883). See *Trade-Mark*.
- 47 and 48 Vict. cap. 63 (*Trusts Amendment Act*, 1884). See *Trust*, 8.
- 48 and 49 Vict. cap. 3 (*Representation of the People Act*, 1884). See *Election Law*, 3.
- 48 and 49 Vict. cap. 16 (*Registration Amendment Act*, 1885). See *Election Law*, 2.
- 49 and 50 Vict. cap. 29 (*Crofters Holdings Act*, 1886). See *Crofter*.
- 50 and 51 Vict. cap. 35 (*Criminal Procedure Act* 1887). See *Justiciary Cases*, 25.
- 50 and 51 Vict. cap. 58 (*Coal Mines Regulation Act*, 1887). See *Reparation*, 24.

STATUTES—Continued.

- 51 and 52 Vict. cap. 25 (*Railway and Canal Traffic Act*, 1888). See *Railway*, 8.
- 52 and 53 Vict. cap. 23 (*Herring Fishery Act*, 1889). See *Justiciary Cases*, 34.
- 52 and 53 Vict. cap. 45 (*Factors Act*, 1889). See *Right in Security*.
- 52 and 53 Vict. cap. 50 (*Local Government Act*, 1889). See *Police Force*, 1.
- 52 and 53 Vict. cap. 7 (*Customs and Inland Revenue Act*, 1889). See *Revenue*, 2.
- 53 and 54 Vict. cap. 40 (*Factors Act*, 1890). See *Right in Security*.
- 54 and 55 Vict. cap. 30 (*Law-Agents and Notaries Public Act*, 1891). See *Agent and Client*, 6.
- 54 and 55 Vict. cap. 39 (*Stamp Act*, 1891). See *Stamp*, 1, 2.
- 54 and 55 Vict. cap. cxxvi. (*Edinburgh Municipal and Police Amendment Act*, 1891). See *Burgh*, 9.
- 55 and 56 Vict. cap. 19 (*Statute Law Revision Act*, 1892). See *Justiciary Cases*, 7.
- 55 and 56 Vict. cap. 55 (*Burgh Police Act*, 1892). See *Burgh*, 1, 2, 3, 7—*Police*, 4, 5, 8, 9, 10.
- 55 and 56 Vict. cap. lxxiii. (*North British Railway, &c. Order Confirmation Act*, 1892). See *Railway*, 9.
- 56 and 57 Vict. cap. 71 (*Sale of Goods Act*, 1893). See *Sale*, 1, 4, 6.
- 56 and 57 Vict. cap. cliv. (*Edinburgh Improvement and Municipal and Police Act*, 1893). See *Burgh*, 9.
- 56 and 57 Vict. cap. clxxix (*Caledonian Railway Act*, 1893). See *Railway*, 10.
- 57 and 58 Vict. cap. 44 (*Heritable Securities Act*, 1894). See *Stamp*, 2.
- 57 and 58 Vict. cap. 58 (*Local Government Act*, 1894). See *Valuation Acts*, 4.
- 57 and 58 Vict. cap. 60 (*Merchant Shipping Act*, 1894). See *Ship*, 4.
- 58 and 59 Vict. cap. 41 (*Lands Valuation Amendment Act*, 1895). See *Valuation Acts*, 2.

STREET. See *Burgh*, 5, 6—*Police*, 3, 4, 5.

SUCCESSION. *Legitim—Discharge of legitim.*

1. A bankrupt executed a deed of discharge whereby, on the narrative that he had received various advances of money from his father, and that it was reasonable and proper that "in respect of such advances" he should execute the discharge after written, he exonerated and discharged his father, his heirs and executors, of any legitim which he could claim through the death of his father. *Held* that the deed was not to be construed as conditional upon the father's claim for repayment of the advances being discharged, but was a gratuitous discharge of the son's right to legitim. *Obers v. Paton's Trustees*, March 17, 1897, p. 719.

Heritable and Moveable—Conversion—Sale of heritage by factor loco tutoris—Minor's power to test on proceeds of sale.

2. A minor pubes may dispose by will of moveable property belonging to him as a *surrogatum* for heritage. *Brown's Trustee v. Brown*, June 18, 1897, p. 962.

Testament—Holograph Writing.

3. Terms of two holograph writings which were found in the repositories of a deceased person who left a formal settlement, *held* not to be testamentary. *Waddell's Trustees v. Waddell*, Dec. 2, 1896, p. 189.

Testament—Destination in moveable bond.

4. B invested money belonging partly to himself and partly to A in a moveable bond payable to A and B and the survivor. In a question between A's executor and B, *held*, after proof, that A had authorised

SUCCESSION—*Continued.*

the investment in these terms, and that the destination operated as a bequest by A in favour of B. *Paterson's Judicial Factor v. Paterson's Trustees*, Feb. 4, 1897, p. 499.

Testament—Destination—Effect of general settlement on prior special destination.

5. *Held* that a will revoking all deeds of settlement, and declaring the testator's wish that her estate should go to her heirs whomsoever, was not to be construed as revoking the special destination in a moveable bond taken by the testator, although its effect was testamentary. *Paterson's Judicial Factor v. Paterson's Trustees*, Feb. 4, 1897, p. 499.

Testament—Revocation—Conditio si testator sine liberis decesserit.

6. A, sixteen months after his marriage, executed a will, by which he left his whole estate to his wife. Five years later a child was born of the marriage, and fourteen months afterwards A died. *Held* that the *conditio si testator sine liberis decesserit* applied, and that the will became inoperative on the birth of the child. *M'Kie's Tutor v. M'Kie*, Feb. 16, 1897, p. 526.

Testament—"My heir"—Executor—Competition.

7. A holograph will provided, *inter alia*,—"My cousin Thomas Forrest is to be my heir." Then followed pecuniary legacies. Mrs Jerdon, the testator's sister, craved to be appointed executrix-dative *qua* next of kin of the testatrix. Thomas Forrest craved confirmation as executor-nominate, or as executor-dative *qua* general disponent and universal legatory of the deceased. The Court *preferred* the claim of Mrs Jerdon, on the ground that it was not clear from the terms of the will that the testatrix had conferred on Thomas Forrest the character claimed by him. *Jerdon v. Forrest*, Jan. 23, 1897, p. 395.

Testament—Construction.

8. General power of sale—Prohibition in codicil against selling a particular subject—Petition for power to sell—Trusts (Scotland) Act, 1867. *Marshall's Trustees*, Jan. 30, 1897, p. 478.

Testament—Construction—"Issue."

9. *Held* that a destination to a person's "issue" in the ordinary case includes not children only but direct descendants of every degree, *per stirpes*. *Turner's Trustees v. Turner*, March 4, 1897, p. 619; *cf.* *M'Murdo's Trustees v. M'Murdo*, Jan. 28, 1897, p. 458.

Substitution in moveables—Evacuation—Fee or Liferent—Repugnancy.

10. Terms of a general disposition and settlement on a construction of which *held* that on the death of the testator his wife became absolute owner of his whole estate, and that it passed on her death to her next of kin—*diss.* Lord Moncreiff, on the ground that, on a sound construction of the husband's settlement, the wife became *fiar* of his estate, with a substitution in favour of legatees named, which substitution had not been evacuated. *Bell's Executor v. Borthwick*, July 15, 1897, p. 1120.

Liferent and Fee—Power—Conveyance to liferentrix with power of disposal "during her life."

11. Certain heritable property was conveyed to M. for her liferent use only, and to her children in fee, with the declaration that "it shall be lawful to and in the power of the said M. by herself alone, during her life, to sell, burden, or otherwise dispose, onerously or gratuitously, of the said subjects as she may think proper." *Held* that the power did not entitle her to dispose of the subjects by a *mortis causa* deed. *Miller's Trustees v. Findlay*, Nov. 6, 1896, p. 114.

Liferent or Fee—Residue—Direction to trustees to invest for behoof of A and pay interest—Right to renounce liferent.

12. In his trust-disposition and settlement executed in 1858 a testator who

SUCCESSION—*Continued.*

had three daughters, one married and two unmarried, directed his trustees, previous to their dividing the residue of his estate, "to set apart and invest" in their own names £1600 in two sums of £800 each "for behoof of" his two unmarried daughters M and W, "the interest thereof to be paid to them respectively so long as they remain unmarried," declaring that in the event of either of them contracting marriage or dying, the interest on the sum "effeiring to such daughter" should be paid to the other so long as she remained unmarried. The testator further authorised his trustees to pay to each daughter on her marriage a sum not exceeding £200 "out of the said sum of £1600" for outfit, and then directed his trustees after payment of his debts, and "after investing the said sum of £1600," to make over the residue of his estate to his three daughters, share and share alike, "but deducting from the shares of my said children . . . any sum . . . that may have been paid by my said trustees to any of my said daughters for outfit in the event of the marriage of either of them." In the event of any of the children dying before the period of division, her share was to accrue to the survivor. The testator was survived by his three daughters. *Held* (1) that the provision in the residuary clause that the sums paid by the trustees for marriage outfit from the £1600 should be deducted from M and W's shares of residue shewed the testator's intention that the fee of the £1600 should form part of the residue, and that it fell to be disposed of accordingly, and (2) that the unmarried daughters were entitled to renounce their liferents of the £1600, and to obtain immediate payment of their shares of the capital thereof as residue. *Whitehead's Trustees v. Whitehead*, July 6, 1897, p. 1032.

Liferent and Fee—"Free liferent use of residue"—Profits of law business—Income or Capital.

13. A law-agent in his trust-settlement directed that his widow should "enjoy the free liferent use and enjoyment of the residue" of his estate. Under a contract of copartnery current at his death his trustees were entitled to receive from his surviving partner a share of the future profits of his business for several years. *Held* that the share of profits did not belong to the widow as income, but fell as capital into residue. *Freer's Trustees v. Freer*, Jan. 28, 1897, p. 437.

Conditio si institutus sine liberis decesserit—Bequest by uncle to nephew and niece.

14. *Held* that the *conditio si sine liberis* applied to a legacy to a nephew, there being nothing in the settlement to shew that the testator was moved to select his nephews and nieces as objects of his bounty by any other consideration than their relationship to him. *Waddell's Trustees v. Waddell*, Dec. 2, 1896, p. 189.

Vesting—Marriage-contract—Vesting of provision to children—Clause of survivorship—Power of appointment—Acceleration of vesting by deed of appointment.

15. Terms of a marriage-contract on a construction of which *held* that the persons entitled under the marriage-contract to the fee of the estate conveyed by the wife, in the event of a power of appointment not being exercised, were the children alive at the death of the longest liver of the spouses, and the issue of such as might have predeceased that date; that these persons were the sole objects of the power of appointment; and therefore that the trustee under the marriage-contract was bound to hold the estate conveyed by the wife (who had survived her husband) until her death. *Cuming's Trustee v. Cuming*, Nov. 14, 1896, p. 153.

Vesting—Clause of survivorship.

16. *Held*, on a construction of a trust-disposition and settlement, that the

SUCCESSION—*Continued.*

presumption that a clause of survivorship referred to the period of distribution had been excluded by evidence of a contrary intention in the deed, and that the children's shares of residue vested in them *a morte testatoris*. *Wood v. Neill's Trustees*, Nov. 6, 1896, p. 105.

Vesting—Fee or Liferent—Direction to trustees to retain.

17. Terms of a trust-disposition and settlement on a construction of which *held* that on the death of the truster's widow the fee of a daughter's share vested in her, subject only to the effect of the direction to settle her share in the event of her marriage. *Mackay's Trustees v. Mackay's Trustees*, June 8, 1897, p. 904.

Vesting—Power to trustees to postpone division or to make interim divisions—Survivorship.

18. A testator, after directing his trustees to pay certain alimentary annuities, directed that "after the foregoing purposes are served" his trustees should divide the residue of his estate equally, share and share alike, among his surviving children *nominatim*, and the children of a deceased daughter, "such children coming in the place of their mother and receiving equally among them the share that would have fallen to her if she had survived me, and formed one of my residuary legatees, and to the survivors of my said five children and grandchildren; declaring that, in the event of any of my children before named, or grandchildren before referred to, dying prior to the division of said residue, leaving lawful issue, such issue shall succeed equally, share and share alike, to that portion of my said means and estate which would have devolved on their parent under the destination above written, and as if such parent had survived said period of division." The testator empowered his trustees to sell all or any portion of his estates at such times as they might consider advantageous, and to set aside sufficient investments for payment of the annuities, if they thought proper. He further empowered them to postpone the division of the residue until the whole had been realised, or to make interim divisions as the realisation proceeded. *Held* that the whole residue vested in the children and grandchildren of the testator at the date of his death. *Maclean's Trustees v. Maclean*, June 29, 1897, p. 988.

Vesting—Direction to pay on attainment of majority.

19. A testator directed his trustees to make payment to his nephew, D. M., of a legacy of £60,000, "and that in liferent for his liferent use only, and on his death I direct the said sum of £60,000 to be paid to and among his children equally among them, share and share alike, on their respectively attaining the age of twenty-one, payable as such children, after their father's death, respectively attain majority, the interest or annual produce being, however, in the meantime, available for their maintenance and education, the issue of any of the said children who may have predeceased taking their parent's share." D. M. predeceased the testator. *Held* that the fee of the £60,000 vested equally in all D. M.'s children at the testator's death, irrespective of their attainment of majority. *Mackinnon's Trustees v. MacNeill*, June 29, 1897, p. 981.

Vesting—Payment—Discretion of trustees.

20. Terms of a bequest of a share of residue to a son on a construction of which *held* that no part of the capital of the son's share had vested in him except the sums paid to him by the trustees. *Russell v. Bell's Trustees*, March 5, 1897, p. 666.

See *Writ*, 1.

SUPERIOR AND VASSAL. *Entry—Corporation—"Managers and their successors in office."*

1. The Orphan Hospital and Workhouse at Edinburgh, incorporated by royal letters-patent, having purchased certain lands, the superior, by charter

SUPERIOR AND VASSAL—*Continued.*

of resignation, disposed the lands "to and in favour of the managers of" the corporation "and their successors in office for the use and behoof of the said hospital and their dispoonees, heritably and irredeemably," and infeftment was taken in these terms. *Held* that the entry so given was an entry of the corporation, and was not an entry of individuals as trustees for the corporation. *Earl of Lauderdale v. Hogg*, June 10, 1897, p. 914.

Barony Title—Crown—Sea—Submarine Coal—Prescription.

2. In a question between the Crown and a vassal, *held* (1) that the grant of a barony, with parts and pertinents, cannot, apart from prescriptive possession explaining the grant otherwise, be construed to carry the coal under the bed of the sea *ex adverso* of the barony lands; but (2) that, if coal below low-water mark has been openly worked from barony lands for more than the prescriptive period, such possession is sufficient to shew that the coal below low-water mark, so far as the same is workable from the barony lands and within the lateral boundaries of the barony, was included in the original grant. *Wemyss' Trustees v. Lord Advocate*, Dec. 11, 1896, p. 216.

Title—Grant of coal infra fluxum maris.

3. A grant of land adjoining the seashore, with the privilege of working the coal *infra fluxum maris*, confers a right to work the coal underneath the foreshore, but implies an exclusion of any right to coal beyond low-water mark, so that possession of such coal is possession without a title. *Wemyss' Trustees v. Lord Advocate*, Dec. 11, 1896, p. 216.

Title—Disjunction of united barony by division of superiority.

4. By crown charter of resignation and novodamus granted in 1651 the three baronies of W., E., and M. which were separately described, were united into a single united barony. Upon the restoration of Episcopacy in 1662 the superiority of the barony of M., which was within the regality of St Andrews, reverted to the Archbishop of St Andrews, and the vassal resigned the lands to the archbishop, and obtained a charter from him. At the Revolution the superiority again passed to the Crown, and crown charters of the whole lands of W., E., and M. were subsequently granted to the vassal. These charters, however, did not re-erect the three baronies into a single barony. *Held* that, as a barony cannot be held of different superiors, M. ceased to be part of the united barony in 1662, and that, as it had never been re-united therewith, possession of submarine coal *ex adverso* of the lands of W. could not be founded on to instruct a title to such coal *ex adverso* of the lands of M. *Wemyss' Trustees v. Lord Advocate*, Dec. 11, 1896, p. 216.

Barony—Crown—Union of baronies with different titles—Possession.

5. A crown charter of resignation and novodamus erected three baronies, W., E., and M., which were separately described, into a united barony, but did not expressly make any additional grant. The description of the lands of W. contained no boundary seawards. After the union of the baronies the proprietor worked the coal under the bed of the sea beyond low-water mark *ex adverso* of W. for the prescriptive period. *Opinion* by Lord Adam that the proprietor was not entitled to found on this possession further than as explaining his title to W. *Wemyss' Trustees v. Lord Advocate*, Dec. 11, 1896, p. 216.

Building Restrictions—Right of one vassal to enforce restrictions against another—Jus quesitum tertio.

6. *Held* that the reference to a common plan and scheme of building in a feu-charter was sufficient to shew that the restrictions were imposed and accepted for the benefit not merely of the superior, but also of the body of feuars, and that the other feuars were entitled to enforce them. *Johnston v. The Walker Trustees*, July 10, 1897, p. 1061.

SUPERIOR AND VASSAL—*Continued.**Building Restrictions—Acquiescence.*

7. Evidence on a consideration of which *held* that building restrictions were still binding notwithstanding alleged deviations therefrom. *Johnston v. The Walker Trustees*, July 10, 1897, p. 1061.

Building Restrictions.

8. Prohibition against building on vacant ground used as a back-green—Whether prohibition affected portion of back-green occupied at date of disposition by a small building not separately conveyed. *Lawson v. Wilkie*, March 4, 1897, p. 649.

Building Restrictions—Ground-annual.

9. By contracts of ground-annual, the City of Glasgow Bank-disponed certain building lots in Carlton Terrace, Glasgow, part of the lands of North Woodside, belonging to the bank. By the contracts, the disponees were taken bound in the second place to “erect on the said steading of ground hereby disponed a good and substantial dwelling-house of stone and lime”; “(third), the front of the house or houses to be erected . . . shall be placed upon the building line, and in all parts and portions thereof shall be built, erected, and finished in every respect in conformity with the designs and building plans” “so as not to be inferior in character and design” to the houses already built on Carlton Terrace, “the first party (the City of Glasgow Bank) being bound to take their disponees in the other steadings fronting Carlton Terrace already built upon, or yet to be built upon, bound to observe similar conditions and to maintain and erect houses not inferior in character and design to the houses built as aforesaid”; “and further, declaring that the second party in building shall be bound to conform to the general feuing-plan of North Woodside; and the first party bind themselves and their successors to insert in all future conveyances to be granted by them or their foresaids of their said lands of North Woodside, as shewn on the said feuing-plan, similar conditions, provisions, obligations, and others, as herein expressed.” *Held* that, as regarded the unbuilt-on lots in Carlton Terrace, the pursuers were entitled to erect tenements of dwelling-houses, provided that in doing so they observed the existing building line in front, and that the houses so to be erected were not inferior in character and design to the houses already built and forming part of said terrace; but that, as regarded the rest of the lands of North Woodside, the pursuers were entitled to erect tenements of dwelling-houses and shops. *Assets Co., Limited, v. Ogilvie*, Jan. 23, 1897, p. 400.

Building Restrictions—Process—Declarator.

10. In an action for declarator that certain building ground within a burgh was not subject to any building restrictions, the Lord Ordinary was of opinion that the ground was subject to certain restrictions and not to others, but he pronounced an interlocutor assoilzieing the defenders, holding that it was incompetent to pronounce a limited decree unless the pursuers restricted their summons, which they declined to do. *Held (rev. the judgment)* that it was competent to pronounce a limited decree, and that decree fell to be pronounced accordingly. *Assets Co., Limited, v. Ogilvie*, Jan. 23, 1897, p. 400.

Building Restrictions.

11. Right of disponee of vassal to enforce restrictions against vassal—Deviation from restrictions. *Campbell v. Bremner*, July 17, 1897, p. 1142.

Buildings on feu—Approval of plan by superior—Servitude of light—Implied grant.

12. A feued a piece of ground in a street to B, the feu-contract bearing that B was “now erecting” on the ground feued “a tenement, the plan of which has been approved by” the superior’s architect. A subsequently feued the adjoining ground to C, who applied to the Dean of Guild for

SUPERIOR AND VASSAL—*Continued.*

warrant to erect upon it buildings which, if built, would have entirely excluded the light of the back windows of B's tenement. B opposed the application on the plea that the superior, having by his architect approved of the plan of his tenement, must be held to have conferred upon him a servitude of light over the adjoining ground for the windows shewn on the plan. The Court *repelled* the plea, *holding* that the superior's approval of the plan did not bind him to warrant the lights of all the windows shewn thereon. *King v. Barnetson*, Oct. 31, 1896, p. 81.

Privilege conferred on vassal to use vacant ground adjoining feu—Reservation of right to curtail vacant ground by building thereon—Extent of reserved right.

13. A feued a building stance to B, with the privilege of using a piece of vacant ground behind it, which was bounded on one side by certain brick buildings facing C Street belonging to A. The feu-contract contained a declaration that, "as the brick buildings are more narrow from back to front than the permanent buildings in C Street to be built upon the site of the said brick houses will be when C Street is feued, the said back ground will thus be curtailed," and that B should have no claim against A for this restriction. A subsequently feued the back ground and the ground on which the brick buildings stood to C, who applied to the Dean of Guild for warrant to pull down the existing buildings and erect in their place permanent buildings of considerably greater depth than the original buildings. The plans shewed that the proposed new buildings would materially injure the lights and ventilation of the buildings on B's feu. B opposed the application on the plea that the proposed buildings would be an unreasonable encroachment on his rights in the back ground. The Court *repelled* the plea on the ground that B's title imposed no limitation on the depth of the permanent buildings, the erection of which it contemplated. *King v. Barnetson*, Oct. 31, 1896, p. 81.

Lease—Power to resume lands.

14. Feu of lands resumed—Liability of feuar to compensate tenant—County Council—District Committee—Hospital—Public Health (Scotland) Act, 1867, secs. 39 and 116. District Committee of the Middle Ward of Lanark *v. Marshall*, Nov. 10, 1896, p. 139.

SUPERFLUOUS LANDS. See *Railway*, 3.

SUSPENSION. See *Interdict—Justiciary Cases*, 19—*Process*, 40, 41—*Trust*, 17.

TEINDS. *Augmentation—Procedure where dispute as to the existence of sufficient free teind.*

In a process of augmentation the heritors admitted the existence of free teind, but denied that it was sufficient to meet the augmentation craved, and moved for an order on the minister to lodge a condescendence of the free teind which he alleged to exist. The Court *granted* the augmentation craved, leaving the question whether sufficient free teind existed or not to be determined in the process of locality. *Minister of Peebles v. Heritors of Peebles*, Jan. 8, 1897, p. 293.

TIME. See *Justiciary Cases*, 11—*Process*, 30.

TITLE TO SUE. See *Assignment—Bankruptcy*, 3, 4, 6—*Executor*, 2—*Lease*, 3.

TRADE-MARK. *Jurisdiction—Petition for Rectification of Register of Trade-Marks—Patents, Designs, and Trade-Marks Act, 1883.*

1. *Held* by Lord Kincairney, Ordinary, that he had jurisdiction to entertain a petition for rectification of the Register of Trade-Marks by a person aggrieved. *Herbert v. Cowie Brothers & Co.*, Jan. 16, 1897, p. 361.

TRADE-MARK—*Continued.*

2. *Held* by Lord Kincairney, Ordinary, that a person aggrieved by an entry in the Register of Trade-Marks is not excluded by the lapse of five years from the date of the entry from presenting a petition for rectification of the register. *Herbert v. Cowie Brothers & Co.*, Jan. 16, 1897, p. 361.

Similarity—Risk of native purchaser in foreign market being misled—Interdict in general terms.

3. A merchant who exported biscuits for sale in Burmah, and elsewhere abroad, and whose registered trade-mark was an architectural drawing, shewing the front elevation of Glasgow Town Hall, brought an action to have another merchant interdicted "from in any way using in connection with the sale of biscuits" the pursuers' trade-mark, or any mark substantially the same. It was proved that the defender exported biscuits for sale in Burmah, under a label which contained a picture, drawn in perspective, shewing the front and one of the sides of Glasgow Town Hall. It was admitted that a purchaser at home was not likely to mistake the one design for the other, but there was evidence, however, that the similarity was such as was calculated to mislead native purchasers in the Burmese market. It was not proved that anyone either at home or abroad had in fact been misled. The Court *refused* the interdict craved. *Cowie Brothers & Co. v. Herbert*, Jan. 16, 1897, p. 353.

TRADE NAME. *Infringement of trade name—Measure of damages—Necessity for proving specific damage.*

- A firm of wholesale whisky merchants brought an action against a public-house keeper for interdict against the defender selling whisky as of the pursuers' manufacture or blending which was not of their manufacture or blending, and for £500 as damages on account of such sales. The defender admitted that the pursuers were entitled to interdict, but he maintained that he was liable in nominal damages only, in respect that the pursuers had not proved special damage. The Court held it to be proved that he had fraudulently sold whisky which was not the pursuers' under the pursuers' name in order to discourage the sale of their whisky. There was no evidence that, after the defender's tenancy of his public-house commenced, the total sale of the pursuers' whisky had diminished in the town in which the public-house was situated. *Held* that the fair inference was that the defender's fraudulent conduct had produced the result which it was intended to produce of substantially injuring the pursuers' trade, and that in the circumstances the damages fell to be assessed at £100. *Thomson & Co. v. Daily*, July 20, 1897, p. 1173.

TRAMWAY. *Nuisance—Police—Street—Snow and Salt—Interdict—Actio popularis.*

1. A tramway company which had a statutory right to use certain streets in a town for their traffic were in the practice, when a snowstorm occurred, of removing the snow from their tramway lines to the sides of the street by the use of a snow-plough, and of afterwards scattering salt upon the lines. In a suspension and interdict brought by a member of the public to have the tramway company interdicted from continuing this practice, the tramway company pleaded that the operations complained of were within their statutory rights. It was proved that the operations of the tramway company created a nuisance to the complainer and to the public using the streets for horse traffic. *Held* (in rev. judgment of the Second Division) that the statutory powers given to the tramway company to use the streets did not authorise them to create a nuisance, and that the complainer was entitled to an interdict against the company removing snow from the tramway lines in certain streets, and from scattering salt,

SUPERIOR AND VASSAL—*Continued.*

warrant to erect upon it buildings which, if built, would have entirely excluded the light of the back windows of B's tenement. B opposed the application on the plea that the superior, having by his architect approved of the plan of his tenement, must be held to have conferred upon him a servitude of light over the adjoining ground for the windows shewn on the plan. The Court *repelled* the plea, *holding* that the superior's approval of the plan did not bind him to warrant the lights of all the windows shewn thereon. *King v. Barnetson*, Oct. 31, 1896, p. 81.

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TITLE TO SUE. See *Assignment—Bankruptcy*, 3, 4, 6—*Executor*, 2—*Lease*, 3.

TRADE-MARK. *Jurisdiction—Petition for Rectification of Register of Trade-Marks—Patents, Designs, and Trade-Marks Act, 1883.*

1. *Held* by Lord Kincairney, Ordinary, that he had jurisdiction to entertain a petition for rectification of the Register of Trade-Marks by a person aggrieved. *Herbert v. Cowie Brothers & Co.*, Jan. 16, 1897, p. 361.

TRADE-MARK—*Continued.*

2. *Held* by Lord Kincairney, Ordinary, that a person aggrieved by an entry in the Register of Trade-Marks is not excluded by the lapse of five years from the date of the entry from presenting a petition for rectification of the register. *Herbert v. Cowie Brothers & Co.*, Jan. 16, 1897, p. 361.

Similarity—Risk of native purchaser in foreign market being misled—Interdict in general terms.

3. A merchant who exported biscuits for sale in Burmah, and elsewhere abroad, and whose registered trade-mark was an architectural drawing, shewing the front elevation of Glasgow Town Hall, brought an action to have another merchant interdicted "from in any way using in connection with the sale of biscuits" the pursuers' trade-mark, or any mark substantially the same. It was proved that the defender exported biscuits for sale in Burmah, under a label which contained a picture, drawn in perspective, shewing the front and one of the sides of Glasgow Town Hall. It was admitted that a purchaser at home was not likely to mistake the one design for the other, but there was evidence, however, that the similarity was such as was calculated to mislead native purchasers in the Burmese market. It was not proved that anyone either at home or abroad had in fact been misled. The Court refused the interdict craved. *Cowie Brothers & Co. v. Herbert*, Jan. 16, 1897, p. 353.

TRADE NAME. *Infringement of trade name—Measure of damages—Necessity for proving specific damage.*

- A firm of wholesale whisky merchants brought an action against a public-house keeper for interdict against the defender selling whisky as of the pursuers' manufacture or blending which was not of their manufacture or blending, and for £500 as damages on account of such sales. The defender admitted that the pursuers were entitled to interdict, but he maintained that he was liable in nominal damages only, in respect that the pursuers had not proved special damage. The Court held it to be proved that he had fraudulently sold whisky which was not the pursuers' under the pursuers' name in order to discourage the sale of their whisky. There was no evidence that, after the defender's tenancy of his public-house commenced, the total sale of the pursuers' whisky had diminished in the town in which the public-house was situated. *Held* that the fair inference was that the defender's fraudulent conduct had produced the result which it was intended to produce of substantially injuring the pursuers' trade, and that in the circumstances the damages fell to be assessed at £100. *Thomson & Co. v. Daily*, July 20, 1897, p. 1173.

TRAMWAY. *Nuisance—Police—Street—Snow and Salt—Interdict—Actio popularis.*

1. A tramway company which had a statutory right to use certain streets in a town for their traffic were in the practice, when a snowstorm occurred, of removing the snow from their tramway lines to the sides of the street by the use of a snow-plough, and of afterwards scattering salt upon the lines. In a suspension and interdict brought by a member of the public to have the tramway company interdicted from continuing this practice, the tramway company pleaded that the operations complained of were within their statutory rights. It was proved that the operations of the tramway company created a nuisance to the complainer and to the public using the streets for horse traffic. *Held* (in rev. judgment of the Second Division) that the statutory powers given to the tramway company to use the streets did not authorise them to create a nuisance, and that the complainer was entitled to an interdict against the company removing snow from the tramway lines in certain streets, and from scattering salt,

TRAMWAY—Continued.

in the manner hitherto practised by them to the nuisance of the complainer and of the public using the streets for the purpose of traffic with horses. Ogston v. Aberdeen Tramways Co., Dec. 14, 1896, H. L., p. 8.

Lease—Relief—Public Burdens—Valuation of Lands (Scotland) Act, 1854, sec. 6.

2. By a contract bearing to be a "lease" the Corporation of Glasgow "let" to a tramway company the sole right to use carriages with flange wheels on the whole tramways authorised to be formed by the Glasgow Street Tramways Act, 1870, for the space of twenty-three years, on condition (1) that the company should pay interest on the sum expended by the Corporation in making the tramways and certain other annual payments during the lease; and (2) that the company should pay to the Corporation "the expense of borrowing, management, &c. [*sic*], and this provision shall be so construed as to keep the Corporation free from all expenses whatever in connection with the said tramways." As the lease extended beyond twenty-one years the company were entered in the Valuation-roll as owners of the tramways at their annual value, and assessed accordingly. *Held* (1) that the contract was a lease of a heritable subject, and (2) that the obligation to free the Corporation of all expenses in connection with the tramways did not apply to assessments for which the Corporation was liable as owners of the tramways. Glasgow Tramway and Omnibus Co., Limited, v. Corporation of City of Glasgow, March 4, 1897, p. 628.

See *Servitude*, 1.

TRANSACTION. See *Executor*, 3—*Judicial Factor*, 1.

TRESPASS. See *Justiciary Cases*, 31, 32, 33.

TRUST. *Constitution—Trust-deed by a woman before marriage for behoof of spouse in life and children in fee—Revocation.*

1. In an action brought by a wife, with the consent of the husband, a year after the marriage, there being no children, for declarator that a deed was revocable by her, *held* that the deed was revocable by the wife, with consent of her husband, in respect that it was unilateral and executed without reference to any contract of marriage, and that there were no beneficiaries in existence other than the spouses. Watt v. Watson, Jan. 16, 1897, p. 330.

Resignation of Trustee—Nobile Officium.

2. Circumstances in which the Court authorised a testamentary trustee to resign office on repayment of a legacy he had received. Orphoot, May 27, 1897, p. 871.

Personal liability of trustee—Culpa lata—Failure to sue co-trustee for trust-funds misappropriated by him—Defence that no loss resulted from failure.

3. In February 1895 A, a trustee, discovered that B, his co-trustee, who acted as agent for the trust, had retained in his own hands trust-money amounting to £150 which he had been instructed to place on deposit-receipt with a bank. A at once applied to B for repayment of the amount, and continued at intervals to press for repayment, but he took no legal proceedings against B, although about midsummer he became suspicious that B was in pecuniary difficulties. A also took no steps to prevent B intruding further with the trust funds, and at Whitsunday 1895 B collected the rent of a heritable property belonging to the trust-estate, and retained it for his own purposes. In November 1895 A was preparing to take legal proceedings against B when B became bankrupt. *Held* (1) that A was guilty of *culpa lata* in not taking legal proceedings against B without delay for recovery of the £150, but that he was not liable to repay that sum to the trust-estate in respect that it was proved that nothing would have been recovered

TRUST—*Continued.*

from B if proceedings had been taken against him ; (2) that A was guilty of *culpa lata* in not taking immediate steps, on discovering B's misconduct, to prevent him intromitting further with the trust funds, and that he was liable to repay to the trust-estate the amount of the Whitsunday rent which B had appropriated. *Millar's Trustees v. Polson*, July 10, 1897, p. 1038.

Personal liability of trustee—Damages for delay in payment of money—Interest.

4. A widow raised an action against testamentary trustees for payment of £11,000, as damages on the ground that heritable properties belonging to her had been brought to a forced sale through the fault of the defenders in withholding payment of sums due to her. *Held* (1) that the action was not relevant, as the pursuer had not set forth circumstances inferring liability on the part of the defenders for damages for delay other than interest ; and (2) that the pursuer's acceptance of interest excluded the claim for damages. *Roissard v. Scott's Trustees*, May 21, 1897, p. 861.

Personal liability of trustee—Claim against trustees for interest in respect of failure to invest trust funds—Count, reckoning, and payment—Competency.

5. In an action of accounting brought against testamentary trustees jointly by certain beneficiaries, the trustees produced accounts which shewed that the trust funds had been allowed to remain in bank for a number of years on deposit-receipt. The pursuers contended that the trust-estate fell to be credited with the additional interest which would have been realised if the funds had been invested on heritable security. The defenders maintained that this was a claim for damages for breach of trust, which could not be entertained in an action of accounting. *Held* that it was competent to entertain the question of the liability of the defenders for a higher rate of interest in the action of accounting. *Melville v. Noble's Trustees*, Dec. 11, 1896, p. 243.

Personal liability of trustee—Interest—Trust funds lodged in bank on deposit-receipt—Liability of trustees for higher interest—Indemnity clause.

6. In an action of accounting by beneficiaries against trustees it was proved that, without deliberately considering the question of investment, the defenders had allowed the trust funds to remain in bank on deposit-receipt for a period of nineteen years from April 1875, during which they yielded interest at the average rate of $2\frac{3}{8}$ per cent. It was proved that during this period safe investments affording over 3 per cent might have been obtained ; but that the expense of investment was saved, that for five years the defenders required to keep money in hand to meet advances to beneficiaries, and that deposit in bank would have been necessary while investments or renewals of investments were being considered. The trust-deed provided that the trustees "shall no ways be liable for any omissions in management." *Held* (1) that the trustees had failed to make a proper investment of the trust funds ; and (2) that they were bound in their trust accounts to debit themselves with interest at 3 per cent on the whole funds for the whole period. *Melville v. Noble's Trustees*, Dec. 11, 1896, p. 243.

Powers—Sale—General power and prohibition against selling a particular subject—Trusts (Scotland) Act, 1867, sec. 3.

7. A truster in his settlement gave his trustees general power of sale. In a codicil he directed,—“As I consider that the value of property in B will improve, I direct and appoint my trustees to hold and retain the property known as K . . . and not to sell or dispose of the same before the youngest of my sons attains twenty-one years of age.” In a petition brought by the trustees before the youngest child had

TRUST—Continued.

attained majority, under the 3d section of the Trusts Act, 1867, for power to sell the property dealt with in the codicil in the interests of the trust-estate, the Court *refused* the petition on the ground that, assuming that a sale was "expedient for the execution of the trust," it was "inconsistent with the intention thereof." *Marshall's Trustees*, Jan. 30, 1897, p. 478.

Powers—Statute—Retrospective operation—Trusts (Scotland) 1867, sec. 2—Trusts (Scotland) Amendment Act, 1884, sec. 2.

8. *Opinion (per Lord Kincairney)* that section 2 of the Trusts Amendment (Scotland) Act, 1884, was declaratory, and therefore retrospective in its effects. *Scott v. Craig's Representatives*, Jan. 29, 1897, p. 462.

Investments—Investment on security of harbour rates—Real or Heritable Security—Trusts (Scotland) Amendment Act, 1884, secs. 3 (b), 10 and 12.

9. A curator bonis lent a sum to Greenock Harbour Trustees, a corporation consisting of the Magistrates and Council, and nine elected trustees, on a debenture, in which they assigned to the creditor "the rates, duties, and other revenues of the trust." *Held* that the investment was not on real security nor on a debenture granted by a municipal corporation in the sense of the Act. *Held* further that it was not a proper investment at common law in respect that the revenue of the trust from dues, &c., was precarious. *Cowan's Trustees v. Ferrie's Curator Bonis*, Feb. 26, 1897, p. 590.

Title to Sue—Expenses.

10. A, who had as trustee on a sequestrated estate raised an action and obtained from a Lord Ordinary a decree for expenses, was afterwards removed from office. The defender having reclaimed, and the new trustee having declined to sist himself, A presented an application to be sisted on the ground that he had an interest in the question of expenses. The Court *refused* the application. *Mackenzie v. Fowler*, July 13, 1897, p. 1080.

Foreign—Statute—Trusts (Scotland) Act, 1867.

11. The Trusts (Scotland) Act, 1867, does not apply to English trusts. Trustees under an English trust which embraced a heritable property in Scotland presented a petition to the Court under section 3 of the Trusts (Scotland) Act, 1867, for authority to sell the Scots property. The Court *refused* the petition on the ground that the Act did not apply to English trusts. *Carruthers' Trustees—Allan's Trustees*, Dec. 11, 1896, p. 238.

Foreign—Nobile Officium.

12. Trustees under an English trust, having obtained the sanction of the High Court of Justice in England, petitioned the Court, in the exercise of its *nobile officium*, to authorise the sale of certain heritable subjects belonging to the trust-estate, which were situated in Scotland. The Court *granted* the petition. *Allan's Trustees*, March 13, 1897, p. 718.
13. Petition by trustees acting under a Scottish trust-settlement for authority to pay the income of legacies to the fathers of minor beneficiaries who were domiciled in England, and from whom, according to the law of England, a valid discharge could not be obtained, *refused* on the ground that the Court had no power to grant the authority craved. *Atherstone's Trustees*, Oct. 24, 1896, p. 39.

Law-agent of Trust.

14. Right of law-agent to have his account taxed by local auditor. *Turner v. Fraser's Trustees*, March 6, 1897, p. 673.

Law-agent of Trust—Law-agent's business account—Taxation—Scale of charges for attending meetings of trustees when law-agent himself a trustee.

15. In taxing the business account of a law-agent to a trust, the Auditor

TRUST—Continued.

restricted his charges as a law-agent for attending meetings of the trustees in respect that the law-agent was himself a trustee. The Lord Ordinary (Kyllachy) having repelled an objection to the Auditor's report, the trustees reclaimed. The Court *refused* the reclaiming note. *Turner v. Fraser's Trustees*, March 6, 1897, p. 673.

Law-agent of Trust—Beneficiary's right to taxation of law-agent's business account of trust after settlement.

16. A beneficiary having right to a share of residue under a trust-settlement granted a discharge to the trustees, and afterwards, on discovering the sum paid to the trustees' law-agent for law expenses and commission, raised an action of accounting against the trustees for the purpose of having the law-agent's account taxed, and any overcharge restored to the estate—the pursuer alleging that the charges were excessive. *Held* that the pursuer was not precluded from raising the action by the discharge. *M'Farlane v. M'Farlane's Trustees*, Feb. 23, 1897, p. 574.

Cautioner for trustee—Suspension—Expenses.

17. The complainer in a suspension of a charge upon a bill having died, his widow, one of his trustees, was at her own request sisted as complainer in his place as his "trustee," and found caution, her cautioner becoming bound "that she shall, as trustee foresaid, pay" the sum in the bill "in full in the event of there being a sufficiency of trust funds, or rateably along with the other creditors" of the trustor "in the event of his estate proving insufficient to pay his creditors in full," and also "that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses in case of wrongous suspending." The Court ultimately repelled the reasons of suspension, and found the complainer liable in expenses "as trustee." In an action by the charger against the cautioner, *held* that whatever the liability of the complainer might be, the cautioner was liable to the charger in payment of the whole expenses. *Stewart v. Forbes*, July 15, 1897, p. 1112.

See *Bankruptcy—Charitable and Educational Bequests and Trusts.*

VALUATION ACTS. *Valuation-roll—Election Law—Lodger Franchise—Evidence of value—Representation of the People (Scotland) Act, 1868, sec. 4—Registration Amendment (Scotland) Act, 1885, sec. 14.*

1. A person claimed to be registered as a lodger in respect of the occupation of two rooms and a surgery in a house. The rent for the furnished lodgings payable by the claimant was 8s. a week, amounting to £20, 16s. per annum. An objection was taken that the yearly rent of the whole house (as shewn by the Valuation-roll) was £5, and that the value of the lodgings, which formed only part of the house, could not therefore be of the clear yearly value, if let unfurnished, of £10. The Sheriff, proceeding on the rent actually paid for the lodgings, held that as matter of fact they were of the statutory value, and admitted the claim. The Court *refused* an appeal, holding that the entry in the Valuation-roll was only an element in the proof, and that the Sheriff was not thereby precluded from forming his own judgment on the value of the rooms occupied by the claimant, and that there was no ground in law for interfering with the Sheriff's decision on the question of fact. *Kellie v. Little*, Jan. 19, 1897, p. 379.

Subjects—Erections by lessee—Lands Valuation (Scotland) Act Amendment Act, 1895, sec. 4—Exemptions 2 and 3.

2. A tenant of certain seams of fireclay and quarries of rotten rock and freestone rock under a lease which stipulated for a fixed rent or for a royalty on every ton of these minerals carried away, erected certain kilns in which the rotten rock and freestone rock, after being quarried,

VALUATION ACTS—*Continued.*

was dried, and also certain buildings containing two boilers, an engine, and pan-mills, in which the fireclay, rotten rock, and freestone rock were ground. *Held* (1) that these erections did not fall within the meaning of exemption 2, in respect that they were used for converting the minerals on which the royalty was payable into a finished product; and (2) that they did not fall under exemption 3, in respect that the royalty was not calculated upon the finished product, but upon the raw mineral. *Gartverrie Fireclay Co. v. Assessor for Lanarkshire*, March 17, 1897, p. 738.

Value—Consideration other than the rent—Tenant a company of which landlord a partner—Hotel—Adequacy of rent—Valuation of Lands (Scotland) Act, 1854, sec. 6.

3. Where a hotel was *bona fide* let to a firm consisting of the owner and two other partners having equal interests in the profits of the hotel, *held* that the mere fact that the owner was one of the partners did not displace the rule that the rent stated in the lease was the measure of value. *M'Lachlan v. Assessor for Ayr*, March 17, 1897, p. 734.

Value—Apportionment of Value—Special District—Farm buildings within Special District—Principle of Valuation—Local Government (Scotland) Act, 1894, sec. 45, subsec. 1.

4. Of a farm of 223 acres, 9 acres, including the farm-house and steadings, lay within a special water supply and drainage district. The Assessor, in valuing the 9 acres, included the value of the buildings thereon. *Held* that the farm, with the farm buildings, should have been valued as an *unum quid*, and the amount distributed proportionally to acreage. *Forbes Irvine v. Assessor for Aberdeenshire*, March 17, 1897, p. 741.

Value—Crofter—Fair Rent—Crofter Proprietor—Crofters Holdings (Scotland) Act, 1886, sec. 6.

5. A crofter, the rent of whose farm had been fixed at a fair rent by the Crofters Commission, purchased his holding. The Assessor, assuming that the fair rent represented only the landlord's interest in the croft, added thereto, in fixing the valuation, a sum representing the annual value of permanent improvements on the holding. *Held* that the valuation was right. *Mackay v. Assessor for Sutherland*, March 17, 1897, p. 737.

See *Public Burden*.

WAIVER. See *Administration of Justice*, 1—*Insurance*, 5.

WRIT. *Authentication—Deed partly written and partly printed—Attestation—Conveyancing Act, 1874, sec. 39.*

1. A person died leaving a will and codicil partly written and partly printed, bearing to be subscribed by herself and attested by two witnesses, but the witnesses' designations were neither contained in the deeds nor appended to their signatures. Her executor presented a petition under section 39 of the Conveyancing Act, 1874, stating that the will and codicil were subscribed and witnessed by the persons whom he mentioned in the petition, and craving a proof, and thereafter to have it declared that the deeds were subscribed by the grantor and by the persons by whom the deeds bore to be attested. The Court allowed a proof by commission, and thereafter *found and declared* as craved. *Nisbet*, Jan. 23, 1897, p. 411.

Delivery—Registration—Gratuitous Deed.

2. The grantor of a gratuitous deed wrote to the law-agent who had prepared it, requesting him "by way of delivering" the deed to the grantee, to register it in the books of Council and Session. *Held* that the registration of the deed was equivalent to delivery. *Obers v. Paton's Trustees*, March 17, 1897, p. 719.

WRIT—Continued.***Proof—Writ of Agent.***

3. *Held* that the accession by a creditor to a composition agreement may be proved by the writ of his duly authorised agent. *Henry v. Strachan & Spence*, July 10, 1897, p. 1045.

Proving the Tenor—Adminicles.

4. Circumstances in which the Court *refused* to grant decree of proving the tenor of a deed, in respect that no evidence of the particular terms of the essential clauses of the deed was adduced. *Incorporation of Skinners and Furriers in Edinburgh v. Baxter's Heir*, March 17, 1897, p. 744.

WRONGOUS APPREHENSION. See *Reparation*, 4.

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